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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

August 21, 2003

(AFTERNOON SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 21st day of August, 2003, between the hours of 1:32 p.m. and 4:33 p.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

INDEX OF VOTES

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

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CHAIRMAN BABCOCK: Okay. Let's get back to it. Deb is making -- Alex. Debra Lee is making some copies of -- just so everybody has got the same language in front of them.

MR. MARTIN: Yeah, Chip, I think she figured out the same language is in everybody's version, so everybody should have it.

CHAIRMAN BABCOCK: Okay. Good. Then we don't have to wait on that. So now we're talking about Rule 167.3(a)(9), and we've got four different versions or potential versions, and John Martin is going to tell us what we need to think about it.

MR. MARTIN: Well, in the subcommittee both Tommy Jacks and I came to the view that we needed to deal with the indemnification issue in here and that there should be an entitlement by the party making the offer to request some reasonable form of indemnification, whether it's to take care of derivative claims or statutory or contractual liens.

Now, Chip and Elaine, I don't know where these four came from, and I personally don't have a -- don't have a favorite here, but Elaine asked me to present this. I don't propose to read all four of them because it's a page long and everybody has got it before you. I

guess I can see some -- consistent with my view on the earlier issue regarding the settlement papers, I guess I kind of go for the more general version, B, but I don't feel strongly about that at all.

MR. TIPPS: I'm sorry, John. Are you on (a)(9)?

MR. MARTIN: Yeah, and it's got four versions, Version A, B, C, and D. Does everybody have that?

MR. GILSTRAP: No, we don't have that.

MS. SWEENEY: (9) is indemnity, and the second sentence contemplates this. Is that the same one you've got?

MR. MARTIN: Maybe we ought to copy it. Deb thought they were in the --

MR. TIPPS: That's over here?

MR. MARTIN: Yeah, it's on the July 9th version.

MS. SWEENEY: Not my July 9th.

MR. TIPPS: There's two July 9th versions. It's not on mine, but I have got Judge Gray's.

MR. MARTIN: I can read these. It's kind of long, but I think it's better if people have --

CHAIRMAN BABCOCK: Well, we're going to get copies made here in a second, but let the record reflect

that Richard Orsinger has just joined us.

MR. TIPPS: The record will reflect that soon, I'm sure.

PROFESSOR CARLSON: We voted family law cases into the offer of settlement rule.

MR. ORSINGER: We'll take care of you in the Legislature.

CHAIRMAN BABCOCK: Okay. John, why don't you read the one that you like, B?

MR. MARTIN: "Include a request for an indemnity provision where applicable." Again, I didn't draft these. I don't know where these came from.

CHAIRMAN BABCOCK: So we've got the language we do for (8) and now the proposal is on B "Include a request for indemnity provision where applicable."

MR. MARTIN: That's the most general one. The other three are more specific, and I'm happy to read them if you want me to. It's just that they're fairly long.

CHAIRMAN BABCOCK: In the interest of time let's see if everybody is okay with that. I mean, it doesn't seem to me that there's too many words there that one could object to, but maybe --

MR. BOYD: But what's the point of it?

CHAIRMAN BABCOCK: Because Tommy and John

think that it's useful, but tell them why you think it's useful.

MR. MARTIN: Well, there are a lot of cases where a defendant in order to be fully released and protected needs to have some form of indemnification. For example, if there's a statutory hospital lien or a workers comp lien or other children who haven't asserted a claim or the lost parent, that sort of thing.

MR. BOYD: But if the defendant -- not that this would happen often, but if a defendant is willing to pay the money without demanding that indemnity we are going to by rule make them do so in order to get the --

MR. MARTIN: No. No. This is just one of the things that you can --

MR. BOYD: But it says "A settlement offer must," No. (9), "include a request for indemnity where" --

MR. MARTIN: "Where applicable."

PROFESSOR CARLSON: Jeffrey, your criticism is valid, and that will probably become (b) or (c).

MR. BOYD: Excuse me?

PROFESSOR CARLSON: Your criticism is correct that it should not be under a "must," and that will probably become something like subsection (b).

MR. BOYD: To say it "may include"?

PROFESSOR CARLSON: Right. What we're trying

to do is the sentiment of the full committee was that we don't want in order to request indemnification for them to take their offer outside of the fee shifting potential, so we have to put something in about the right to request indemnity. If we don't, then it becomes a condition that takes the offer out in subsection (10), which will probably become (c) or (d).

CHAIRMAN BABCOCK: Okay. Any other comments about this particular language? We're going to move a little bit quicker through this rule because we have to. Go ahead, Elaine.

PROFESSOR CARLSON: Version A is the version that Tommy Jacks preferred. He preferred something with more specificity. Version B is the simple, pure, presentation of John Martin. Version C was the language that we received back from Judge Christopher and Buddy, and Version D was the Martin-Jacks compromise if they couldn't get A or B.

CHAIRMAN BABCOCK: A says, "Claimant agrees to indemnify the defendant from any and all claims and demands for monetary damages, including attorney's fees, brought by, through, or under a claimant."

Yeah, Bill.

PROFESSOR DORSANEO: I'm not sure I understand what that means, but it seems to me that it

would be unlikely that I would recommend to my client claimant to give indemnity unless it was very, you know, very limited. Would that include -- I guess maybe I'm not smart enough to understand the purpose of this language and what its problem is meant to deal with, if it's a real problem.

CHAIRMAN BABCOCK: John, do you want to enlighten us on that?

MR. MARTIN: Well, if there's a -- which one are you on? On A?

PROFESSOR DORSANEO: Uh-huh.

MR. MARTIN: Well, one of the problems is Medicare liens.

PROFESSOR DORSANEO: I understand the lien provisions that are down here that are (c) and (d). I understand those, but I don't understand that (a) would be limited to that.

MR. MARTIN: A wrongful death case where there's a -- the guy had a parent but nobody knows where he is, and so the surviving widow agrees to provide indemnification if the surviving parent ever shows up and makes a claim.

PROFESSOR DORSANEO: And you get that kind of a -- do you do that?

MR. MARTIN: Yes.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: Wouldn't it be limited more or less to liens, assignments? I want to agree I haven't assigned my cause of action, or to necessary parties. I mean, you can almost put it in -- I don't know, just broad indemnity is pretty bad, but generally I can understand liens, assignments, or necessary parties. What other kind of --

MR. MARTIN: Those are the three that I can think of.

MR. LOW: Because we get involved where people want you to indemnify them from all kind of stuff, and that's kind of scary, but I generally require those for my client.

MR. MARTIN: Right.

CHAIRMAN BABCOCK: The compromise language is "If there are any statutory or contractual liens on the claimant's cause of action, the settling defendant may condition the settlement on the claimant's providing indemnity. The condition regarding indemnity must be in the form prescribed in subsection (a)," and that says, "Claimant agrees to indemnify the defendant from any and all claims and demands for monetary damages, including attorney's fees, brought by, through, or under a claimant."

MR. LOW: But that's -- well, an assignment would be included in that because claimant may have

assigned something.

MR. MARTIN: And that one is fine with me, too. I just don't feel strongly about it.

CHAIRMAN BABCOCK: Okay. But that one I just read is fine with you?

MR. MARTIN: Yeah. Because D incorporates A by reference.

CHAIRMAN BABCOCK: Yeah.

MR. MARTIN: So I think that one's fine.

CHAIRMAN BABCOCK: All right. Anybody -- Judge Gray.

HONORABLE TOM GRAY: Would you be adding then, if I understand it, after "statutory contractual liens," comma, "assignments," comma, "or mandatory parties"? Did that pick up the wrongful death problem?

MR. LOW: "Necessary."

HONORABLE TOM GRAY: "Necessary parties"?

MR. LOW: Is what I would think.

MR. MARTIN: Yeah, A picks up the wrongful death.

MR. LOW: Because if you've got somebody, they claim to be a widow, and somebody else, you know, might have the wrong widow. I assume that --

CHAIRMAN BABCOCK: Yes, Bill.

PROFESSOR DORSANEO: I can understand the

liens, but I really have trouble with this absent wrongful death beneficiary making that a mandatory part of this thing. Maybe it's just my experience would indicate that I would ordinarily not be inclined to give you that kind of an indemnity if I expected that there was any likelihood that some such person would show up.

MR. LOW: But who is more likely to know who those people are out there, you and your client or the person that's related to the dead man? I mean, he's likely to know whether he had -- you know, those people know where there are children or others, and there should be some responsibility because one person dies, and you want to release all claims. You don't want to have to pay for his death to anybody else.

MS. SWEENEY: I think, though, in that context, I question whether we should be able to have that in a cost-shifting rule. I mean, that may be an instance where cost-shifting would be inappropriate. If plaintiffs can't find this guy, defendants can't find this guy, and yet the defense wants to force the plaintiff to resolve the case and then have to bear an indemnity burden, you know, that may be an example where we ought not to be talking about cost-shifting. Because if they go to trial and they get a judgment, then there's -- you know, you get a verdict, you get your own verdict. You don't owe indemnity

for anybody else. So they ought to be allowed to do that without the fear of cost-shifting if there is this absent person that nobody can find.

MR. LOW: I can't disagree. I mean, I just meant that those are the kind of things I ask for and maybe others should be outside the rule, but I surely think assignments and liens ought to be.

MS. SWEENEY: Uh-huh. Liens ought to be.

PROFESSOR DORSANEO: My attitude is like Paula's. The things that you ask for and that might be good practice always to insist upon getting don't necessarily fit into this. The ones that clearly do fit are the ones that you ought to be entitled to get almost as a matter of course in order to finally dispose of this claim that we're dealing with.

MR. LOW: But do you think that assignment, that liens wouldn't come within that?

PROFESSOR DORSANEO: The assignment, I don't think the liens would come within the assignment, but --

MR. LOW: No. It would be separate, but I mean if I have assigned a part of my cause of action, then, you know, there is somebody else out there that I know about, why wouldn't you want to require that? Not many people assign something without knowing it. I mean, why wouldn't you want that to come within the rule?

PROFESSOR DORSANEO: Well, I don't have a problem with the assignment part.

MR. LOW: Oh. Or statutory lien.

PROFESSOR DORSANEO: I don't have problems with the statutory liens.

MR. LOW: Well, then you and I don't have a problem.

PROFESSOR DORSANEO: The easiest ones are the statutory liens. Those are the easiest ones.

MR. LOW: Okay. We don't have a problem.

CHAIRMAN BABCOCK: Buddy, do you like Version D okay, or have you even seen it yet?

MR. LOW: I haven't seen it.

CHAIRMAN BABCOCK: Well, you're about to see it. John.

MR. MARTIN: Bill, to respond to you, what if somebody files a wrongful death claim claiming to be the only child of the deceased, but he knows that there's another one out there? He knows that and the defendant doesn't, so typically that's why the defendant insists that there be indemnification in there. Now, whether you would be able to collect is problematical, but at least you're doing everything you can to protect your client.

PROFESSOR DORSANEO: There might be some mechanism for dealing with that where somebody is just

making a false claim, but I don't know whether that --

MR. MARTIN: Yeah. Typically that's the way it's dealt with, is through indemnification language at settlement.

CHAIRMAN BABCOCK: Okay. Everybody got all four versions in front of you?

MR. HAMILTON: Do I understand that D would just be a continuation of A?

CHAIRMAN BABCOCK: Yeah. You would put the -- see the stuff in quotations there in A? That's what would follow. Isn't that right, Elaine?

PROFESSOR CARLSON: Yes. "Claimant agrees..."

CHAIRMAN BABCOCK: So, yeah, Bill.

PROFESSOR DORSANEO: Does the language match? I mean, I can see that you go to "the claimant agrees to indemnify" language, but I mean, what's the difference between A and D in terms of meaning? Is D more narrow or meant to be more narrow because of the opening sentences?

CHAIRMAN BABCOCK: Well, that's the way it reads to me, Bill, but, Elaine, do you know -- it was Tommy and --

PROFESSOR CARLSON: John.

PROFESSOR DORSANEO: I'm wondering how we make language that says "claimant agrees" mean something

different in -- because it's preceded by other language, even though the language is the same, and I just have trouble getting my head around that. I mean, that sentence means whatever it means, and I have some trouble understanding what it means.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: But it doesn't get any clearer on its own by being preceded by other language.

CHAIRMAN BABCOCK: Okay. John, do you hear what he's saying?

MR. MARTIN: Yeah, but I'm not sure I quite -- I'm not sure I'm quite following you.

CHAIRMAN BABCOCK: You don't understand what he's saying or you don't agree?

MR. MARTIN: I'm not quite sure I understand what he's saying.

CHAIRMAN BABCOCK: What he's saying, I take it, is that the language in Version D, the first sentence doesn't match with what you're getting the claimant to agree to. The first sentence, Dorsaneo says, seems to be limiting to situations where there are statutory or contractual liens on the cause of action and then you can demand some language, but then when you get to the language that's being demanded, it seems to be different and broader than what --

PROFESSOR DORSANEO: "Any and all claims."

CHAIRMAN BABCOCK: Yeah. Right. That's what his problem is. Right?

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: See, I understood you.

MR. LOPEZ: There's got to be something wrong.

CHAIRMAN BABCOCK: Except I got something wrong. Judge Bland.

HONORABLE JANE BLAND: Maybe I'm missing something, but this language that is suggested doesn't seem to be any different than the standard indemnity language. I mean, it doesn't seem to me to be getting anything broader than what you would get in any normal settlement, and I think that it doesn't include other parties, or, you know, it only includes claims that can be brought through this individual claimant, and I think it's a narrowly construed indemnity provision that will serve the needs and the purposes behind the rule.

CHAIRMAN BABCOCK: Yeah. So you're in favor of it?

HONORABLE JANE BLAND: Yes.

CHAIRMAN BABCOCK: Okay. We're going to vote on Version D.

MR. HAMILTON: Can I make a suggestion?

Couldn't we just say under A "Claimant agrees to indemnify defendant from any and all claims, including any statutory liens" and then just forgot about D?

CHAIRMAN BABCOCK: Yeah, we could say it that way, I suppose.

MR. HAMILTON: "Statutory claims, demands for monetary damages."

MS. SWEENEY: Are you going on with the rest of it as well, or are you truncating it?

MR. HAMILTON: No. Just "statutory and contractual liens," just stick that up there after "claims" under A.

MS. SWEENEY: No, that's what I mean. You're inserting that, but you're keeping all of the rest of A as-is?

CHAIRMAN BABCOCK: Right.

MR. HAMILTON: Yeah.

HONORABLE DAVID B. GAULTNEY: Read the whole thing, will you?

MR. HAMILTON: "Claimant agrees to indemnify defendant from any and all claims, including statutory or contractual liens on a claimant's cause of action, and demands for monetary damages, including attorney's fees, brought by, through, or under claimant."

MS. SWEENEY: I'm okay with that.

HONORABLE JANE BLAND: That's good.

CHAIRMAN BABCOCK: You okay with that, Paula?

MS. SWEENEY: Yes, sir.

CHAIRMAN BABCOCK: Everybody like that all right? Judge Bland? Okay. Let's vote on that, the Carl Hamilton Version A.

MR. BOYD: One clarification.

CHAIRMAN BABCOCK: Yeah.

MR. BOYD: This is going to be a subsection (b) as opposed to a sub-subsection of (a)?

PROFESSOR CARLSON: Yes.

CHAIRMAN BABCOCK: Okay. Everybody in favor of that, raise your hand. I was hoping you would vote for it, Carl, since it was your idea.

Everybody opposed? 18 to 2, the Chair not voting, it passes. Let's go on to the next thing, Elaine.

PROFESSOR CARLSON: I guess there's two large issues potentially. One is 167.11(h) --

CHAIRMAN BABCOCK: Okay.

PROFESSOR CARLSON: -- dealing with discovery. If we look at the existing discovery rules, they are inadequate to support discovery in regards to fee shifting. Obviously our pretrial discovery rules terminate before trial.

MS. SWEENEY: Elaine, we can't hear you.

PROFESSOR CARLSON: Oh, okay. 167.11(h) is the committee proposal that we have an express provision allowing for discovery in regard to the reasonableness of litigation costs to be shifted. The subcommittee was concerned that the pretrial discovery rules would not support that and Rule 621(a), discovery in support of enforcement of a judgment, would not either; and so we propose inclusion of subsection (h).

CHAIRMAN BABCOCK: Okay. Paula.

MS. SWEENEY: Is that discovery something that's taxable as court costs and litigation expenses?

CHAIRMAN BABCOCK: Couldn't hear what you said.

MS. SWEENEY: Is that discovery going to be added to the bill? Is that taxable as court costs and litigation expenses?

PROFESSOR CARLSON: I would think so.

MS. SWEENEY: Pardon?

PROFESSOR CARLSON: I would think so.

MS. SWEENEY: It's going to take a long time to do if it is.

MR. LOW: Why don't we just leave that up to -- as a separate thing for the judge, the costs of such discovery be up to the judge, because the party that prevailed may be the party that's unreasonable or

something, and it may be the judge would want to tax that separately.

PROFESSOR CARLSON: We could provide a statement like that.

MR. LOW: I'm just wondering why. I'm not suggesting it. I'm just wondering.

MS. SWEENEY: Well, you could take 10 depositions and spend $20,000 finding out whether or not $6,000 in expenses was reasonable. There's got to be some kind of wall around that.

HONORABLE DAVID B. GAULTNEY: Yeah, if we don't, what we have essentially done is we have established liability, and now we're just saying how big can you make your damages?

MS. SWEENEY: Yeah.

HONORABLE DAVID B. GAULTNEY: By permitting your recovery costs. I think there --

MR. LOW: Could a provision that costs of same shall be, you know --

HONORABLE DAVID B. GAULTNEY: I'm not sure it needs to be recoverable. If you don't allow it to be recovered you impose a limitation. I'm not sure we want to encourage too much discovery. There ought to be a certain amount, but I think it's -- I'm not sure it necessarily is recoverable costS. It's like a second level that I don't

think needs to be awarded under the rule.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: Well, I think the incentives will be reversed by this point because the party that's prevailing will say, "Here are my bills," and it's going to be the party -- excuse me. It's going to be the party that is going to have to pay those fees and expenses that's going to be interested in seeking discovery, and at that point I don't think the incentive is going to be for them to run up high discovery bills, so I'm not sure that it's going to be this explosion that we're contemplating, but we always have the issue of whether the discovery is too broad or too expensive, and people come in and say, "Judge, they're asking us to do too much or produce too much or it's too expensive," and I think the regular rules give us a framework, you know, to monitor this discovery and make it reasonable under the circumstances.

CHAIRMAN BABCOCK: Yeah, but the issue is if I have -- if I have successfully triggered the rule. In other words, I have made an offer that should have been accepted under the theory of the rule, and so now I say, "Okay, I've got $50,000 worth of expenses with litigation costs," and the other side comes back at me with a bunch of discovery, and now I've got to go and I've got to dig out my records or maybe hire an expert or I've got to do a

whole bunch of things. All that time and effort that I'm putting into it is eating away at my money, isn't it?

HONORABLE JANE BLAND: Oh, well, I wasn't weighing in on whether or not it ought to be paid and taxed with the rest of the litigation costs. I was just saying that I don't think it's going to be this explosion because I think that probably it should be included in the amount calculated at the end and --

MS. SWEENEY: If he's already won, and he's trying to -- he triggered offer of judgment against me. I didn't take his offer and then I didn't get enough money from the jury, and he tells me he's got $50,000 in expenses, and I say, "Oh, you do not. You haven't done anything." And we start discovery and we're going back and forth. He's got every incentive to stall, drag it out, make it expensive for me, go through the whole folderol.

By now we already don't like each other at all. We've had offer of judgment. We've, you know, not done well at trial, so the incentive is there for him to just build the number as high as he can by making me do a bunch of discovery to prove whether or not he's reasonable.

HONORABLE JANE BLAND: I see your point, and I guess the only thing I can say is that the reasonableness of the discovery will have to be evaluated along with everything else, reasonable attorney's fees, reasonable --

whether, you know, the post-verdict discovery is reasonable, but we do that all the time with attorney's fees and costs.

CHAIRMAN BABCOCK: Judge Gray and then Carlos.

HONORABLE TOM GRAY: I was just going to weigh in on that aspect of it. When you get into the abuse of the discovery, you've already got a rule on how to deal with that, 215.3; and if they get abusive during the discovery process, the trial court so finds; and there's probably going to be a lot of scrutiny applied to this post-judgment discovery anyway because you're holding up a judgment to wait to get this number to put in it.

CHAIRMAN BABCOCK: Yeah. Carlos and then Bill and then --

MR. LOPEZ: Well, how does the party resisting Paula's efforts, how do they resist the effort to show that they were reasonable? I mean, they're going to have to turn over their bills.

CHAIRMAN BABCOCK: Sure.

MR. LOPEZ: Right? Which, of course, they're going to say are privileged, but --

CHAIRMAN BABCOCK: Well, I mean, there's probably going to be an issue of redacting the bills to some degree, perhaps, but that's not all they will turn

over. I mean, they will have to turn over a lot of other stuff probably.

MR. LOPEZ: It's just going to be awfully -- it's going to be real screwy when we have to argue about -- how do you get into arguing whether some deposition was reasonable without talking about work product and strategy? It seems like it would be a lot easier if we could just put the burden on that party to give affirmatively certain things that would show that they were reasonable. I'm just thinking outloud here, but that's just going to be a mess.

CHAIRMAN BABCOCK: Yeah. I think Bill had his hand up and then Judge Bland and then Jeff.

PROFESSOR DORSANEO: We have 167.12, "The court after a hearing at which the affected parties may present evidence shall impose litigation costs." I'm contemplating that hearing would be like a hearing or like a part of the trial that's about attorney's fees, the reasonableness of attorney's fees, right?

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: Does there need to be a lot of discovery preceding that hearing to go through that, to make that presentation?

MR. LOPEZ: Depends on who you put the burden on to prove it.

PROFESSOR DORSANEO: Yeah. That's my next

question. Isn't the burden on the person who's going to get the fee?

CHAIRMAN BABCOCK: Well, whether it is or is not, if I'm defending, if I'm on the the other side, I'm not going to go into that hearing even if they do have the burden without wanting to do some discovery. I mean, I want to look at the bills. I want to talk to the, you know, young associate who racked up, you know, 180 gazillion hours on this thing.

PROFESSOR DORSANEO: And you need to do it beforehand?

CHAIRMAN BABCOCK: Well, I mean, it depends on how prepared you want to be, but I mean, our theory of litigation these days is that you get to do discovery. It could be a big number. It could be a huge number. There's a case that was just decided by the Dallas court of appeals involving the City of Garland and the *Dallas Morning News* that had been going on 10 years; and it was all about attorney's fees; and they had a trial, a whole one-week trial, about attorney's fees. Liability was already established.

PROFESSOR DORSANEO: So we're going to send out interrogatories or whatever asking about the disciplinary Rule 104 factors and what cases didn't you take and --

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: -- difficulty and all that?

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: That seems like a very bad idea to me.

MR. LOPEZ: How do we do that without putting a whole framework together that regulates time frames and all the rest of it?

CHAIRMAN BABCOCK: Right. Judge Bland.

HONORABLE JANE BLAND: I do think that by separately articulating the ability to conduct discovery in connection with this rule you may be inviting more discovery than is necessary, and I'm not sure that the current rules wouldn't allow for discovery. I mean, and I understand that -- I think what we're saying is because of the way the discovery control plan levels work and there can't be discovery conducted, you know, after the time of trial, because the trial date has elapsed, but I mean, we have evidentiary hearings all the time where we provide that parties can engage in discovery that's not in connection with the docket control order, and I think the rules allow for that.

So I'm not sure that we have to put this in, but certainly if we do put it in, I wouldn't say any more

than this, and I wouldn't try to put in a schedule or the amount of discovery or anything like that. I would leave it up to the discretion of the parties and the court to try to figure it out.

CHAIRMAN BABCOCK: Can I just ask Judge Bland a question? If I come into your court under this rule and say, "I won." You know, the 20 percent thing kicked in, and "So you must award me the" -- let's say the verdict was $2 million. "You've got to give me a million dollars because I can prove to you that that's -- you know, that's reasonable litigation costs," and so that's my -- I'm coming to you saying that.

The other side says, "Well, Judge, I want to do some discovery on that, because I can't believe that they spent a million dollars on this case, you know, which is only limited to two experts" and whatever all those other things are. Are you going to allow discovery under the current rules?

HONORABLE JANE BLAND: I would allow discovery, but I could understand the real fear that another trial judge might say, "Sorry, you should have gotten that discovery before trial, and since you didn't and you knew there was an offer out there" -- and, I mean, that is one consideration. I mean, this kind of discovery, you know, presumably could be done prior to trial. We do

it all the time with claims for attorney's fees.

CHAIRMAN BABCOCK: Sure.

HONORABLE JANE BLAND: And we sometimes separately try attorney's fees by agreement after the main liability trial is over. Sometimes they just like to try that to the bench, and often they defer discovery into attorney's fees until after the trial, but by agreement. So, you know, I would allow discovery, and I can understand the reason that this is in here is because there would be a concern that some trial judge might not, and it doesn't make practical sense to do this kind of discovery ahead of time, you know, and it would all be needless if the rule isn't triggered.

CHAIRMAN BABCOCK: Yeah. I'm with you. Buddy.

MR. LOW: Well, Elaine, did you consider that discovery would be permissible after such court order or that you had to go in order to treat this a little bit differently, it may be necessary, it may not, but only pursuant to court order as directed by the court so you would have some -- if you need it, the court could outline and have some guidelines or control on what was necessary and you don't find yourself doing more discovery than the court felt necessary.

CHAIRMAN BABCOCK: Okay. Here's what I want

to do. Let's vote on whether people like the language in (h), and if it gets voted down, I think the Court has got the benefit of this discussion where we've talked about all the issues, and so if this gets voted down they will just have to come up with something. So everybody in favor of (h) as written, raise your hand.

All those opposed? Carlos, you got your hand up? No?

By a vote of 16 to 6, the Chair not voting, (h) passes. What's the next one, Elaine?

PROFESSOR CARLSON: 167.11(c). We added to the end of (c) the words "up until the date the judgment is signed." This sentence deals with when litigation costs are shifted when do they end. The statute makes clear it picks up after rejection --

CHAIRMAN BABCOCK: Right.

PROFESSOR CARLSON: -- of the offer. The statute does not provide a closing date. Some states, including I think Florida, allow the recovery of even appellate attorney's fees when fees are shifted. Our subcommittee felt up until the date the judgment is signed was appropriate.

CHAIRMAN BABCOCK: Well, now, that's going to cut out -- or is it? Is it going to cut out the discovery we just talked about?

MR. GILSTRAP: It would occur before judgment.

CHAIRMAN BABCOCK: It would occur before judgment. Okay. Richard Orsinger.

MR. ORSINGER: The question may be out of context, but are we contemplating that there is no right to a jury determination on the reasonableness of this fee?

CHAIRMAN BABCOCK: We have talked about that at length, and we ducked that question.

MR. ORSINGER: Okay. Then it's possible there may be a right to a jury, and if that's true then it's possible there may be a right to the same jury that you had the first time on the liability and damage issues, the first phase of the trial.

CHAIRMAN BABCOCK: We ducked that question, too.

MR. ORSINGER: I don't see how we can have fees all the way through judgment if -- other than by projecting in the future what the fees are, because people would have to be testifying either to the first jury in the first trial or the first jury in the second phase of the first trial, or if there was punitive damages, in the third phase of the first trial, and then they would be projecting what their fees would be through the end of the judgment.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: And we don't even know whether we're allowing discovery for any of that or whether that discovery has to be done before the first trial. It seems to me like we ought to cut it off at the time of trial rather than the signing of the judgment.

CHAIRMAN BABCOCK: At the time of trial? Before trial?

MR. ORSINGER: No, I mean up through the conclusion of the trial.

CHAIRMAN BABCOCK: At the conclusion of the trial.

MR. ORSINGER: Through the conclusion of trial is what I mean. I want to include the trial fees, but I don't want to include a lot of speculative testimony about how much follow-up work there might be.

CHAIRMAN BABCOCK: Judge Bland and then Richard Munzinger.

HONORABLE JANE BLAND: We have testimony all the time about reasonable fees that will be incurred in connection with preparing the judgment, you know, post-trial prejudgment fees, and it's presuming that this doesn't get awarded until the time the judgment is signed. If it turns out that those fees are not supported by the record then the judge can factor that in, or the jury if it's a jury, but the fact finder can factor that in in

determining what the reasonable costs are; but I think the date of judgment is a much more definitive cutoff than the end of trial because the end of trial can mean different things to different people. You know, what about jury deliberations, post-trial issues that have to be considered by the bench, or that are necessary to the rendition of judgment? I think signing of judgment is a better way to go.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I agree for the reasons stated. We have all been in cases where there are a lot of activities after a verdict is rendered. Motion for judgment, motion for judgment NOV, motion for new trial, hearings on jury misconduct. The object of the rule is to prompt settlement and to penalize the person who unreasonably resists settlement, and you can unreasonably resist settlement after the verdict to be spiteful or whatever. The rule as written is better.

CHAIRMAN BABCOCK: Okay. Judge Gray.

HONORABLE TOM GRAY: Following up, then why not carry it all the way through the appellate process because you're still doing the same thing? I mean, you're trying it -- if it's achieving the objective then why not carry it all the way through the appellate process and do the appellate fees as well?

MR. MUNZINGER: Why not?

HONORABLE TOM GRAY: I'm suggesting that. Why not? I think we have a motion and a second.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: Well, at what point are you past the settlement, the motive to settle, and now you're just punishing someone for not settling? And if I didn't guess what the jury verdict is very well then I've got another trial going on here on the reasonableness of the fees, which is my right to be sure that the punishment is reasonable, but I shouldn't be punished for insisting that the fees be reasonable, so I don't see why a proceeding on determining the reasonableness of the fees should be charged against the nonsettling party.

And then if there are arguments that have nothing to do with the settlement offer, if it has to do with JNOV's on legal issues that predated the jury verdict or if you're taking things up on appeal that had nothing to do really with the damage claim, like the failure to grant a JNOV or something like that, why should you be punished for that? I mean, just because you guessed the jury verdict wrong doesn't mean you pay all fees that occur after the offer, right?

MR. MUNZINGER: The only answer I have is that the Legislature has defined litigation costs the way

they have defined it.

MR. ORSINGER: Well, do they include fees on the question of fees, or is it just fees on the original underlying lawsuit and not the fees on the fees?

MR. MUNZINGER: All I can say is that litigation costs is the cost which is incurred or paid or an obligation incurred related to the lawsuit, and if you don't make a settlement with me, make me come down and prove the reasonableness of my fees and reproduce my 2,000 invoices to my client and all of my expense account matters and the rest of it because you're spiteful or even because you're curious, you still are running into the teeth of the law that the Legislature wrote that says you've got to pay for it. You want it, you pay for it.

MR. ORSINGER: So there's a second offer of settlement procedure on the fee question after you've got your jury verdict on the first offer of settlement on underlying liability and then whether you have to pay the fees on the fees depends on whether you guess right on that offer?

CHAIRMAN BABCOCK: We're getting too far afield. Paula.

MS. SWEENEY: I think we solve that problem -- I agree with Richard, but I think that problem can be solved by simply assigning a burden of proof, and if the

burden of proof is on the entity -- the offeror claiming that their fees are reasonable, then they must come to the court and make a showing; and if that showing is inadequate then the court has to permit discovery behind that without taxing that to the losing party.

And as to the costs of the appeal if an appeal follows, you know, we already have rules about frivolous appeals. If the appeal is nonfrivolous, I don't think that this statute is meant to carry forward to preempt somebody from using the judicial system the rest of the way or incur more and more and more and more of its opponent's costs.

CHAIRMAN BABCOCK: Okay. We're going to vote on up until the date the judgment is signed. If that fails then we'll consider people who want to carry it through appeal or people who want to shut it off at the end of the trial. Yeah.

MR. BOYD: Can I mention one thing since we're about to vote? To keep in mind in the vote that there is a cap placed on this total amount that you can be liable for, so --

CHAIRMAN BABCOCK: Right. Yeah. Could be a lot of money, could be a little money, but you don't know. But there is a cap.

MR. BOYD: Yeah.

CHAIRMAN BABCOCK: Right. Okay. Everybody in favor of the language in 167.11(c), carrying it up until the date the judgment is signed, raise your hand.

All those opposed? By a vote of 20 to 5, the Chair not voting, that passes. Is there anything else that we need to discuss in this rule, Elaine?

PROFESSOR CARLSON: Mr. Chairman, in light of the extensive debate we have had and we have exceeded the time provided for this, I would suggest that we close. The subcommittee doesn't have any major issues left. If anybody has comments, that they direct them to the Court.

CHAIRMAN BABCOCK: To the Court. Yeah. Great. Now we need to get to the TRAP Rule 24 and 29 briefly and quickly, succinctly. And, Elaine, I think you and Bill have that, don't you?

PROFESSOR DORSANEO: Go ahead, Elaine. You do it.

PROFESSOR CARLSON: All right. The Legislature in HB 4 amended the requirements for supersedeas on appeal to no longer require a supersedeas bond or other appellate security other than for compensatory damages, so the way that the statute now reads is that the appellate security needs to cover compensatory damages, interest for the duration of appeal, and costs awarded in the judgment. However, the statute goes further

and provides a cap on the amount of the supersedeas bond or appellate security, and it may not exceed 50 percent of a judgment debtor's net worth or $25 million, whichever is less.

The statute further directs the trial court to allow lesser security when there is a showing by the judgment debtor that the making the appellate security at the cap would cause substantial economic harm. Then the trial court is directed to lower the security even further.

All of these changes in House Bill 4, I think it's Article 6, only deal with money judgments. Under our current appellate Rule 24 we have a standard for lesser security that we can either choose to retain or we can conform the whole thing to the Legislature's new provision, but we're not required to.

I drafted some proposed changes to appellate Rule 24 and at TRAP 24.2, subsection (a)(1), I suggest the modification of "Where the judgment is for money, the amount of bond, deposit, or security must be at least the amount of compensatory damages awared in judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment provided" and then I include the statutory language. In further reading the statute, I did not verbatim track the language, and so I would ask you to indulge me in striking the words "be at least," and replace

that with "equal." That's the language the Legislature used.

CHAIRMAN BABCOCK: Where does that --

PROFESSOR CARLSON: It's 24.2(a)(1) in the first sentence. The words "be at least."

CHAIRMAN BABCOCK: Okay. And what do you want us to put in there?

PROFESSOR CARLSON: Strike that and replace it with "equal," "must equal the amount of."

CHAIRMAN BABCOCK: Okay.

PROFESSOR CARLSON: I don't think up until (a), we get to the cap, that there's any -- I don't think there's any controversy because this is what the legislation requires. When we get to subsection (a) on the cap it says "50 percent of the judgment debtor's current net worth." There are two issues that arise under that statutory change. One is do we want to make any attempt to define net worth. I suspect not, but I did include a footnote that raises some of the issues that will likely come up. What does net worth include, does it include insurance that covers the claim the subject of the lawsuit? Is the judgment itself a part of net worth? Do you look at net worth on market, fair market value? Should it be looked at under generally accepted accounting principles? It can get very, very complex.

If we choose to leave that to the courts to decide, the second issue that we would need to address is how do we want to deal with the situation where a judgment debtor wishes to place supersedeas or other appellate security based on net worth; and in the discussion that follows the bottom of the page there's, as I see it, three options. One option is to allow the judgment debtor to waltz down to the clerk's office, file a supersedeas in the amount of 50 percent of their claimed net worth, and the clerk would have the ministerial duty to accept it.

Right now with the money judgment supersedeas had to be posted at the amount of judgment, interest, and costs. It's a ministerial job of the clerk to accept the bond in the amount, but there's not much fudging that can go on because you look at the face of the judgment to see if it, in fact, is that amount. Now we have a situation where a judgment debtor can come and say, "No, I'm posting 50 percent of my current net worth." That would seem to warrant something more than just a claim, "This is my net worth, and therefore I'm posting security in the lower amount."

A second option would be to allow a judgment debtor who is claiming that they are entitled to post the supersedeas at 50 percent of their net worth to have to file some type of sworn statement or affidavit, and that

would be taken as true unless it was contested in so many days.

A third option would be that if a judgment debtor wants to proceed with lesser security based upon net worth that they will have to make a motion with the court and go in and establish what their net worth is. If we go with that third scenario with notice and hearing, it seems to me we've got to have some type of stay of enforcement until the trial court would adjudicate that matter.

CHAIRMAN BABCOCK: Hatchell, did you have your hand up?

MR. HATCHELL: Huh-uh.

CHAIRMAN BABCOCK: No? Stretching again, huh?

MR. HATCHELL: Yes.

CHAIRMAN BABCOCK: Were you finished, Elaine? Sorry.

PROFESSOR CARLSON: Yes, at that point.

PROFESSOR DORSANEO: What does Bonnie think about that?

CHAIRMAN BABCOCK: What do you think about all this, Bonnie?

MS. WOLBRUECK: Bonnie would prefer that the clerk not be responsible for determining net worth on setting the amount.

PROFESSOR DORSANEO: If you had to be responsible, how would you like to go about doing it?

MS. WOLBRUECK: I would probably request the court to make that decision.

PROFESSOR DORSANEO: Hmm. Refuse to do it.

CHAIRMAN BABCOCK: Carl.

MR. LOPEZ: What if we fused Elaine's two and three, which is have it be sworn to in some kind of way, contested within X amount. If there's no contest then obviously there's no issue. If it is contested, make it automatic that they then have to get leave from the court, and it's automatic. I definitely think that this certainly sounds like the kind of thing you want the court -- I know if I was the judge I would want to have something to do with whether that's going to happen or not based on the facts of the case, the facts of the circumstances.

MR. GILSTRAP: Chip?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: Are we talking about a procedure whereby the defendant -- the losing party submits an affidavit, says, "Here's my net worth; therefore, the amount of supersedeas bond is X" and then if that's not contested then he can post supersedeas by posting a bond in the amount of X?

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: You know, there's a problem that's going to come up under here that I don't think is generally appreciated. We are going to have a lot of people with no net worth who are saying "I don't owe a supersedeas bond."

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: So he's going to say -- okay. I'm okay. I just understand it now.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I'm not sure what the scope of the question at the moment is, but one of the things Elaine covered was procedurally are we going to rewrite the Rule 24.2 or lay this alongside it or what. It seems to me that this definitely supersedes 24.2(a)(1), and with respect to money judgments, (b). There's nothing left of either of those in light of the statute. I think whatever language implements the statute here has to replace 24.2(a)(1), and for money judgments has to replace 24.2(b) as well.

Now, I realize that's a different topic here than the question of how do we deal with determination of net worth, and I don't know whether this is the time to raise that or whether we want to keep on working on how do we determine that wording problem.

CHAIRMAN BABCOCK: Well, Elaine, as I

understand how you've set this up, either 24.2(a)(1)(a), that's language out of the statute but you feel like you need to insert one of these three options at the first asterisk, right?

PROFESSOR CARLSON: Yes. Because otherwise litigants will not know how to proceed.

CHAIRMAN BABCOCK: Yeah. And either (a) or (b) -- strike that. Either your first option or your second option is going to require the next clause which says "in which case it's going to be established by an order of the trial court after notice of an evidentiary hearing," right?

PROFESSOR CARLSON: Uh-huh.

CHAIRMAN BABCOCK: And your third option you don't really need because that's already in here.

PROFESSOR CARLSON: Right, but I didn't know if it would be the sentiment of the committee to go with just file it or affidavit.

CHAIRMAN BABCOCK: Oh, without a hearing?

PROFESSOR CARLSON: Yeah.

CHAIRMAN BABCOCK: Well, you've got to have a way to challenge it, it seems like. Judge Gray.

HONORABLE TOM GRAY: There's a fairly elaborate scheme for doing something similar to this in the appellate rules under 20.1 for civil cases with some

modifications. I mean, basically you file the affidavit of your -- in this one it's an inability to pay costs.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: Basically you would want to use the same type evidence to establish net worth but just have an affidavit of your net worth and file it. If it's not contested then you go on, provided a very specific procedure to make that contest that would seem to be fairly -- I mean, obviously needs a lot of editorial changes, but basically the clerk files it and notifies the interested parties. You know who those are going to be, so traditional service of the affidavit on the other parties and you go on down the road.

CHAIRMAN BABCOCK: So you're leaning towards Option No. 1 in Elaine's --

HONORABLE TOM GRAY: Actually, I think it would be No. 2 because the rule provides for a sworn affidavit.

CHAIRMAN BABCOCK: Okay. I'm sorry. Option 2 is what you like. Okay. Bill.

PROFESSOR DORSANEO: I think the main thing would be to try to reduce the amount of litigation activity to the smallest amount possible. If the clerk does it, Bonnie said she's going to want the judge to do it, and if the court has to do it, there's more likely to be a motion

even if the clerk would do it ministerially. There's more likely to be a motion if there's less information, so I like No. 2 as well. The intermediate one would seem to maybe eliminate the need for the trial court activity, which would be desirable.

CHAIRMAN BABCOCK: Okay. How many days? You know, you've got "X days" in here. How many days are we suggesting? 10?

PROFESSOR CARLSON: I would think that would be sufficient.

CHAIRMAN BABCOCK: 10 days?

HONORABLE TOM GRAY: That is what's in Rule 20, by the way. 10 days.

CHAIRMAN BABCOCK: Yeah. See, I knew that. Alistair.

MR. DAWSON: I think if you're going to go with the intermediate you have to have a procedure to allow the opposing party to challenge. You know, if Jeff Skilly puts in an affidavit that he's an indigent and, you know, I want to challenge that, then there should be a procedure in place that allows me to do that.

CHAIRMAN BABCOCK: Yeah. What is contemplated by the challenge?

PROFESSOR CARLSON: You then go into a hearing, an evidentiary hearing.

CHAIRMAN BABCOCK: Yeah. Yeah. I think what this is, Jeff, your example here is that he files an affidavit that says, you know, "Here's what it is." You file a piece of paper within 10 days saying, "Huh-uh. That ain't right," and then the court has a hearing. That's the procedure, isn't it?

MR. DAWSON: Right. And I think ultimately the court would decide what the appropriate bond amount would be --

CHAIRMAN BABCOCK: Yeah. Just like our Rule 20.

MR. DAWSON: -- as long as procedurally that you've got that mechanism somewhere in these rules.

CHAIRMAN BABCOCK: Okay. If we put 10 days in here, which is the same as Rule 20, we like Option No. 2? Everybody like Option No. 2? Anybody dislike Option No. 2?

Okay. Option 2 it is, and, Elaine, just make the language work.

PROFESSOR CARLSON: Along the lines of TRAP 20?

MR. LOPEZ: Is it clear who has the burden? It's clear, right?

HONORABLE TOM GRAY: Yes. 20.1(g) puts the burden of proof on the person claiming indigency, and you

can put it on the person claiming net worth.

MR. LOPEZ: Are we going to import all that?

CHAIRMAN BABCOCK: Anne McNamara.

MS. McNAMARA: Just a question for Tom. Does that also say that that person would put in their basis for the conclusion?

HONORABLE TOM GRAY: Yes. There's actually 11 different items that they have to put into the affidavit on which they claim their indigency, so I'm assuming that those could be modified in the rule to the parties other assets, you know, just goes through a whole litany.

MS. McNAMARA: Because if you have a foreign corporate defendant, you haven't got a clue how they have computed their net worth under their accounting rules of their jurisdiction. So unless you have some way into how they came to their conclusion, you won't even know what the cash out would be.

CHAIRMAN BABCOCK: Is Rule 20 sufficient for that, Judge Gray?

HONORABLE TOM GRAY: It would probably need to be -- I mean, because these are directed to really income-producing stream as opposed to net worth. Obviously they need to be modified in that sense of that you're going to go with assets and liabilities or something along that nature, fair market value. I think that's where you would

want to bring in those concepts.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Is that the sense of the committee, that we want to try and get into that level of detail?

CHAIRMAN BABCOCK: Yeah. Do we want to -- Anne says "no."

MS. McNAMARA: I would urge that you just say "Put in the basis for your conclusions," because I think if we try to write accounting definitions that work for both U.S. and non-U.S. corporations in the time we've got we're going to go nuts.

HONORABLE TOM GRAY: No, I think you could do it fairly global, and I think Anne is exactly right. Just "Explain the basis upon which you have computed your net worth" or something of that nature, because the person that is going to be receiving this affidavit is either going to agree or disagree; and if they disagree, they're going to get into the whole nine yards of, you know, what your net worth is, what assets you have, how did you arrive at their value, and all that; and that's going to get into that in the contested stage.

CHAIRMAN BABCOCK: And we could take some comfort because, as Frank says, this is only going to happen in like big cases, where there's a lot of money at

stake.

MR. LOPEZ: If that's true, net worth will have already been an issue.

CHAIRMAN BABCOCK: Well, not necessarily, but probably.

MR. LOPEZ: For punitive damages.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN BABCOCK: Yeah, probably. Yes.

PROFESSOR DORSANEO: I think it's going to happen in every case where there's liability insurance, and I would believe that liability insurance would be a part of the judgment debtor's assets after a judgment had been rendered against him. That would be my view. It might not be the view of, well, some of my clients, but --

PROFESSOR CARLSON: From the accountant's perspective, insurance is only an asset if it has some value. If it has like a life insurance policy has some cash value to it, but maybe it should be different for purposes of --

PROFESSOR DORSANEO: Wouldn't liability insurance have value after there's a judgment and there's legally obligated --

PROFESSOR CARLSON: I think it has great value. I think it has great value, but accountants may differ.

MR. SCHENKKAN: But the question is not whether it has value. The question is whether it counts as net worth for the purpose of this supersedeas provision, and I think the answer to that would be "no" because it doesn't enable the judgment debtor to get any more cash with which he can post more than half his net worth. I mean, that's not to say that it wouldn't be counted as his asset for some other legal purposes. I don't know what they might be, but it seems to me in this case the answer would surely be, no, that wouldn't count.

PROFESSOR DORSANEO: I think the answer would surely be "yes."

CHAIRMAN BABCOCK: Hold it. Hold it. Speak when spoken to.

MR. SCHENKKAN: I'm sorry. A more general proposal, therefore, would be we not try to resolve that this afternoon, we leave it at net worth because both for that reason and the other ones set out in Elaine's memo. There are too many different possible disputes that can arise over what counts as this judgment debtor's net worth and how we determine it here for us to possibly cover it in the rule. Let's leave it at net worth, and those are going to have to be fought about occasionally.

CHAIRMAN BABCOCK: All right. I think we have got a fix.

PROFESSOR CARLSON: Okay.

CHAIRMAN BABCOCK: And Justice Hecht says he's got it. So if he's got it, we've got it.

JUSTICE HECHT: Jefferson's quicker than I am.

CHAIRMAN BABCOCK: Yeah. Jefferson got it a half an hour ago.

Okay. Take us to the next place.

PROFESSOR CARLSON: 24.2(b). 24.2(b)(2). Currently that provides for alternate security in all cases. We now have the new statute that gives us a different standard for alternate security and money judgment. I think subsection (b)(1) tracks verbatim the statutory language, except I filled in (a)(1).

MR. GILSTRAP: It doesn't say "irreparable harm," does it?

PROFESSOR CARLSON: "Substantial economic harm."

MR. GILSTRAP: "Substantial economic harm," not "irreparable harm." We've got to change that, too.

MR. HAMILTON: It's not in there.

MR. GILSTRAP: The statute says that you can get it reduced based on a showing of substantial economic harm. The rule says "irreparable harm."

PROFESSOR CARLSON: I'm reading from my

proposed changes.

MR. HAMILTON: Our rule says "economic harm."

CHAIRMAN BABCOCK: She's made that change, Frank.

MR. GILSTRAP: Okay. I'm sorry.

PROFESSOR CARLSON: Let me read what the proposal is at (b)(1). "The trial court shall lower the amount of security required by (a)(1)" -- the amount of compensatory damage, interest, and costs -- "to an amount that will not cause the judgment debtor substantial economic harm, if, after notice to all parties in a hearing, the court finds a posting of bond, deposit, or security in amount required by (a)(1) is likely to cause the judgment debtor substantial economic harm."

Second paragraph, and this also tracks the statute, HB 4, "The trial court may enjoin the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, but the trial court may not make any order which interferes with the judgment debtor's use, transfer, conveyance, or dissipation of assets in the normal course of business."

This is, to the extent feasible, working it into the rule is a verbatim adoption of statute. I think the only issue that we may want to consider, and maybe not, is whether we want to retain or change the standard for

alternate security that will apply to non-money judgments. If we don't do anything, there will be this -- there will be a different standard for non-money judgments than we currently have in 24.2(b)(2).

CHAIRMAN BABCOCK: What do you think, Sarah?

HONORABLE SARAH DUNCAN: I think we spent a lot of this committee's time getting to one standard. Remember, we used to have the Property Code standard for some judgments, and the Supreme Court rule standard for other judgments. I think there's a lot to be said for just having one standard for alternate security, period, and that's what I would vote for.

CHAIRMAN BABCOCK: And how would you implement that?

HONORABLE SARAH DUNCAN: Delete (2). And make whatever change would be necessary.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: You would have to do more than just delete (2) because (1) references (a)(1), which is only money judgments.

MR. BOYD: You're deleting (b)(2)? I didn't follow you.

CHAIRMAN BABCOCK: (b)(2).

HONORABLE SARAH DUNCAN: (b)(2) and make whatever changes are necessary to (b)(1) to make it

encompass more than just money damages.

CHAIRMAN BABCOCK: You would say it that "The trial court shall lower the amount of security required to an amount that will not cause the judgment debtor substantial economic harm if after notice," blah-blah-blah, "or security in the amount required by (a)(1) is likely to cause the judgment debtor substantial economic harm." You would take out the first (a)(1) but not the second (a)(1).

HONORABLE SARAH DUNCAN: No, I would take out both (a)(1)'s.

CHAIRMAN BABCOCK: Well, then how -- the amount required by what then?

HONORABLE SARAH DUNCAN: This rule. By (a). (a)(1) is money judgments.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: (a) has various sections in it that will cover all judgments.

CHAIRMAN BABCOCK: Okay. (a). All right. What's everybody think about that?

PROFESSOR DORSANEO: Good idea.

CHAIRMAN BABCOCK: Good idea? Paula, good idea?

MS. SWEENEY: Oh, yes.

CHAIRMAN BABCOCK: Okay. Paula Sweeney is substantially strongly in favor of this. All right.

Anything else? What about 29?

PROFESSOR CARLSON: Did not see any changes necessitated.

CHAIRMAN BABCOCK: Terrific. Thanks so much. I know that was a tough, tough deal.

Richard, you're up.

MR. ORSINGER: Okay. First, an outline of the discussion; second, the materials to refer to. We are talking about the class action rule. You should have received an e-mail and/or downloaded the subcommittee recommendation dated August 18, 2003, so that's the first packet I'm going to talk about. The subject matters covered are the changes to the Texas class action rule mandated by House Bill 4, which includes discretionary decisions on the part of the Supreme Court and requires us to decide what to do, if anything, about an effective date for the changes.

Then apart from the House Bill 4 mandated changes are the pending Federal rule amendments, which go into effect on December 1, 2003, unless Congress overrules them; and in short, we are adopting or integrating most of those into our proposal. Or we are integrating all of those into our proposal with slight rewording in some instances.

The third factor to consider are the Jamail

proposals, which we have discussed before, and they are included in the packet. I'll tell you in a minute.

The next category are changes the subcommittee recommends based on recent Texas Supreme Court rulings, including Bernal, which caused the trial courts to be more proactive in the certification process and articulating their grounds for it and in other cases in the settlement process and articulating their grounds for it. We have proposals that are not out of the Federal rules or the Jamail proposal that are prompted by our reading of Supreme Court cases.

And then lastly we have the shareholders derivative action lawsuits, which originally were appended to the class action rule, although they don't really belong there; and over time it's become increasingly clear that they need to have their own rule; and the Legislature has passed statutes which provide much procedural detail about how class action -- about how shareholders derivatives suits should be handled, and so we are basically breaking that out and cross-referring to the statute.

Now, this packet that you have that was e-mailed around or downloaded for this meeting contains the subcommittee proposals, and then behind that is the current Rule 42, Texas Rules of Civil Procedure, that starts on page 16. So if you want to refer to the existing language

without redline, you'll see it back on page 16, but the first 15 pages show the old rule with redlines with our proposed amendments.

The Federal Rule 23 changes were in a packet that was e-mailed out before the last meeting in July, and it has not been e-mailed out again, and you may or may not wish to refer to that, but that would be your source material if you want to see the language in the proposed Federal amendments.

The Jamail recommendations relating to class actions are in this current packet on page 19, and the last information source in the packet is what we call the recodification draft version of the shareholder derivative action rule, and it's called the recodification draft because in the second prior immediate iteration of this committee there was a subcommittee that basically rewrote and modernized all of the rules of procedure and reorganized them and then processed through that and then issued that out of the committee. So it's a whole-scale rewrite of all the rules, and we call that the recodification draft, and because committee time had already been spent in how to handle the derivative action rule, we have appended that at page 21 for your reference.

The first thing to take up --

CHAIRMAN BABCOCK: Wait a second. Are you

proposing that the derivative action rule be broken out of Rule 42?

MR. ORSINGER: Yes. You're going to find that at the bottom half of page one. We're proposing that what is currently part of Rule 42 on derivative suits is actually going to have its own stature as a separate rule, and this committee will decide whether we want to outline the procedures for those claims in the rule or whether it's better to cross-refer to the statute where the Legislature has given much detail on what the procedure would be. And just as a slight preview, it's our preference as a subcommittee not to write or copy the statutory standards into the rule out of concern that the statutory standards may be modified and then the rule will be out of sync with the statute and we would probably be better off to just alert the practitioner to go from the rule book to the statute book, but not actually restate the statutory requirements in the rule.

Okay. So having said that then, our focus is on the changes the subcommittee is going to propose to Rule 42 and then issues that have been put before us where we have decided that we cannot make a recommendation without further study. The first one we come to is, in fact, the derivative suit provision, but I don't know if we want to take that up first because it probably has the lowest

priority.

CHAIRMAN BABCOCK: Yeah. We don't want to take that up first.

MR. ORSINGER: Let's revisit that last then. If you go to page two of the materials you get into the actual foundational rules for when you can maintain a class action, and at the top of page three the subcommittee is making the first noteworthy recommendation, and that is to eliminate the subdivision (b)(3) class actions. There are currently -- before this committee takes any vote and the Supreme Court acts, there are currently (b)(1) classes, (b)(2) classes, (b)(3) classes, and (b)(4) classes; and the ones that we have been talking about and concern ourselves mostly with are (b)(4) classes. We feel that (b)(3) classes, which I believe are not reflected in the Federal rules anyway, are unnecessary to have a separate subdivision for them; and we are proposing to delete them as unnecessary and just leave us with (b)(1) and(b)(2) classes and then what used to be (b)(4) would become a (b)(3) class.

CHAIRMAN BABCOCK: Was there any dissent in the subcommittee on this?

MS. BARON: Richard, I have a question. Is it unnecessary because you think it's already included in (4) or some other section?

MR. ORSINGER: Already included in (1) and (2). Not (4). Do you agree with that, Bill?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: Okay. In other words, we feel like we're deviating from the national norm here for no real reason that has validity today. There apparently is a historical reason going way back into the Seventies, and Bill can explain that, but I'm not sure that it's worth it because I think nobody objects to it.

MS. BARON: Yeah. I just wanted to be clear that no substantive change is intended by this.

MR. ORSINGER: We believe not, but it would be because they are covered by (b)(1) and (2) and not (b)(4).

PROFESSOR DORSANEO: Primarily it would be (1)(b).

CHAIRMAN BABCOCK: Okay. Anybody got a problem with ditching (b)(3)?

MR. ORSINGER: Okay. So now in this subcommittee proposal what used to be (b)(4) classes, we're now going to start calling (b)(3) classes, and I don't want anybody or the record to be confused. From this point forward in the debate when we say "(b)(3)" we mean "(b)(4)"; and if we accidentally say "(b)(4)" we mean "(b)(3)." Okay.

PROFESSOR DORSANEO: Heretofore when we said "(b)(4)" we meant "(b)(3)."

MR. ORSINGER: Okay. So, now, this is where we get into some --

CHAIRMAN BABCOCK: Semantics.

MR. ORSINGER: We get into some serious stuff here. Our scrivener on this, who worked long and hard and for late hours, was Frank Gilstrap, for which we're very appreciative; and a lot of the explanation I think I'm going to defer to Frank to explain the exact language. He's identified every change in terms of a deletion by an overstrike and then every addition is by an underline, and whenever we've made a change there is a note right there. Not a footnote. It's actually a bracketed note that explains what we did or at least identifies what we did.

So as you see on page three as you move on down, we've changed the title to subdivision (c) by taking out "appointing class counsel" and "multiple classes and subclasses" because we are going to adopt the Federal subdivision, and we're actually putting some of that language into another area. So it's appropriate to move those titles to another place.

MR. GILSTRAP: Richard, let me just -- one point so everybody won't be confused. With regard to (c), (e), (g) and (h), we're not starting with the Texas rule.

We're starting with the pending Federal rule on each one of those.

MR. ORSINGER: Okay. That's an important correction. So the redlined draft is not against the Texas rules. It's essentially adopting wholesale as a baseline the proposed Federal rule, and then when we deviate from that we're showing our deviation by a redline or an underline, and so what that means is that you're going to have to do a visual comparison with our baseline proposal here because I misstated it. We have not alerted you to the way we are changing from our current Texas rule because we've adopted wholesale the Federal proposal, which we think is functionally equivalent, and are attempting to maintain a parity between our rule and the Federal rule. Did I say that right, Frank?

MR. GILSTRAP: Yes.

MR. ORSINGER: Okay. So then moving on down, there's an issue about when the class certification or the representative of a class is appointed at an early practicable time. That's the second to last indented line there on page three. It's four lines off the bottom. That is a change from the current Texas rule, which says "as soon as" --

PROFESSOR DORSANEO: "Practicable after the commencement of an action brought as a class action."

MR. ORSINGER: That is on page 17, subdivision (c)(1). "As soon as practicable after the commencement of an action brought as a class action." The Federal rules committee has proposed that that language be changed to "at an early practicable time," so that more time can elapse or at least the judges are encouraged in certain cases to allow more time to elapse before the decision is made about appointment of representatives for the class or the class certification process, and they explain their rationale, and that was included in the e-mail that went out to you before the last committee meeting, and it seemed to be a legitimate concern.

It was well thought of. They took input from all over America, and we as a subcommittee didn't see any reason why we ought to have a different standard from the Federal standard, which is the one that's going to develop all the case law and which had all the groundwork layed for it anyway, so our recommendation is to go ahead and accept that Federal committee concept and bring that into Texas law.

Any other comment? Subcommittee members? I'm going to encourage any of the subcommittee members to augment or disagree with anything I say. We covered a lot of ground.

CHAIRMAN BABCOCK: But nobody has any problem

with that?

MR. BOYD: So to be clear on the record, "an early practical time" is not quite as quickly as "as soon as practicable."

MS. BARON: Correct.

MR. ORSINGER: Well, it's not required to be as quickly. I mean, it could be as quickly, but it is not required -- let's see. It was believed that "at an early practicable time," which was the Federal standard as well, was encouraging judges to do it earlier than some cases really warranted; and they wanted language to give the judges less pressure to do it so early if that wasn't appropriate. But it's not necessarily a longer period of time in any case. It's just that the Federal people felt like we were putting too much pressure or giving too much of a hurry up signal to the trial judges.

MR. LOW: And didn't they also feel that that's really what's happening anyway?

PROFESSOR DORSANEO: That's what's happening here for sure anyway.

MR. LOW: Yeah. And so why not -- that was the Federal committee's opinion.

MR. ORSINGER: Okay. Then no opposition to that? The top of page four, we're changing cross-references that would be appropriate to the Federal

rule to the state rule and then we get to subdivision (D), and this is the subcommittee's effort to write into the rule in general terms the wisdom or the law that we received in in the Bernal case and Henry Schein case from the Texas Supreme Court in the last few years, knowing that we didn't want to get too detailed in articulating the standards for certification because they may be subject to further refinement by the Texas Supreme Court, but we did feel like bringing at least these general concepts forward was true to those cases and appropriate.

PROFESSOR DORSANEO: This language was taken very close to verbatim, if not verbatim, from Bernal and Henry Schein in the sense that Henry Schein repeated what Bernal said. We could have selected other sentences from Bernal or Henry Schein that recapitulate the same idea, but this seemed to us to be the essence of the drill.

MR. ORSINGER: Now, this is an exhortation to the trial judges or even actually a requirement because they must identify things that's not present, not going to be present, by requirement in the Federal practice but clearly a part of Texas law, and we -- and the danger, of course, of being too detailed in stating Texas law in 2003 is that this rule may still be in effect in 2007; and it may have 15 more Texas Supreme Court cases that have articulated standards and we don't want to be misleading

for a trial judge to think, "Well, the only thing I have to do are the three things in this rule" when the Supreme Court really has told them there are other factors later on, next year, year after next, they decide there are other things are important.

So we are trying to do a balance here between being informative but not being so detailed that our rule gets outdated too quickly, and so we could entirely omit this and say, "Go look at the case law. You're smart enough to figure out what the important cases are"; or we could be with just what we think is a proper balance; or we could be even more detailed and require the trial court to go through more steps to put on paper its reasoning so that it's more amenable to appellate review, et cetera, et cetera. So I think we're asking for a comment on that, the subcommittee's balance of these factors.

CHAIRMAN BABCOCK: Jeff, and then Judge Bland.

MR. BOYD: I'm supportive of the idea of having the court enter an order that specifies his or her findings, but these findings don't match the findings that the rule requires the court to find, do they? I mean, for example, "must identify the substantive issues that will control the outcome of the litigation." Where in the rule is the court required to find that in order to certify?

PROFESSOR DORSANEO: Well, that's why we want to put it in the rule, because the case law says that's what the court must do.

MR. ORSINGER: But what you've just said is that the holding in the Supreme Court cases cited is not explicitly stated in the rule that they were interpreted, which is true. But the Supreme Court case has said that this is the way we're going to do our class actions in the future, so we're taking that as a given; and if we are concerned about what you just said then probably our reaction would not to be to alter (D) in any way since we are told that's the way it is, but maybe to go back and somewhere else insert what standards are for you to certify so that (D) is consistent with the component parts of when a class action is appropriate. But we don't want to tinker with that too much because we're in alignment with the Federal rule on those; and so if we were to take these (D) factors and then go try to retrofit them earlier in the class action rule then we're going to be drifting away from the Federal rule language, which means we're going to drift away from the Federal case law interpreting it and whatnot.

CHAIRMAN BABCOCK: Judge Bland, you had your hand up.

HONORABLE JANE BLAND: Richard, did your committee consider whether or not to require the trial

court to issue a trial plan in connection with the certification order?

PROFESSOR DORSANEO: That's what this is meant to be, in part at least.

MR. ORSINGER: By trial plan are you talking about a timetable or just identifying the components?

HONORABLE JANE BLAND: Well, the method for resolving fact -- issues of fact and law, because I think that that's an important part of what the case law tells us, which is you've got to show exactly how you're going to try these things. Because it's pretty easy to -- I mean, it's pretty easy just to say "common issues of law and fact or fact predominate." The harder thing is to discuss how you're going to try them and how you're going to manage it, and it says this about the individual issues, but I didn't know if the case law -- I didn't know if you wanted to include a reminder to the trial court to have a -- have some kind of a trial plan, and should we require that as part of the class certification order so that when you're looking at whether the class should be certified you're also looking at the proposed trial plan? And I don't know the answer to it. I just --

MR. ORSINGER: The two questions, of course, about whether it should proceed as a class action and how it should proceed as a class action don't necessarily have

to be made at the same time. Is it advisable for us to require that you have to have a specific method in mind at the time you certify as to how, in fact, you're going to litigate those issues?

PROFESSOR DORSANEO: That is what a trial plan is.

MR. ORSINGER: I know, but right now the Texas rules don't require a trial plan at the moment of certification, do they?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: They do?

PROFESSOR DORSANEO: Yes. Maybe, you know, looking at this now after -- I hate to say this, but what Jeff was talking about as in a (b)(3) it does have specific requirements for the court to make findings. What we've done, at my suggestion, was to put this new (D) in the Federal rule. I'm not sure that it's good enough at this point here today. It is very faithful to Bernal and Henry Schein. Hearing Judge Bland, it doesn't use the term "trial plan," and actually, the trial plan would do more than state how the individual issues would be considered. It would talk about the predominating issues as well, so maybe I don't -- maybe we don't have enough here, and maybe it's not in the right place. Professor Hatchell, what do you think? You know as much or more about this than

anybody I know.

MR. HATCHELL: Alive. I'm reluctant to put (D) in because personally I don't agree that it -- I guess what we're trying to do here is to just sort of outline the mental processes, and I don't agree that this is really what's required by Bernal and Schein. I think it's a very good attempt. I'm not being critical, but I think when we start trying to outline mental processes by our own subjective interpretation of cases, we get -- it can be kind of off and -- but I do think that there needs to be a requirement that the trial judge enter a trial plan because, Bill, as you and I both know, it's not being done and never is going to be done.

MS. SWEENEY: Speak up, Mike. We're still down here.

MR. HATCHELL: I'm through.

MS. SWEENEY: Oh.

MR. TIPPS: You really missed some pearls, too.

MS. SWEENEY: I hate that.

MR. BOYD: I'm not in any way objecting to the intent of this subsection capital (D). It just seems odd to me that what you're asking the order to say is inconsistent with what (b) is asking the court to find, and so I wonder if the way to do this is not to say that "For

any class certified under Rule 42(b)(3) the certification order must identify the common issues of law or fact that the court has found to predominate and state how the court intends to address" -- well, whatever language you want to use for setting a trial plan, and that way at least you're matching what you're requiring the order to say with what the court has to find under (b)(3).

PROFESSOR DORSANEO: I agree with that. In some of our other proposals, in fact, Frank, didn't we have one that just said, "The court should include a trial plan", talk about that a little bit? I mean, I'm almost ready not to use this but to just indicate that there needs to be a trial plan and it needs to be in the certification order.

MR. GILSTRAP: We discussed it. I don't know that it ever made it into the form of a written proposal.

MR. ORSINGER: Well, Bill, you said earlier that the current rules require a trial plan at the time that the certification decision is made.

PROFESSOR DORSANEO: Uh-huh.

MR. ORSINGER: But are you saying the rules require that or the Texas cases require that?

PROFESSOR DORSANEO: I'm saying the Supreme Court says that the rule requires it.

MR. ORSINGER: Okay. At the time that the

certification decision is made the court has to include in the certification order its trial plan?

PROFESSOR DORSANEO: Uh-huh.

MR. LOW: Bill, what about --

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: Bill, as I recall the Bernal decision, it lays out what has to be in the trial plan, and if the idea here is to sort of codify what is in --

PROFESSOR DORSANEO: No, this is what Bernal says, and it doesn't really quite say what needs to be in the trial plan. That's why trial courts feel -- some of them feel comfortable to say that "we're going to have a trial plan and it's going to consider how we should do the trial," end of order.

MR. DAWSON: Then I would propose that you have language saying that the certification order shall include a trial -- must include a trial plan and then specify what has to be in the trial plan.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: As I recall, Schein says you don't have to have a trial plan, you know, attached, and that's why we didn't say it here is because it's not -- I mean, everybody knows you have to have the trial plan of some kind, but doesn't Schein say something about you don't have to have -- every case doesn't have to have a trial

plan?

MR. HATCHELL: That's referring to non-(b)(3) cases, however, that language. You need to read that language in context.

CHAIRMAN BABCOCK: Yeah, Pam.

MS. BARON: I just have some question about whether we want to be this detailed in the rule. Obviously these same requirements apply in Federal court, and in amending the Federal rule they decided not to put all these requirements in. The question is whether it can be resolved by a very strong comment, because obviously just sitting here we don't even seem to agree on necessarily what the requirements of the Texas Supreme Court are.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Notwithstanding the source of this language, which I copied from Bernal, I really think it ought to say that there ought to be a trial plan. The certification order ought to include a trial plan that indicates how the issues will be tried. There is language in Schein that is about as simple as that, "a trial plan which describes how the issues will be tried." I don't have Schein in front of me, but I think that's -- after hearing the comments I think that's better and helpful, and getting into a lot more detail probably is not helpful. I think the mistake I made was trying to get --

copy a formula out of these cases, and it doesn't look right now.

CHAIRMAN BABCOCK: Okay. Pam, is that Schieny enough for you?

MS. BARON: It's better.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: I like having the idea of setting this out in (D) and not leaving it just to the case law for two reasons. No. 1, the state judiciary I think needs more guidance on these matters than the Federal courts do; and, No. 2, I look upon this as kind of saying to trial judges, "We don't want you to certify first and then think about the details later. If you're going to certify, there are some basic overriding details we want you to think about and articulate. Otherwise, don't certify." And I think that's a good idea, too. We need to be told that in the rule.

MR. LOW: But that's in the Federal rule. They don't have tentative now. You know, they say if it's tentative then don't do it until you're sure of it. The Federal rule doesn't require Glock analysis, but Federal courts do. So there are so many things. Would you put a Glock analysis in there? I mean, I don't know what all it would include when you start including everything. It sounds like to me you have to have a trial plan, and after

that, you know, there's so many other things you could put, the Glock analysis, a lot of things I don't even know about.

CHAIRMAN BABCOCK: Alistair and then Carl.

MR. DAWSON: Buddy, I was going to raise the same issue. I would like to wonder or I wonder if the committee could address why they chose not to address differences in state law or Glock exhibits, which comes out of the Schein opinion.

PROFESSOR DORSANEO: It's not in there because, at least in my view, that's part of the decision as to whether common issues predominate, and in Glock vs. Spence -- that's what you're talking about, right?

MR. LOW: Yeah, right.

PROFESSOR DORSANEO: Fifth Circuit case, says you're supposed to make a determination of the applicable law that's going to apply to the class claims. Sometimes people call that choice of law. I don't necessarily call it that myself, but that's just part of the -- to me that's part of the larger question as to whether the common issues predominate or whether the individual issues overwhelm the common issues when you have the multiple states law involved. So I guess, Alistair, what I thought is I thought we were addressing that, but maybe not at the same level of detail that you and Buddy are thinking -

MR. LOW: No.

PROFESSOR DORSANEO: -- with respect to your own affairs.

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

MR. DAWSON: I guess what I was following on Judge Peeples' comment about wanting some guidance and where if you don't put it in a rule, might it make sense to include it in a comment?

CHAIRMAN BABCOCK: Carlos and then Pete.

MR. LOPEZ: I just -- I'm not on either side of that substantive debate. I just -- I just think that sometimes there's unintended consequences and perils when you start dumping a lot of case law into the rule. I mean, the case law is there. It's there, and I think it's up to the litigants -- the first thing they do in my certification hearing is we talk about Bernal and all the other cases. So, I mean, it's great to put it in a rule, but I'm not sure, you know, the judge can't find it in the cases. I'm not sure the rules make it -- maybe it's mandamusable if it's in the rule rather than the cases. Maybe that's the difference. I don't know.

CHAIRMAN BABCOCK: Pete, then Buddy.

MR. SCHENKKAN: I wanted to suggest that the issues like Glock criterion not only affect the predominance criterion for what is now a (b)(3) class

action, formerly known as (b)(4), but also the superiority criterion.

PROFESSOR DORSANEO: Yes, true.

MR. SCHENKKAN: Because it may well be that the common issues do predominate but a better way to resolve the common issues is to let the state that has most of the claims in it and has a proposed class action there deal with it or whatever, and maybe that then just serves as another example for the proposition that if we try to summarize Bernal and Schein and where they might ought to lead in a rule we're trying to bite off too much here and that we would be better off leaving this out of the rule.

The countervailing consideration that Richard started with and that I want to return to and end with we were concerned about is flagging to practitioners, and I guess as Judge Peeples is suggesting perhaps also in many cases to the state trial judges, the need to take this one seriously and be aware of its existence. It seems to me that that criterion is one that the Texas Supreme Court is in the best position of anybody to weigh the balance on, and they may have gotten all the benefit they're going to get out of our discussion of this point, and we might be ready to punt that question to them, if they would rather put their own summary of Bernal and Schein into this rule or say nothing about it.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, I was not suggesting that we make -- that we put a Glock analysis in. I was merely illustrating where do we stop if we do that, and it's the same thing we had in the -- when you talk about the expert. You list each factor, you overlook, so I agree with Mike that we should point out that they have to have a trial plan, and then other than that I think I agree with Bill that the other things fit within it; and if the lawyers don't know how to follow that then when they get to the Supreme Court they're going to be in trouble. I mean, that's just point-blank.

CHAIRMAN BABCOCK: Okay. Anymore? Okay. So, Bill, your current thinking on this subpart (D) is what?

PROFESSOR DORSANEO: Just I agree with Buddy and with Mike that we need to say something about the need for a trial plan in the rule, notwithstanding the fact that our Federal model doesn't include that. This is a good place to do it, but this tries to do too much and along the way really doesn't actually do enough.

CHAIRMAN BABCOCK: Okay. Should it be limited to (b)(3) class actions, the trial plan?

PROFESSOR DORSANEO: Yes.

MR. HATCHELL: Yeah.

CHAIRMAN BABCOCK: Okay. Trial plan limited to (b)(3), and this language here about stating how the individual issues can be considered, that's not enough?

PROFESSOR DORSANEO: No, I just think we should say "trial plan," and there's language in Schein that just simply says "indicating how the issues will be tried" or some such language, which Chris is going to get right now.

CHAIRMAN BABCOCK: Okay. Is everybody okay with that general approach, recognizing that Bill is going to have to do some drafting, or not?

HONORABLE DAVID PEEPLES: Chip, I'm not.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: And let me tell you why. In theory, you know, if you can analyze Supreme Court case law and distill the principles and compare that to what might be stated in a rule then it might be equal, but that's in theory; and the reality is that while there are trial judges in state court that really understand this stuff, there are people who have general jurisdiction, they come to work on Monday and they've got a bunch of criminal cases and family law and maybe some juvenile, and maybe a case like this shows up on the docket; and to expect that kind of judge to take the time to read Schein and Bernal and really distill everything, I think you're asking too

much.

You know, we are in a better position, and the Supreme Court with our guidance, in a better position to distill the principles that we think judges ought to look at and put them in a rule; and I'll grant you that it shouldn't be this way, but psychologically, if this book is on my bench and I take it off and if a lawyer is pointing me to this, that just weighs more than some case; and I've got a lawyer saying "Ah, but look at this language" and another one saying, "Oh, no, no, but look at what they said here." I just think in the real world it has much more impact and weight to have it in a book; and, again, we can write the criteria better than the lawyers can argue it and have some poor judge look at highlighted language on page this and that. I think we ought to do this and even make it better than it is right now.

PROFESSOR DORSANEO: Mr. Chairman, I can take another try at it, just based on the Schein opinion, overnight.

CHAIRMAN BABCOCK: That would be good, but the question is whether or not the majority of people feel as David does or whether they feel as maybe Jeff and some others, Buddy, think that it shouldn't be there. We don't want you doing work for nothing. Anne.

MS. McNAMARA: I would agree with David that

if one of our objectives in this whole effort is to reduce litigation costs and to focus litigation earlier and more directly on what's actually going on in the case this language is really quite extraordinary in terms of getting to the point of the litigation faster than you normally get to it, and that may not be always, you know, in everyone's best interest, but it would reduce the cost of litigation to get the case focused.

CHAIRMAN BABCOCK: Hang on. Judge Bland had her hand up, Richard.

HONORABLE JANE BLAND: The practice in Federal court is for the trial judge to make extensive written findings in issuing any ruling, including one involving class certification, and it's the exact opposite practice in state court. We rarely, if ever, issue written findings in support of orders, and I think that it's important to flag to the trial judge the need for extensive written findings to support your order when you issue an order granting or, you know, perhaps even denying a motion for class certification and that, you know, this is going to be a -- for the reasons that David and Anne articulated and everyone else, I think it's good to model the Federal rule, but here I think there's a good reason for us to depart and give a little more guidance to the trial judge.

CHAIRMAN BABCOCK: Buddy, are you convinced

yet?

MR. LOW: No. I'm wondering, the Federals must have considered this. They've got some people that have had experience and --

CHAIRMAN BABCOCK: Justice Hecht says "no."

MR. LOW: Well, what's the committee above yours? Isn't there the one your report --

CHAIRMAN BABCOCK: That's somebody we can't easily get in touch with, Buddy.

MR. LOW: I thought there were two Federal groups.

JUSTICE HECHT: There are, but Judge Bland is right. The reason the Federal judges don't talk about anything like (D) or a trial plan is because they already have to make findings on everything. They deny motion for summary judgment, grant a motion for summary judgment, grant a motion for sanctions, they ordinarily write a little opinion saying why they're doing that. So it just never came up in any of the Federal.

MR. LOW: They do it, but do their rules -- specifically a lot of them don't require it. It's just because they do it.

JUSTICE HECHT: No, but the circuits have just basically made some Federal judges do it.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: To me the Texas Supreme Court has already told us they want the trial courts to do these things, and the question we're debating is whether we ought to tell them that in the Rules of Procedure or we ought to just make them figure it out by reading the case law. If the Supreme Court is going to promulgate a revised class action rule and leave out something that the discussion appears to consider to be central to the question, and we all know that this is subject to interlocutory appeal, and in the Texas practice trial courts are not required to give findings and conclusions on interlocutory appeals, I don't see why this isn't a golden opportunity for us to articulate what the trial courts have to believe before they certify and they have to say why they believe it, and it needs to be in their order so that the appellate court can look at it and see what their thinking was and whether their trial plan matches their thinking. It may be that their thinking is okay to certify, but their trial plan is not good or something, and it seems to me like I don't understand why we wouldn't want the rule to tell the judges that the Supreme Court requires this of them.

CHAIRMAN BABCOCK: Okay. We're going to have a vote on the Peeples-McNamara proposal, which is to have it in there, in which case Bill will draft over the evening; and the alternative to that is the position that

Buddy and Jeff articulate, that it shouldn't be in here.

So everybody in favor of the Peeples-McNamara let's-put-it-in raise your hand.

All those opposed? It passes by a vote of 20 to 5, the Chair not voting, but Boyd voting against his own proposal.

MR. BOYD: Let me make that clear. That was Mike. You've confused me.

CHAIRMAN BABCOCK: Okay. So we go back and draft some tonight.

MR. BOYD: To make it clear, I just wanted what it required to be in the order to be what the rules require and not something different.

CHAIRMAN BABCOCK: Let the record reflect that the Chair was goofing around today.

MR. HAMILTON: We talked about this earlier. Before we pass it, I think we need a comment, and we've changed "as soon as practicable" to "an early practible time." I think we need a comment for the courts on that so they will know what we're talking about. There was some discussion in the Federal materials about why they did that, and the courts need to know what it means.

CHAIRMAN BABCOCK: Yeah. Yeah, Mike.

MR. HATCHELL: The phrase, original phrase, "as soon as practicable" in the Federal rules are strange

words to use to accomplish what they were trying to accomplish, but it should be made clear that those words were originally inserted to prevent what's called a one-way class action, and that is a judge that proceeds to summary judgment before proceeding to class certification or some other dispositive ruling. So I always thought the language they chose to accomplish that was very strange, but that's the reason this concept is in the rule, so if you have a comment, you probably want to include that in there.

CHAIRMAN BABCOCK: Who's going to do the comment, Carl?

MR. HAMILTON: Bill.

PROFESSOR DORSANEO: Oh.

CHAIRMAN BABCOCK: That didn't take long, did it?

MR. ORSINGER: The Federal rule proposals have two types of commentary that discuss this very question, and we could either let it ride because people are probably smart enough to figure out that this rule is the same as the Federal rule and go look at the Federal comments or -- thank you -- we could borrow some of that language to build our own comment. We don't have to draft it just out of the blue. Or we could drop a note saying that it conforms to Federal rule so-and-so, which is a tip for people to go look up the Federal rule.

CHAIRMAN BABCOCK: Yeah. Let's not be too clear about it, though. Let's just have clues. Bill, can you do a comment so we can look at it?

PROFESSOR DORSANEO: I can copy and try not to copy too much, yes.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: One thing. Bill, when you go back and you're looking at this attempt to redraft (D), it was mentioned that findings might be helpful or findings can play a part. If you'll recall over on page 11 when we're talking about attorney's fees, we put a requirement in there the court must state its findings and conclusions in writing or orally on the record, so we already went through that there, and we may be able to do the same thing here.

CHAIRMAN BABCOCK: Okay. What else? Okay. Let's move on to the next thing, Richard.

MR. ORSINGER: Okay. The next thing has to do with the requirement or mandate of notice to (b)(1) or (2) classes, and our subcommittee proposal is not to require that actual notice be given to the members of the class in (b)(1) and(b)(2) classes.

CHAIRMAN BABCOCK: And what's your thinking on that?

MR. ORSINGER: Bill, do you want to

articulate our rationale for that? Are you listening?

PROFESSOR DORSANEO: Well, I was doing something else, but --

MR. ORSINGER: Okay. The next proposal is that subdivision (2)(A) on page four, "For any class certified under Rule 42(b)(1) or (2) the court may direct appropriate notice to the class."

CHAIRMAN BABCOCK: But it doesn't have to give actual notice?

MR. ORSINGER: Well, of course, the rule doesn't say that, but that's what you should infer from that.

CHAIRMAN BABCOCK: Okay. And what's your thinking behind that?

MR. ORSINGER: Well, the types of classes that are certified, the representativeness of the class representatives is -- has a sufficiently high degree of competence that the suggestion has been made that actual notice is not required.

PROFESSOR DORSANEO: Well, in terms of the history and what our current rule says, our current rule has a provision in it for notice and, in fact, individual notice in all types of actions. If I'm looking at the right one on -- it's, again, on page 17; and all class actions under (b)(1) or (b)(2), the notice, individual

notice, needs to say certain things; but I guess the main thing is we have individual notice to all members who can be identified through reasonable effort in (c)(2) of our current rule, which is -- which was different from the existing Federal rule.

The idea I think in 19 -- meetings in 1975, '76, just my recollection, was that either due process or something required individual notice in all types of class actions; and that's how the Texas rule was crafted, notwithstanding the fact that the Federal Rule 23 from which it was copied didn't say that individual notice was required. The current Federal proposal is what we have in our draft; isn't that right, Frank?

MR. GILSTRAP: That's correct.

MR. ORSINGER: Yes, it is.

PROFESSOR DORSANEO: And the idea under current Federal thinking is that notice, so it appears, that notice is not needed except for (b)(3) actions, or it's not mandatory.

MR. ORSINGER: Not required.

PROFESSOR DORSANEO: Not mandatory, not required, and I'm not completely up to speed here in my recollection of the Federal comments as to why that's so, but it would have to do with the nature of the interests involved, with it being the case in (b)(1) actions

and(b)(2) actions that we're talking about interests that are so aligned between the representatives and the members of the class that there isn't a Hansbury vs. Lee type of problem.

I think the committee was as motivated by anything as it was to make our rule be like the Federal rule for uniformity sake. Beyond that, I think it's clearly not required that individual notice would be necessary in a (b)(1) or (b)(2) action; and, again, it must be current Federal thinking that in those types of actions it's not required by due process to give notice because of the nature of the interests; and that's the best I can do here today.

CHAIRMAN BABCOCK: And are you saying that the language that is suggested here for our 42(2)(A), notice, is the current Federal language?

MR. ORSINGER: The current Federal language doesn't specify what notice is required for (b)(1) and (b)(2) classes.

PROFESSOR DORSANEO: But it does say -- it does notice -- here. Carl handed me, "The authority to direct notice to class members of (b)(1) or (b)(2) should be exercised with care." He found part of the legislative history with a comment. "There may be less need for notice than in a (b)(3) class. There is no right to request

exclusion from a (b)(1) or (b)(2) class. Characteristics of the class may reduce the need for formal notice. The cost of providing notice could easily triple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that the notice costs may deter the pursuit of class relief against the benefits of notice."

CHAIRMAN BABCOCK: Does 23(c)(2) currently say "as practicable" or is that "reasonable efforts" or have they changed that to "appropriate notice"?

PROFESSOR DORSANEO: I think that's Texas language. I think that was always Texas language. That's my recollection.

CHAIRMAN BABCOCK: Well, not according to your little note here.

MR. ORSINGER: Let me answer your earlier question. The Federal rules as currently written before the December 1 amendments don't specify what notice is given to (b)(1) and (b)(2) classes. They just specify what notice will be given to (b)(3) classes. So proposed Federal amendments now have introduced a clause to describe what notice is appropriate for (b)(1) and (b)(2) classes, and the proposed Federal amendment language is "For any class certified under (b)(1) or (2) the court may direct appropriate notice to the class."

CHAIRMAN BABCOCK: That's the Federal proposal?

MR. ORSINGER: Right. So for the first time they're articulating what your standard for notice is for (b)(1) and (b)(2) classes, and since we've opted to allay ourselves to the Federal changes we're bringing that into Texas law. But, unlike Federal law, when we bring it into Texas law, it doesn't just fill in a gap. It actually amends an existing rule that requires actual notice in Texas (b)(1) and (b)(2) classes.

PROFESSOR DORSANEO: And that probably -- I remember we did that because we thought it was necessary to do it, and it wasn't. We were wrong.

CHAIRMAN BABCOCK: Well, we're never wrong about what we do in our own state.

PROFESSOR DORSANEO: No, I mean our reasons for doing it were not -- it was perceived to be necessarily a good idea, but that it was mandated by the Constitution.

CHAIRMAN BABCOCK: By the Federal Constitution. Gotcha. You know, you do say here, though, in your note that both the Texas rule and Federal rule require all classes certified to be given the best notice practicable and notice to all members who can be identified through reasonable efforts.

MR. GILSTRAP: The reference to the Federal

rule is probably incorrect.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: Well, Chip, I mean, to me I think the decision we have to make as a committee is if we're going to follow the Federal amendments we need to be aware that while the feds are filling in a gap in their rules, for us to copy them we're changing an existing requirement for (b)(1) and (b)(2) classes.

CHAIRMAN BABCOCK: Yeah. This is a pretty big issue to me. Pete and then Judge Bland.

MR. SCHENKKAN: And we also need to focus on the fact that if the change we're making here is for (b)(1) and (b)(2) classes a relaxation of the current requirement notice --

MR. GILSTRAP: That's correct.

MR. SCHENKKAN: -- but at the same time we need to be aware that later on in this draft -- I think it's at page seven -- when we get to settlement, we are departing or proposing, the subcommittee is proposing, that the committee propose to depart again from the new Federal and require notice when a class is to be settled be given to all those who may be bound by it, which the feds did not do.

CHAIRMAN BABCOCK: Right.

MR. SCHENKKAN: So the net downward departure

on the sort of due processing of binding people through this class process is less than it may appear if you look at this one provision only, though I'm not suggesting you should consider it. Fine. I'm just pointing out that you've got to look at this as a package, and the package we're doing is changing the notice both from what we now have it and from what the feds propose, but in a way that's in between what we now have and what the feds are going to have.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: Well, I think practically there are these (b)(1) and (b)(2) cases in state court I think will be deed restriction cases, which used to be I think under that odd (b)(3) that we used to have, and the class action is often agreed to. There's usually not a -- the parties usually don't contest class certification, but as long as the parties affected by the judgment receive notice of any settlement, I don't think that giving some discretion as to whether notice ought to be sent is a problem in (b)(1) and (b)(2) classes.

CHAIRMAN BABCOCK: Buddy.

HONORABLE JANE BLAND: And so it looks like the way that the subcommittee has proposed the rule be written allows notice -- it says notice doesn't need to be sent in cases where it doesn't appear to be appropriate,

but then if there is a settlement there is going to have to be notice to be sent, and I think that's probably a good way of handling those cases.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: The proposed Federal rule doesn't distinguish between like we do, but they say, "the court shall," and it requires the court to direct to the members of the class the best notice practicable under the circumstances, and ours said -- why do we say, "a court may direct appropriate action"? Why do that when they say in all class actions the court shall direct the members of the class the best notice, you know, practicable? Why don't we follow that?

MR. HAMILTON: I think you might be reading the old rule.

MR. LOW: No. It says it's new.

CHAIRMAN BABCOCK: Justice Hecht has a comment.

JUSTICE HECHT: Do you have the text there?

MR. ORSINGER: I have the text of the Federal rule, if you'd like to read it.

JUSTICE HECHT: Yeah. It just says --

MR. LOW: This includes the amendments that go into effect.

JUSTICE HECHT: No, but it says "in any class

action maintained under subdivision (b)(3) the court should direct notice."

MR. LOW: Because, see, they speak in terms of the 2003 amendment.

CHAIRMAN BABCOCK: Now, we've got a copy in our materials of the proposed amendments, and according to this the Federal proposed amendments to (c)(2)(A) say "may direct appropriate notice for (b)(1) and (b)(2)," but it seems to me -- and maybe we're spending too much time on this, but it seems to me that the big issue for us is whether or not we're going to recommend going from what we currently have, which is actual notice, to not actual notice, because that's a pretty big issue; and I don't know if the Court is anywhere on that or not. Or are you just kind of waiting to see what we have to say about it?

JUSTICE HECHT: Waiting to see what you have to say.

MR. GILSTRAP: The question is whether or not the nature of (b)(1) and (b)(2) certifications are such that we don't need the type of notice provisions that we have under (b)(3). From what Judge Bland says, it sounds like we don't.

HONORABLE JANE BLAND: I think in the Federal courts they are often civil rights cases, am I right, somebody who practices in Federal courts? But I don't

think we get -- we don't get civil rights cases in state court, but what we do get --

MR. YELENOSKY: You get some.

HONORABLE JANE BLAND: Well, yes, that's true, but you know, the only time in five and a half years I've seen it is two different deed restriction or property right disputes, with maybe an easement that applies to an entire subdivision, and it would seem that there would be not a need for notice so much of the suit but maybe of any potential settlement. Because it's the settlement that would affect the rights of the property owners.

CHAIRMAN BABCOCK: For those of you who do class actions, isn't it fairly common for class actions to be brought as both (b)(1) and (b)(3)? I mean, don't you see them coupled together -- not (b)(2) so much, but don't you see them coupled together a lot? Alistair?

MR. DAWSON: I mean, nowadays you see a lot of -- well, it used to be (b)(2)/(b)(4) now are (b)(2)/(b)(3).

HONORABLE JANE BLAND: But if you have any allegation of (b)(3) there has to be notice.

MR. DAWSON: Well, if it's certified under (b)(3). I think I would point out the two sides of the argument this way. Under the current (b)(1) and (b)(2) they are mandatory non-opt-out classes, so if it's

certified, the members of the class don't have the option of opting out. So the argument is, well, why send them notice? They can't opt out, or if it's already been certified then they can't really object.

CHAIRMAN BABCOCK: Well, the argument is even more powerful, because if you can't opt out maybe you want to go there and see what's happening.

MR. DAWSON: And the flip side of the argument is that if judgments -- if the class is certified and judgment is rendered that there are, you know, preclusive effects or res judicata effects that the members of the class ought to know about. I mean, those are the two sides of the argument on whether you should or shouldn't give notice in a (b)(1) or (b)(2) class.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I want to suggest that there are some other kind of class actions where declaratory relief is important or where if it looks to be the plaintiff's lawyer's advantage to find it as a (b)(2) class, perhaps to avoid having to give notice, that may work. Examples would be where you're declaring rights and duties under a regulatory statute or rights and duties under an agency rule, two fairly important categories.

The third category, and I defer to the several people in the room who I think either have had or

may have currently pending classes is declaratory judgments about warranties under mass sales of a computer product, computer software or hardware, whatever it is.

So I think this actually is an important category to look at the question of whether we have adequate notice and at the right stage of the process, whether it's good enough to not require it here on the front end but require it in the settlement, which is the subcommittee draft, or whether we want to require it even at the front end, which is the current Texas rule, or whether we don't want to require it either place, which I gather is where we're headed in the Federal rule.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: Again, what the committee did, I think, after several, three or more, three-hour teleconferences was on the whole trying to follow the Federal pattern unless we saw something particularly wrong with it, and we didn't see anything wrong with it on this (b)(1) and (b)(2) nonmandatory notice. There are really three options. There's the way we have it now in our current rule, which is probably the worst choice, requiring individual notice, best notice practicable under the circumstances in (b)(1), (b)(2), and (b)(3), that we -- that my recollection is, again, that

the committee recommended the Court to do that because it was believed that the Constitution required it.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: There's the current Federal rule, which does require notice in (b)(1) and (b)(2). It is required, right, Richard, in the current Federal rule?

MR. ORSINGER: I think only -- they don't specify. They just say that notice is required for (b)(3) classes, and they don't say for (b)(1) and (b)(2).

PROFESSOR DORSANEO: Is that right? Hmm. Okay.

MR. ORSINGER: I think the feds are plugging a hole to say "Where we have no rule we're going to say that the court has" --

PROFESSOR DORSANEO: Discretion.

MR. ORŠINGER: Should give appropriate notice.

PROFESSOR DORSANEO: But at any rate, you could require notice in a (b)(1) or (b)(2) action but not require individual notice, the best practicable notice under the circumstances, so you could have not a letter, but, you know, some sort of publication, publicized notice, which I believe was the practice in (b)(1) and (b)(2) cases and may well still be the practice at the Federal level.

Or we could go the whole way and just monkey-see, monkey-do the Federal for the reasons that they stated, and I don't -- I'm trying to remember Hansbury vs. Lee and then Judge Bland mentions a deed restriction case, I mean, that was a deed restriction case. How did those people get cheated out of their property? Was it a settlement, or did the trial judge litigate the case? I don't remember. That would have an impact on me.

MR. ORSINGER: Well, wait a minute. We are also providing for notice of settlement, even (b)(1) and (b)(2) settlements.

PROFESSOR DORSANEO: Well, I know. So if Hansbury vs. Lee was a settlement then I'm comfortable, but if it was some sort of a different kind of railroad job then I'm not comfortable.

CHAIRMAN BABCOCK: It seems to me that whatever the misguided policy reasons or mistaken policy reasons were back in the mid-1970's, that we ought to have some discussion for the Court's direction on whether or not we think actual notice in (b)(1) or best notice practicable or whatever it may be in (b)(1) and (b)(2) is a good thing policywise given the unique characteristics of this state or whether we should just go with the Federal, and we will have a couple of comments. Then let's take a short break, like five minutes, and then come back and talk about that

issue. But Alistair, then Judge Bland and then Pete, and then we'll take a break.

MR. DAWSON: Yeah. I would just point out that the subcommittee's proposal leaves the issue of notice to the discretion of the trial court. So if you go back to the two ends of the spectrum that I pointed out earlier, the trial court will be able to determine whether or not notice would do any real purpose in a particular case before the trial judge or whether there are res judicata issues and, therefore, it would be appropriate for these issues. So I think --

CHAIRMAN BABCOCK: Judge Bland. I'm sorry. Judge Bland.

HONORABLE JANE BLAND: I think Pete's comments are well-taken. If people are filing dec actions upon which they're going to later use findings made in those actions as a basis for civil liability then obviously I think notice would be appropriate, and if we're not comfortable that leaving it to the trial court will get the notice out, then maybe we stick with requiring the as soon as practicable.

CHAIRMAN BABCOCK: Okay. Pete and then we'll take a break.

MR. SCHENKKAN: And I haven't been involved in one of these class actions which is framed as a (b)(2)

dec action, so I don't know how this is handled, but I'm wondering because the Civil Practice and Remedies Code requires for our uniform declaratory judgment actions that all parties who have or claim any interest that would be affected by the declaration must be made parties. So I'm a little unclear how you make somebody a party in compliance with that without even giving them notice.

PROFESSOR DORSANEO: Well, that language has been interpreted, and it suggests something different from what it actually means. It means all the parties you make parties are -- that doesn't make somebody a so-called necessary party or a person needed for just adjudication, so it ends up being effectively not particularly meaningful.

MR. SCHENKKAN: But what it leaves, if I have understand it, Bill, is it leaves them not bound in the res judicata collateral estoppel sense, but only stare decisis. That's a huge difference from that to a class action where you're bound in a real sense. That warranty or that statute, that's the amount of money you get, that much, no more, no less, whenever your facts are then triggered. So it seems to me it is a -- I mean, maybe that's too long a discussion, but that seems to me to be an additional problem.

PROFESSOR DORSANEO: I'm leaning toward

notice but not individual notice, best notice practicable under the circumstances, because that's more than you need given the nature of the interests involved. You can have people that have nearly a united interest, you know, working against each other for other reasons, racial discrimination or whatever, but it's fairly unusual, such that I wouldn't go the whole nine yards of best notice practicable under the circumstances, individual notice, and then make the action not something that it can be prosecuted because the capital isn't there to fund the notice.

CHAIRMAN BABCOCK: Sarah, do you want to say one last word before we take a break?

HONORABLE SARAH DUNCAN: I just would like to know what to think about during the break. You said that individual notice in all three types of class actions is the worst possible structure. Is it because of what you just said?

PROFESSOR DORSANEO: Yes.

HONORABLE SARAH DUNCAN: The cost of the notice?

PROFESSOR DORSANEO: It's not necessary and it's expensive and the burden is on -- probably on the class representatives to fund it.

CHAIRMAN BABCOCK: Let's take a quick break.

(Recess from 3:42 p.m. to 3:55 p.m.)

CHAIRMAN BABCOCK: Okay. Final push here for a half hour or so. Sarah, what have we thought on over the break about this actual notice or no notice or any kind of notice we feel like it?

HONORABLE SARAH DUNCAN: Well, I appreciate that it could cause the person who has to give the notice not to be able to maintain the lawsuit --

HONORABLE DAVID PEEPLES: Can't hear you.

HONORABLE SARAH DUNCAN: I appreciate that it may cause the person who has to give the notice to not be able to maintain the lawsuit, and I appreciate that it may not be constitutionally required to give notice, but it is just screwier than I can accept that somebody could be bound by a judgment and never even have known that they were a party to the lawsuit.

MR. ORSINGER: That's going on right now in class action litigation, Sarah.

CHAIRMAN BABCOCK: It doesn't mean she has to accept it.

MR. BOYD: Well, apparently the case law is that in a subsequent lawsuit it may be determined that you are not bound. Even if it was certified under the rules, if under those circumstances the court in hindsight says, "Yeah, but due process says you should have gotten better

notice, so you're not bound."

So my proposal would be that we have one provision that says in a (b)(3) class action you've got to give the best notice practicable under the circumstances and in a (b)(1) or (b)(2) the court shall give such notice as may be required by due process under the circumstances; and by doing that, we're recognizing and the Court is recognizing the importance of the trial courts to consider it, but the case law is just not apparently clear yet on exactly what kind of a notice is required on the (b)(1) and (b)(2) by due process.

MR. GILSTRAP: That's essentially the committee proposal, what you just said.

MR. BOYD: Yeah. I would just change the committee proposal, instead of saying "appropriate notice" to say "such notice as may be required by due process under the circumstances." I realize that doesn't give her much guidance, but it does point out the importance to the trial court to give careful thought to that issue.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I'd like to fill in the record just a little bit. There's a ALR on the subject of res judicata effective judgments in class action. It's in 48 ALR Fed 675, and it's old. It's 1980, but they cited a Federal district court case out of Eastern District of

Louisiana called Pasquier vs. Tarr (318 F Supp 1350) in which a court that was later litigating someone's rights, and an effort was made to impose a res judicata bar based on a (b)(1) or (b)(2) class certification as to which no notice was issued whatsoever. They ruled that due process of law was violated because of the absolute failure to give any kind of notice to absent class members, and that district judge held there was no res judicata effect to the earlier adjudication.

Now, a possible concept here is for us to somehow indicate that you're not res judicata bar bound unless you received -- or unless due process of law was met. Not that you received actual notice, but that due process rights were met; and I would point out that while we would all agree that everyone getting notice would eliminate any due process requirement, on the other hand, if enough people were given notice that had identical interests and they were competently represented and the case was fairly adjudicated, you're not going to be able to show that adding another 15 plaintiffs or another two plaintiffs lawyers or defense lawyers would have affected the outcome of the lawsuit whatsoever.

So, you know, No. 1, does everybody always have to have notice before you can even have a trial, or maybe is there an escape out on the other end for people

who unfairly had their rights adjudicated?

And, No. 2, at what point can we say that there was enough fairness in the adjudication that even though this party didn't have a chance to conduct the fifth questioning of the same witness in each part of the trial that they didn't lose any due process of law by losing that possibility?

MR. LOW: But, Richard, don't you think that's because the court has to find that the class rep is adequate and the lawyers are adequate and so forth, and for that reason they couldn't do better?

MR. ORSINGER: Well, exactly, but additionally, either the plaintiff or the defendant, whoever it is that wants this res judicata bar, they may have a financial incentive if there's a connection between the adequacy and the bindingness to be willing to pay for or urge greater notice, more due process for those people.

MR. LOW: Right.

MR. ORSINGER: But do we mandate individual notice before you can even go forward with the trial?

CHAIRMAN BABCOCK: Yeah, Judge Patterson.

HONORABLE JAN PATTERSON: Well, one of the problems with leaving it only to the trial judge is just that the parties are not always adequately represented at that stage, but I wonder if Richard's suggestion isn't the

answer and we could include that by virtue of a note saying that this is -- in light of res judicata notice is to be given in the appropriate form. So kind of putting parties on the notice and yet not constructing a rule to specifically address it, but to specify a purpose for which it is necessary.

CHAIRMAN BABCOCK: One way to get a sense of this committee is to see if anybody is in favor of retaining the current notice provision that we have for (b)(1) and (b)(2), and that is that the -- "After the court has determined a class action may be maintained, it shall order the party claiming the class action to direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"; and it further goes on to say that "For subdivisions (b)(1) and (b)(2) classes, the notice shall advise the members of the class, (a), the nature of the suit; (b), the binding effect of the judgment, whether favorable or not; and, (c) the right of any member to appear before the court and challenge the court's determination as to the class and its representatives."

So that's what the current rule says. How many people are in favor of retaining that for (b)(1) and (b)(2) class actions in our new rule? Raise your hand.

How many are opposed? Keep them up again. Huh. There are 12 in favor of retaining the language and 10 opposed, the Chair not voting, so where does that leave us?

PROFESSOR DORSANEO: Can I say one thing?

MR. YELENOSKY: 12 wins.

PROFESSOR DORSANEO: Notice to these people is not their friend.

JUSTICE HECHT: Right. But I think Judge Jefferson and I have the sense of the concern, and maybe we ought to --

CHAIRMAN BABCOCK: Move on. Okay. Good. We'll move on. Let's move on to where we're -- to our next -- let's move on to -- on page four, Richard, you've got a laundry list of things that you want to tell the (b)(3) members.

MR. GILSTRAP: Page five.

CHAIRMAN BABCOCK: Huh? Yeah. You're on page five talking about the (b)(3) classes, and this is roughly the same as in the current rule, or is it?

MR. GILSTRAP: That's correct. What you just read. It's similar to what you just read.

CHAIRMAN BABCOCK: Right. Any discussion on that? Yeah, Buddy.

MR. LOW: Chip, I need to ask a question, and

I hate to go back to something, but when you say notice, does that mean immediately? Because if it's appealed, it's useless to give notice. I mean, where is there a timing in here? If you just follow that literally, the judge certifies it. Well, you're going to give notice. They're going to have an interlocutory appeal. Do you -- is there a timing thing in here, when you give notice?

PROFESSOR DORSANEO: Well --

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: Doesn't House Bill 4 say that everything is stayed if there's an appeal? Is there a problem about getting the notice out top speed before somebody --

CHAIRMAN BABCOCK: Appeals it?

PROFESSOR DORSANEO: -- appeals it? That would be pretty fast.

CHAIRMAN BABCOCK: And it wouldn't make any sense, either.

MR. LOW: What I'm saying, that's in the bill, but if you read this rule it looks like the judge is being directed by this rule to give notice right then, even though there is an appeal, and I don't -- well, I won't say anymore. The Court understands.

MR. DAWSON: I'd like the record to reflect I agree with Buddy, first time; and I do believe, even though

Bill is right, it is included in House Bill 4, it would not be inappropriate to include some comment or something that notice shouldn't be issued until after interlocutory appeals have been exhausted.

CHAIRMAN BABCOCK: Yeah. Good point. All right. Let's move on to the next section.

HONORABLE DAVID PEEPLES: Hold it.

CHAIRMAN BABCOCK: David.

HONORABLE DAVID PEEPLES: Are we still on the laundry list?

CHAIRMAN BABCOCK: Yeah. Do you have anything on the laundry list?

HONORABLE DAVID PEEPLES: Are we going to talk about an opt-in versus opt-out?

MR. GILSTRAP: No.

MR. ORSINGER: We would ask that we not discuss opt-in/opt-out this afternoon because we need to emphasize House Bill 4 changes. They are going to go to the *Bar Journal* in September for publication in October, and we're not sure that we're going to resolve the opt-in/opt-out debate this month at all.

CHAIRMAN BABCOCK: Who is "we"?

MR. ORSINGER: Those of us who have attempted to get to the resolution of that question.

CHAIRMAN BABCOCK: Well, we're going to have

to discuss it tomorrow.

MR. ORSINGER: We will discuss it, and I don't mean to be pessimistic, and perhaps I shouldn't say it publicly, but I think there's at least an outside chance we won't get to the solution of that tomorrow.

CHAIRMAN BABCOCK: Well, the Court may take that out of our hands, because they may get to the solution.

MR. ORSINGER: Right. They just might, in which event it will save us a lot of trouble.

CHAIRMAN BABCOCK: Well, we just have to give them our best wisdom on that.

MR. ORSINGER: But all I'm saying is why don't we defer that because there are some very important and we expect long debates to occur on some of these proposals, but we need to get the House Bill 4 stuff through --

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: -- I would think, and we can still take the rest of them up as soon as we finish this.

CHAIRMAN BABCOCK: I'm okay with that if David is.

HONORABLE DAVID PEEPLES: Sure.

CHAIRMAN BABCOCK: Okay. Go to the next section, Richard.

MR. ORSINGER: Okay. On the top of page six --

MR. GILSTRAP: Let me explain that if I can. That language is currently in the Federal rule. It's currently in the state rule in subsection (d), which is the top of page seven, and because -- to keep from messing up the section numbers, we just elected to take it out of the Federal rule and leave it in the state rule where it currently is. That's all it is. The two provisions are exactly the same.

CHAIRMAN BABCOCK: Okay. Next?

MR. GILSTRAP: Inchoate.

MR. ORSINGER: We're going to ask that we defer the discussion of this because this has to do with the inchoate claims concept, although there is a dispute as exactly what is included in inchoate claims.

CHAIRMAN BABCOCK: You're talking about page six?

MR. ORSINGER: Yes.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: Okay. On page seven, the labeling is just to put appropriate labeling to reflect where this language really is and not where it isn't.

MS. SWEENEY: Do what?

MR. GILSTRAP: We just added multiple classes

on subclasses because that's what the Federal rule calls it, and it is in subsection (d).

MR. ORSINGER: We had mentioned it in (c), on page three in subdivision (c). That's where it was under the Federal rule proposal, and we have stricken that out and discussed striking it out on page three, and now we're inserting it back here because it's where it fits the text.

Okay. Now, the "settlement, voluntary dismissal, or compromise" language on page seven we are proposing deviation from the Federal rule, but these are otherwise -- otherwise, we're following with the Federal rule changes. Frank, do you want to go ahead and explain subdivision (e)?

MR. GILSTRAP: Okay. Well, subdivision (e) is simply the pending Federal subdivision (e) that's going to go into effect on December 1st, and everywhere where it's been stricken out is a change recommended by the subcommittee, and the first one is in (e)(1)(B), and that involves notice not of the class action, but notice of the settlement, and the subcommittee believed that -- rejected the Federal rule proposal, which says, "The court must direct notice in a reasonable manner to all class members who would be bound" and opted instead for the language from the current Texas rule with some additional terms to toughen it up, and that's the underlying language there in

paragraph (e)(1)(B), "Notice of the material terms of the proposed dismissal or compromise together with an explanation of when and how members may elect to be excluded from the class shall be given to all members in such manner as the court directs," and we're talking about notice of the settlement.

MR. ORSINGER: And this is important in our -- I'm sorry, Richard. This is important from our point of view because later on we're going to propose that everyone be given an opportunity to opt out of a (b)(3) class if they don't like the settlement after they receive notice of it. So this is essential to our subcommittee's concept that everybody ought to have a chance to bail out after they find out the terms of the settlement.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: If there is a difference between a settlement, a voluntary dismissal, or a compromise and a compromise alone or a dismissal alone, the underlying sentence excludes any reference to a settlement. I don't know why, and it would seem to me that a settlement -- I'm not sure whether it would be different than a compromise, but that is potentially a substantive variance.

CHAIRMAN BABCOCK: Yeah. Why did you drop settlement?

MR. GILSTRAP: Because that is what the Texas rule says currently, but I don't see any harm in putting settlement in there.

CHAIRMAN BABCOCK: I think you should.

MR. ORSINGER: You want to say "dismissal, compromise, or settlement"?

MR. GILSTRAP: "Settlement, dismissal, or compromise."

CHAIRMAN BABCOCK: Why don't you keep it parallel to the (1)(a)?

MR. TIPPS: Shouldn't you say "voluntary dismissal"?

MR. GILSTRAP: "Settlement, voluntary dismissal, or compromise."

CHAIRMAN BABCOCK: Yeah. Just parallel it to (1)(a).

MR. ORSINGER: Well, the voluntary dismissal to me means nonsuit, and a dismissal means a court-ordered dismissal of the lawsuit, and you might have a court-ordered dismissal that is by agreement, but it's not a voluntary dismissal, and therefore, I wouldn't want to limit dismissals to voluntary dismissals if voluntary dismissal means nonsuit. If it does mean nonsuit, maybe we ought to cross-refer to our rules of procedure and use the same terminology. I don't know. Maybe we don't want to do

that.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: Is now the time to comment about the bracketed language about an explanation of how and why members may elect to be excluded from the class, or is that going to be taken up when we talk about whether or not people can opt out of the settlement?

CHAIRMAN BABCOCK: What do you think about that, Richard?

MR. ORSINGER: I think we should take that up in the later debate, and if the sense of the committee is, is that we are not going to allow an opt out then this whole bracket would be deleted. Is that okay if we take that up when we reach that?

CHAIRMAN BABCOCK: Yeah. You bet.

MR. ORSINGER: Okay.

MR. GILSTRAP: So what we're doing is we're changing line 2 to "settlement, dismissal, or compromise"? Is that where we are?

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: Yeah. Okay. The top of page eight, we just have some state cross-references instead of Federal cross-references, and there is a change in language here that's consistent with the subcommittee view that notice of settlement is required, so -- and you see in

paragraph (3) on page eight instead of saying, "The court may refuse to," "The court may not approve a settlement unless it affords a new opportunity."

The Federal proposal gives the trial judge the authority to reject a settlement or approve a settlement, depending on whether additional notice is given. It gives that choice to the Federal judge, and this subcommittee is suggesting that we prohibit a trial court from approving the settlement until it affords an opportunity to opt out, and we should -- I'm sorry, defer the legitimacy of that because that's derivative also of our discussion on whether we should permit an opt-out at the settlement stage. I'm sorry, Judge.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: (3) is a hugely controversial part of the changes in the Federal rule because the argument by people who typically represent the class is that giving a second notice of the settlement with another chance to opt out does a lot of things. First of all, it runs up the costs. Secondly, it threatens to destroy the agreement because so many people may opt out of the settlement that it can't go forward or perhaps the defendants are unwilling for it to go forward.

The argument on the other side is class members shouldn't buy a pig and a poke so that when they

are told, "This is a class, these are the people, these are the claims, we're the lawyers, do you want in or out" without knowing what they're going to get out of it and then their claims are barred when they find out that they're only going to get 10 cents or a coupon or whatever, they ought to get a second opportunity to opt out.

So the Federal committee made it optional with the court, and the subcommittee's recommendation would require this second opt-out. So that's the basic history.

CHAIRMAN BABCOCK: Judge, and I forget, but in Federal court now can you opt out of a settlement? Isn't there some kind of --

JUSTICE HECHT: It varies. Some judges will let you and some judges won't.

CHAIRMAN BABCOCK: As I recall, Judge Kendall had one right before he left the bench where he let a lot of people out, and there was actually a firm somewhere that was soliciting people to "come with us."

JUSTICE HECHT: Right.

CHAIRMAN BABCOCK: "Opt out and then we'll go and get you a better deal."

JUSTICE HECHT: Right. And the dynamics of this are very complex because sometimes plaintiffs try to rate each other's cases. Sometimes the defendant will settle, conditioned that not more than X number of people

opt out, so the whole settlement may fall apart. If the defendant makes that demand, which you can say is reasonable or unreasonable, but if the defendant makes that demand and class counsel wants to accept the settlement, then class counsel then has an incentive to try to talk class members or keep class members in the class; otherwise, the settlement is not going to go through.

So it can get very complicated, but there was a huge debate that lasted for more than an hour between national lawyers who do these things about whether you ought to always give class members a second opt-out or never give them a second opt-out, and the committee came down in the middle.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Justice Hecht, on the expense part, I'm not sure I understand that. Isn't there a notice going to go out anyway about the settlement, and wouldn't that notice include this new opportunity, or are they thinking about some third notice?

JUSTICE HECHT: They were thinking about some third notice.

PROFESSOR DORSANEO: Why would there need to be a third notice?

JUSTICE HECHT: Some lesser notice that -- since all the class members have already gotten notice of

the class action and they were told in the first notice, "This might settle," then maybe you don't have to give them the same actual notice you gave them the first time. Maybe you could just run an ad or do something less, and that's an argument. I'm not saying I agree with that.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Justice Hecht, did the committee discuss -- I defended a case that was a class of opt-outs and then people trying to get them to opt out and form a third class of double opt-outs. I don't know where it ends. Was there any discussion along those lines?

JUSTICE HECHT: Oh, yeah. I mean, the question is if you give people a second right to opt out and there are incentives and motives out there among all different sorts of groups to try to get that to happen, then the settlement may go away, because there's no longer any incentive for the defendant to settle because the defendant is not buying peace.

On the other hand, the argument, which seems to me fairly powerful, is, yes, but how can you require somebody to accept a settlement that they didn't know the terms of before they were bound by it? But those were the arguments.

MR. ORSINGER: You know, if I might, this is a little bit more moderate change than to go to an opt-in.

It's basically telling people, "We're still going to have a fundamentally opt-out approach to class actions, but we're going to give you the chance to opt out and, therefore, you won't be bound by the settlement," and that's not -- I mean, if the notice is just a pretext, that isn't going to make any difference; but if the notice is legitimate then people who really don't want to be bound are going to opt out; and those who don't, it's indicative that they want to stay in and they want the reward of staying in.

PROFESSOR DORSANEO: It would seem that there would be -- it would seem that this would be a prophylactic against misbehavior as well, a pretty clear one, coupled with the idea that you would need to give notice of what the settlement was and what everybody would receive. I mean, I would be embarrassed to send out something indicating this is a very unfair transaction, if you had to put in there, "and you, of course, don't need to go along with it if you don't want to." People would just have to behave differently.

CHAIRMAN BABCOCK: Right. Right.

MR. ORSINGER: Although, if there is no other comment, I would ask the question of if the settlement is so bad that so many people don't want it, that the defendant is not willing to pay for it, then why should we allow it to happen? I mean, we're kind of saying through

ignorance and inaction and everything else we're going to allow a small group to make a bad settlement and then bind the larger group with it, and I have a -- personally, I don't see the policy there.

CHAIRMAN BABCOCK: Yeah. Jeff.

MR. BOYD: Except that they still have the right -- No. 1, you've jumped through all the certification hoops to theoretically at least ensure that their due process is being met to allow this representative and his or her lawyer to pursue their interests; and, No. 2, they still have the right to receive notice and file an objection to the proposed settlement and all the due process that goes through the court's analysis of whether the settlement is fair and reasonable.

What this does by giving them a second chance to opt out is basically provide an opportunity to, in effect, bust the settlement without making the court reject it; and that's where I think -- so I don't think this is a due process issue. You've got all the due process covered. It's just a really nice thing to do for people who may get bound by a settlement they don't like, but you balance that against the additional cost and the potential waste of everything that has gone before that, and I think it goes further than is necessary.

CHAIRMAN BABCOCK: Gotcha. Judge Bland and

then Frank I think had his hand up.

HONORABLE JANE BLAND: I pass.

CHAIRMAN BABCOCK: You pass? Frank.

MR. GILSTRAP: Well, I'm not sure that we can forget about due process here. One of the things we talked about earlier was in (b)(1) and (b)(2) we don't need full notice because they're going to get notice of the settlement. Now we're talking about not giving them notice of the settlement. I guess it's possible and in some cases people could be bound by the lawsuit and never get notice at all. I mean, if you're going to reduce (b)(1) and (b)(2), it seems to me you've got give notice of the settlement.

MR. BOYD: They get notice. It's just whether they get a chance to opt out versus object. If it's a bad enough settlement and enough of them don't like it, they come in and object and convince the judge not to approve the settlement.

CHAIRMAN BABCOCK: Judge Bland is back in the game.

HONORABLE JANE BLAND: Pass.

CHAIRMAN BABCOCK: You pass again?

HONORABLE JANE BLAND: I'm on the same page with Jeff on the notice issue.

CHAIRMAN BABCOCK: Okay. All right. And

then, Richard Munzinger, did you want to --

MR. MUNZINGER: No, you go ahead.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Richard, you mentioned that the defendant pay the costs. Is that who pays the cost of the settlement?

MR. ORSINGER: No, but the defendant is buying a res judicata bar.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: That's all they're buying. They are paying money, and what they're paying money for is to buy their peace, and so if so many people are opting out of the settlement that they're not buying their peace then the defendant isn't going to pay the same amount of money or maybe not pay any money. And it's not a question of what the rule requires. It's a question of what the defendant is paying for.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I'm confused. Help me, please. In a (b)(1), (b)(2) class action may a person opt out whether he or she receives notice at all?

MR. ORSINGER: No.

MR. MUNZINGER: They may not opt out of the class?

MR. ORSINGER: Correct.

MR. MUNZINGER: And so if they don't have notice and they can't opt out then if there's no notice requirement of the settlement, they are totally bound by a judgment that they never knew was taking place.

MR. ORSINGER: Right. So if we don't require notice --

MR. MUNZINGER: And that is foreign to any concept of fairness or freedom.

MR. ORSINGER: Yeah, we have to go back and reconsider that issue of whether we're going to require -- what kind of notice is required for (b)(1) and (b)(2) classes if we don't require notice of settlements.

MR. BOYD: I thought --

CHAIRMAN BABCOCK: Wait a minute. Judge Bland had her hand up first.

HONORABLE JANE BLAND: I don't think anyone is talking about not giving notice of the settlement. I think everyone -- everyone I have heard from so far contemplates notice of the settlement. The question is do you have a right to notice of the settlement, then appear and object and contest the adequacy or the fairness of the settlement, or are you able to just basically say, "Leave me out"? But I don't think under any scenario we contemplated no notice of the settlement.

MR. GILSTRAP: Well, the Federal rule says

the court may refuse to -- "may refuse to approve the settlement unless it affords a new opportunity."

MR. TIPPS: Yeah.

MR. GILSTRAP: The inference is that it doesn't have to do that. It doesn't have to give a new opportunity. It's strictly discretionary. That's the problem.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I just don't like the idea of judges, state or Federal, ruling on people's rights. I don't --

CHAIRMAN BABCOCK: Without them knowing about it.

MR. MUNZINGER: Without giving them a shot at talking about it or objecting or getting out of it.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: Well, we've got to go back to the beginning, (e), the little (e), "Settlement, voluntary dismissal, or compromise." (e)(1)(b) says, "Notice of the material terms of the proposed dismissal or compromise shall be given to all members in such manner as the court directs." So notice has to be given to everybody of the settlement.

MR. LOW: Right.

MR. BOYD: The question is are you telling

them, "Here's what the terms are. You have the right to object," or are you telling them, "Here's what the terms are. You have the right to either object or opt out." I mean, that's the only -- the proposal is either make the court also give them the right to opt out or give -- as the Federal courts are apparently proposing, give the courts the option to also give them the right to opt out. So they are going to get notice of the settlement and a right to object at the very least.

MR. MUNZINGER: But if they are not given the right to opt out, they are bound by a process or a judgment that is the result of a process that they had no notice of and no right to participate in.

MR. BOYD: No. Well, and (b)(1) and (b)(2) is what you're talking about.

MR. MUNZINGER: Yes.

MR. ORSINGER: Yeah.

MR. BOYD: And that goes back to why we voted 12 to 10 to keep (b)(1) and (b)(2) the way it is, because there's due process concerns. I mean, you start with this whole idea that once it's certified, that person is my lawyer whether I know who they are or know what they're doing or not. They're representing me through their client, who is the representative. Theoretically, due process is being met. If there were never a settlement and

there were a judgment, I would be bound it.

But here we're saying, "Okay. We're going to give you a second chance to opt out because you don't like the deal that your lawyer," in theory at least, "has now negotiated."

MR. MUNZINGER: Well, I understand, and that's what I would want, would be the person has the right to opt out, contrary to what the present Federal system is saying where you leave it up to the judge to say whether I can opt out or not.

CHAIRMAN BABCOCK: Sarah.

MR. ORSINGER: That is the debate, I agree, but they're going to get notice of it. The question is can they react by objecting or can they react by objecting and, if that fails, opting out?

MR. LOW: And even if they object, they don't have to intervene in Federal court to be able to appeal.

PROFESSOR DORSANEO: Or in state court.

MR. LOW: Well, I don't know about state court, but I know in Federal court there was a question of whether you had to intervene. You know, you can object and then appeal.

CHAIRMAN BABCOCK: Stephen, Judge Gray, and then Justice Duncan.

MR. YELENOSKY: Well, I mean, some of

these (b)(1) and (b)(2) cases, a lot of the things that we deal with, you can't have an opt-out. I mean, the whole purpose for the class action is because you would otherwise have inconsistent direction to the defendant to sue a governmental entity if you want them to do something, but they can only do it in a way that affects everyone, so there has to be a possibility that you have cases like that where there is no opt-out, and Jeff knows all about it.

CHAIRMAN BABCOCK: Justice Gray.

MR. BOYD: And so do you, so does Advocacy, Inc.

HONORABLE TOM GRAY: I just want to know when we're going to be able to talk about the opt-in provision. When is that conversation going to happen? Because it colors everything, this whole conversation.

CHAIRMAN BABCOCK: It does. It really does, and my suggestion, Richard and Bill, is that we take that up first thing in the morning, for one reason, so we're fresh; and, two, because, I agree, I think that it colors so much of what else we're doing that we need to make some decisions on that.

MR. GILSTRAP: The concern I have is that opt-in and opt-out and the inchoate claims, those, I mean, we could talk for a very long time on those, and those are extremely contentious.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: And opt-in/opt-out fundamentally changes the nature of class actions.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: And that's fine. Let's talk about them, but we need to be able to cover the House Bill 4 changes.

MR. ORSINGER: Let me make a proposal for the next 30 minutes.

CHAIRMAN BABCOCK: No, we're recessing right now.

MR. ORSINGER: Oh, we are? Well, then let me make a proposal for the first thing tomorrow morning, is the House Bill 4 proposals that relate specifically to the attorney's fee question, maybe we could take them up first, because they are not going to be affected by opt-in and opt-out and then I still favor Frank's statement. I think we ought to fight through the body of the Federal rules and defer the debate on the opt-in/opt-out until we have finished with the Federal rule changes, because the opt-in/opt-out I think is going to be very contentious and not lead to a resolution anyway.

CHAIRMAN BABCOCK: Well, we don't -- we are limited by time because we've got to get to the -- we've got to get to the ad litem rules, and, Judge Bland, you're

going to lead that in Bobby's absence?

HONORABLE JANE BLAND: That's the first I've heard, but yes, I will.

CHAIRMAN BABCOCK: Well, that's what he told me this morning at 5:30 a.m. --

HONORABLE JANE BLAND: Okay.

CHAIRMAN BABCOCK: -- or something or whenever he called me.

HONORABLE JAN PATTERSON: What about MDL? What about MDL?

CHAIRMAN BABCOCK: Well, and we need to get through these class action rules. We need to get through ad litem, and if there is time we can talk about MDL, but the Court has a rule, and we've already had a full meeting on MDL, and I know Judge Peeples really wants to talk about it to the whole group sometime either tomorrow or Saturday, so we'll try to fit that in. But in order of proceeding it seems to me we go with class actions. We've got to start with ad litem sometime tomorrow, Richard, so this neverending debate about, you know, opt-in/opt-out has got to be over by the afternoon break.

MR. ORSINGER: Well, see my preference is first thing let's talk about the fee requirements in House Bill 4 and get them behind us because we think we're okay on that.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: We have to make a decision about effective dates, the effective date of that change, and that's going to require some discussion, and then I would suggest we go back to taking up the Federal rule amendments in chronological order and skip over the debate about individual references to the opt-in or opt-out concept, and then when we finish the Federal rules then let's take it on. Let's take on opt-in/opt-out and inchoate, but if we do that first I'm afraid we won't get to the less controversial stuff that's got more time urgency.

CHAIRMAN BABCOCK: Well, as the subcommittee chair you're due some deference, but, Justice Hecht, what would be most helpful to the Court?

JUSTICE HECHT: Yeah, I think that's fine.

CHAIRMAN BABCOCK: You want to do it that way?

JUSTICE HECHT: Yeah.

CHAIRMAN BABCOCK: Okay.

MR. SCHENKKAN: Just for people that if they have any time or energy to devote to this ahead of time tomorrow, what Richard is talking about on the implementation of the House Bill 4 portion of class action is really quite short. It's at page 12 and the top of 13

of this draft.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: (i), part (i).

MR. SCHENKKAN: And part (i).

MR. GILSTRAP: Part (i).

MR. SCHENKKAN: And almost all of it, of what we've proposed, is identical to the statute. There's I think one extra sentence in (i)(1) that's not in the statute, and I don't think there's any extra sentence in (2), so we ought to be able to, I hope, get that resolved fairly quickly. The effective date part of it might take longer.

CHAIRMAN BABCOCK: Justice Gray, you okay with that?

HONORABLE TOM GRAY: Yeah. I just want to know when I'm going to get to talk about it.

CHAIRMAN BABCOCK: You're going to get to talk about it. Thanks. Sorry we had to quit early today, but that's my fault. We're in recess.

(The meeting adjourned at 4:32 p.m. and continued the following day, as reflected in the next volume.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 21st day of August, 2003, Afternoon Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1209.00 .

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

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

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