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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

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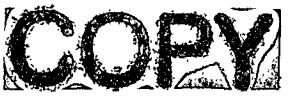


Taken before Patricia Gonzalez, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 24th day of October, 2003, between the hours of 9:04 a.m. and 5:11 p.m. at the Texas Law Center, 1414 Colorado Street, Austin, Texas 78701.

INDEX OF VOTES

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

CHAIRMAN BABCOCK: All right. We're on the record, and the -- with the new seating arrangement today -- I guess so that people can hear better -- and we'll start with the report from Justice Hecht, who has a lot to talk about, since the Court has been very busy, as we all know.

JUSTICE HECHT: Well, we have met the deadlines under House Bill 4 and are now awaiting comments.

On August 29th, the Court issued new Rule of Judicial Administration 13 setting up the MDL procedures, amended Rule 11 and amended Rule 166 of the Rules of Civil Procedure to make reference to the procedure, and we -- I don't think we have received any comments.

Chris stepped out, I guess. I don't think we have -- oh, there he is. Have we gotten any comments on the MDL rule?

MR. GRIESEL: Yes, sir. We have received several comments on it.

JUSTICE HECHT: Okay. Well, we've gotten comments on it. And what we said to everybody was that, even though we had to put the rule in place, according to the statute, on September 1st, we would continue to take comments till November the 1st. And, of course, we always -- as you know, we take comments forever, basically, but we would have a formal comment period until November the

1st and then make whatever changes we needed to in those rules.

We've had a filing under the rules, courtesy of one of our committee members, Mr. Tipps, and the clerk reports to me that at least from the point of view of management, everything is proceeding well. Members of the panel are communicating by e-mail, and we don't seem to see any glitches or expense items that we didn't anticipate. So I think from the standpoint of just internal procedure, the rule seems to be working okay.

Then we had amended Rule 24 of the Rules of Appellate Procedure to comply with House Bill 4, and I don't -- have we gotten any comments on that?

MR. GRIESEL: Yes. Professor Carlson.

JUSTICE HECHT: Okay. And we'll -- again, we'll be taking comments on that until November the 1st -- formal comments, and may make some changes in it if we need to after that.

And then, again, as instructed by House Bill 4, we've changed Rule 407(a) of the Texas Rules of Evidence just to conform to the same rule in the Federal Rules of Evidence, and there were some -- mostly, I think, the Legislature wanted the last sentence out of the rule, so we did that, but we also just went ahead and conformed the rest of the language.

And there is an ongoing effort to restyle the rules -- the Federal Rules of Civil Procedure, and it's about a third of the way along -- maybe half -- and should be finished, I imagine, at the end of next year, and then they'll put those rules out for comment -- so that will take a year -- and so probably along about 2005 or 2006, there will be restyled Rules of Civil Procedure with very few changes, but a change in the format and the style of the language.

The Chief Justice of the United States has indicated that he does not want to do a similar revision of the Rules of Evidence, and so our Court's tentative thinking is that as long as our rules are as close as they are to the federal rules, it would be better to keep them that way rather than to do very much restyling or work on it. I know we have some issues pending, and those are okay, but, generally, if the federal courts are going to leave the federal rules alone, we think it probably is best to leave the state rules where they are, even though they could use some work.

So that was on August the 29th. And then on October the 9th, the Court issued changes in Rule 42 of the Rules of Civil Procedure. And the addition of Rule 42(i) applying to attorney fees and how they're calculated and limits on them is required by House Bill 4. And so that and

its effective date, which is cases filed on or after September 1st, are required by statute.

Then, of course, as you know, the other changes in Rule 42 -- most of the other changes were to bring the rule into consistency with the changes in Federal Rule 23, which will be effective December the 1st, unless the Congress disapproves them, which I don't think the Congress is going to do, because they don't seem to be at all controversial.

And we also added -- the committee added the Bernal requirements out of our case law into the rule and took out Subclass (b)(3) out of the rule to -- again, to make it consistent with the federal rule.

An issue has come up on, "In what cases should the changes to Rule 42, other than 42(i), apply?" The rule is effective January the 1st, but the Court discussed whether it should be made to apply in all cases pending on that date, filed on that date, filed after September the 1st, pending but not to change things that have already been done, and so we left that -- we did not specify how that was going to apply and would like the committee's views on that subject, or if it's just left -- if it's not addressed, it will be just be left up to the jurisprudence to decide how it applies. So that's an issue that, I think, is on the agenda and we'd like some comment

on.

Then we changed Rule 16 -- added Rule 167 -- a new Rule 167, which is "offer of settlement," and we've received a few comments on it. Again, it's an effort to comply with House Bill 4 to remove some of the vagaries of statutory language and try to make it as workable as we can. And, of course, we're very interested in hearing comments from the Bar and the judges on that rule, because we don't have any choice about having the rule, but we do have a great deal of choice about what it says, and we'd like to make it as useful to the Bar as we can. So that -- comments on these rules, 42 and 167, are open until the end of the year, December 31st.

Statute, I think, with respect to Rule 42 requires that the rules be adopted by December 31st. So I anticipate that a day or two before the end of the year, the Court will issue an order making any changes and making those rules permanent.

Then we also promulgated Rule 8(a) -- which has gotten a considerable amount of comment -- on referral fees and made a comment period for it, as usual, for the usual period, till December 1st 2004. So we've already gotten a number of comments on that, and we'll, again, respond to those before the end of the year.

So that's what we've put out and --

MS. SWEENEY: Did you say 2004?

JUSTICE HECHT: No.

MR. TIPPS: You said December 1st, 2004.

JUSTICE HECHT: 2003. Yeah. December the 31st, 2003.

(Simultaneous discussion)

(Laughter)

JUSTICE HECHT: And then we did not get to ad litem -- the ad litem rule because we just ran out of time, and we need to be sure how any rules change interfaces with the statutory changes in the family code this last session. So that's still on the table.

I expect that we will probably not have another set of rules out until after the first of the year, but, when we do, we need to look -- the ones that are closest to the top are the changes in the expert witness rules that have been approved to, basically, make them similar to the federal rules and to incorporate the Daubert jurisprudence somewhat.

And we also need to look at a rule -- a change in the rules that will allow the clerks to destroy records -- to offer to give them back to counsel, and then if counsel doesn't respond within a certain amount of time, to destroy them. And this is just because the budget crunch has got clerks worried all over the state that they're not

going to be able to store these things.

They've been after us for a long time to do this, but there are archival issues and, obviously, open government issues, and so we don't want to -- historic issues. We don't want to throw away papers that somebody wants, but, on the other hand, if they've been sitting there for a long time, maybe nobody wants them. So we've got to come up with some way of doing that.

And those are the changes that I anticipate. And Justice Jefferson was here earlier, but he's obliged to introduce Judge Gonzales at festivities in San Antonio later this morning, and so he's not going to be here.

CHAIRMAN BABCOCK: Okay. As I understand it, the --

(Brief Pause)

JUSTICE HECHT: Okay. Chris reminds me that we'll need to address how we're going to handle responsible third parties, according to the changes they made in House Bill 4, fairly quickly. And we'll probably turn to the jury charge rules before long as well. So that's on the board.

Any questions?

CHAIRMAN BABCOCK: Anybody got any questions?

MR. TIPPS: What is the nature of the changes that are contemplated in the Federal Rules of Civil

Procedure?

JUSTICE HECHT: I don't remember them all. The ones that are effective December 1st are the same ones that we're making in the class action rule, and they basically have to do with how class counsel is selected and -- but they're -- our changes follow those.

MR. TIPPS: But you said there's some project underway to do a wholesale change. I mean, what's that all about in three sentences?

(Laughter)

(Simultaneous discussion)

JUSTICE HECHT: The -- I'll use lawyer sentences here -- don't have a lot of punctuation in them.

The Federal Rules of Appellate Procedure were restyled about seven or eight years ago, the same way we restyled our Texas Rules of Appellate Procedure. We went back through and we renumbered them. We put them where you can find them, basically, took out the old language that we're not using anymore, changed the petition for review.

They did the same thing. They didn't make as many substantive changes as we did, but they changed theirs.

This is part of a Brian Garner-style project that the Supreme Court of the United States commissioned about 15 -- 12, 15 years ago, and Charlie Wright was a big

part of that. And then, since then, they have done the Rules of Criminal Procedure, and that has been successful also.

The -- restyling the civil rules is harder because you -- there's not two sentences that you get through that you don't find issues that you could resolve one way or the other if you change the words, and so try not to do that, but the restyling project will produce a new form of the Federal Rules of Civil Procedure that are not to be substantively different, but will be renumbered, reparagraphed, rewritten.

CHAIRMAN BABCOCK: Nina?

MS. CORTELL: Will we have an opportunity today to comment at all on the referral fee rule, because there is one sentence in particular that I would like to comment on?

CHAIRMAN BABCOCK: Well, we can do whatever we want. It's not on the agenda. I don't know if the -- what's the best way to get comments to the Court. I know there have been a bunch of written comments; there have been a few oral comments.

JUSTICE HECHT: We want to hear the comment -- all the comments, but we want to make sure we get them in a format that we can review them. So I think -- and I don't think we need to spend a lot of time on it

today.

So whichever you think is the best way to -- I mean, I don't -- we're going to need it in writing, eventually.

MS. CORTELL: Right. Well, I'll defer. I just -- I didn't know if we would have an opportunity.

CHAIRMAN BABCOCK: Any other questions?

(No response)

CHAIRMAN BABCOCK: Okay. As I understand it from Chris, the matters that the Court is interested in hearing from us on class actions are the effective date issue -- is one, and then there were a number of other issues that we just didn't reach last time, like the opt-in/opt-out, and, that, we also want to talk about today.

Right?

JUSTICE HECHT: If they're ready.

CHAIRMAN BABCOCK: We're ready.

Richard, are we ready?

MR. ORSINGER: Yes.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: We have discussed the choices on effective dates for various components of the rule here before. The subcommittee was divided in a lot of different angles. Some wanted to leave it unspecified, so that it could be developed through jurisprudence, as Justice Hecht

said. Others felt like the effective date of House Bill 4 should control as to the House Bill 4 mandated amendments, which would be only suits filed on or after September 1 of 2003. And others felt like the entire rule should be effective according to the Supreme Court's decision of the effective date of the rules.

And then another approach that some supported was the idea that the House Bill 4 requirements would have one effective date, which would be either September 1 or the effective date of the rule, and the rest of them would be applicable to cases pending but not to matters already decided.

So if you had yet to appoint class counsel, the new class counsel procedures would apply, but if class counsel had already been appointed, they would not. If you hadn't determined the fee yet, then the fee arrangements -- the fee determination would be pursuant to the new rule, but if the fees had already been determined, they would not. And the subcommittee really has no recommendation that we could speak with a unified voice.

The argument that the effective date of the House Bill 4 changes should be September 1 is that the statute said that House Bill 4 -- at least I think we think that this portion of it becomes effective on September 1, but the House Bill 4 revisions on class actions did not

actually change the law, as we read it. It told the Supreme Court to change the rules of procedure by December 31. So an argument could be made that the Legislature was expecting the Supreme Court to take the final step on the House Bill 4 changes; and, therefore, it's the effective date of the rule going in that would control those changes, and not the effective date of the statute. But there was probably a feeling that we wouldn't go back on House Bill 4 changes to lawsuits filed before September 1, because the statute didn't appear to want to make the changes it directed effective to lawsuits that were already pending on that date.

And we have had discussion about this, and as I recollect among the committee, we didn't have a very strong unified voice on that issue either.

CHAIRMAN BABCOCK: Okay. Buddy?

MR. LOW: Chip, as I understand it, one of the problems that I envision the Court having was that there are certain requirements that the law -- Bernal and others, have required that are not expressly stated in the rule that are now stated. So what the Court said, "This rule goes into effect only after a certain date," it's not really true, because it's not that way.

The way I would suggest that we do it is similar to what -- the way we had voted before, and that the

Court recognized that the old rule and the cases enforcing and interpreting the old rule would apply. I mean, you know, that encompasses case law -- Bernal and all that. The new rule would go into effect and would govern after a certain date. It's -- would be my suggestion.

That way you don't get in and say, "Well, now, this is in the new rule and that doesn't apply now." "Yes, it does apply, because the new rule puts it there, but it was already a requirement under Bernal." Now, is that -- was that one of the problems the Court had in a guideline or a deadline or a date?

JUSTICE HECHT: Well, subject to your comments, just my own view is that I don't think the Bernal list is really much of an issue, because it was meant to incorporate the case law anyway. So I don't think that really changes. And if that's what it did, which I hope is what it did, then it shouldn't matter when those take effect. But all the other rules about selection of class counsel and all of that, should that apply in pending cases, I think, is the issue.

MR. LOW: I know, but if you just wrote and said, "This new rule applies after a certain date; old rule applies before," somebody would interpret that and say, "Well, the new rule now states the Bernal requirements" -- I'm not sure they're not in argument -- and the old rule

did not expressly have that. So there could be an argument --

CHAIRMAN BABCOCK: So you think the effective date issue might effectively overrule a Supreme Court precedent?

MR. LOW: No. I'm not saying that it would. I'm saying there could be room for saying that, "If this rule says this, and it doesn't include the Bernal requirements. This rule says this, and it does." That then -- I mean --

MR. YELENOSKY: Couldn't that be cleared up with a comment?

MR. LOW: That's what I'm talking about. That's what I'm saying.

JUSTICE HECHT: Well, what should it be? I mean, should it apply in pending cases or not? The discovery rules applied in pending cases, but you couldn't go back and undo something that had already been done. In other words, the time limits didn't affect -- didn't cut off people that had already taken more discovery than the time limits would have allowed.

MR. LOW: What we did in the discovery rules -- remember, the Court, you-all entered an order, December the 20 -- or something like that -- remember, in discovery rules, where it was unclear as to what applied,

because there would be a hiatus that there might be a case not applied. And I think you-all handled that the proper way by saying that, "If this case is filed such-and-such, this applies. If it's such-and-such, that applies."

So it went on -- it wasn't just -- the case that was filed went on under the new discovery rule, and the case that was filed after a certain date went under a new discovery rule. So it was a bright line and there wasn't any mixing and mingling, and I'm saying the same thing could be done here.

CHAIRMAN BABCOCK: Okay. Any other comments?

Pete.

MR. SCHENKKAN: Yeah. I really hope that the Court will let all the non-House Bill 4 mandated parts of the rule be effective in pending case to steps that have not yet been taken. That's clearly the much superior public policy. There's no reason in the world why we should say that just because a case was filed before this rule goes into effect that the determination of class counsel would be made under the prior rule rather than under the current one, which I think is much sounder than saying "We want best counsel representing the interest of the class, not necessarily the first to file," as an example.

And it's -- this is just a question of policy, not of power. The Court clearly has the power to do

this either way they want to because all the rest of this is just procedure change, you know, from the House Bill 4 standard, and I just don't have a reason why we would say that we would not want these changes effective in pending cases to steps that haven't been taken. I hope the Court will take that approach.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: Well, I think the reason that you would not say that is because many steps are taken in a lawsuit in the planning stages and the early stages and as the case progresses based on what the law is at the time, and it's, to me, unthinkable to rip the rug out from somebody by changing the law that they've relied on either in their fee, in who is class counsel or any number of other decisions.

I think if somebody has taken on a case, had a certain fee arrangement or agreement or system and is proceeding with the case and investing in it heavily a reliance on that, to whimsically change the law in the middle of a lawsuit is unconscionable, and I don't think that that ought to be the policy of this state. And certainly there's no reason for it in midstream in a pending lawsuit to change either the designation of class counsel rules or the fee rules. It should be cases filed after.

CHAIRMAN BABCOCK: Pete, you weren't advocating whimsy, were you?

(Laughter)

(Simultaneous discussion)

MR. SCHENKKAN: I would hesitate to describe the Court's procedural rule changes to the class action rule as whimsical, and we're not proposing to make even the nonwhimsical but carefully considered policy changes as they apply to fees applicable to pending cases. That's covered under Rule 42(i), and that is by command of the Legislature, only for cases filed after September 1, 2003.

As to any other aspects of fee arrangements, this is a class action. The fee arrangements that counsel has in mind in filing the case are of absolutely no weight whatsoever. The fees are to be determined by the Court out of the common fund, if there is a settlement or recovery. Counsel has no entitlement based on the fact that counsel has filed a proposed class action.

So I think it's neither whimsical nor affecting any justifiable reliance to say that when we change the procedure or remedy but not the best in substantial right in the language of case law that what we've -- what the Court has considered to be the superior procedure or remedy as a policy matter, it ought to be effective in the case in which the step hasn't already been

taken.

Now, obviously it is different if class counsel has already been appointed, but I don't hear anyone proposing that we make it effective to undo steps that have already been taken.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: Depending on -- what he just said might change my opinion on that, but I do -- I mean, to suggest that someone is not entitled to certain things because they file a lawsuit, I think that's true, but they're also entitled to decide whether to file a lawsuit in the first place, and I think -- and how to do it.

And the way they do that, I think, it's -- should be self-evident, is that we as lawyers are taught to analyze the law as it applies, strengths and weaknesses, and then base our actions accordingly. That's how our system works.

So to make changes that argue that -- I don't want to get into that fight -- but arguably have retroactive application, as a general rule, I'm just against it, for reasons that I think should be obvious.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: It would be helpful to me -- and I should probably know this, but if it's not 42(i) that goes to the September 1 HB 4 rule, what is it we're talking

about in Rule 42 as to what the effective date will be? What changes are we referring to?

JUSTICE HECHT: The elimination of (b)(3), the incorporation of the Bernal requirements and the changes made consistent with the federal changes which have to do with the selection of class counsel and the procedure for obtaining attorney fees. And the only other one that jumps out at me is the question whether notice of a settlement must be given to a class separately from notice of the class certification, so that class members have a chance to opt out of a settlement after they know the terms.

MR. SCHENKKAN: And also the requirement that if the class has not been certified yet that the determination will be made at an early practicable time rather than as soon as practical. And I don't -- I think these examples are illustrations of the proposition. These are not drastic matters retroactively impairing anybody's substantial reliance on them. These are quite literally procedural or remedial changes that have traditionally, in case law, been considered appropriate to apply in pending cases where the steps have not been taken.

JUSTICE HECHT: Jurisprudentially, you know -- I mean, we don't need to get into all of this, but ordinarily when the court either construes a statute or the constitution or declares to common law, the idea is that

it's always been that way but you -- nobody knew it until now and now it is, so you can't complain that you didn't know it the day before yesterday because somebody in some other case knew it, argued it, got it decided, and now it affects everybody in the same situation in the same case, whether -- as long as they preserve the complaint along the way.

So that -- but the second branch comes along and actually says -- changes red to green, and so, typically, what the Legislature does can only be prospective and what we do is fully retroactive, but rule changes are kind of in the middle some place, because some of this -- like the incorporation of the Bernal requirements is really just a restatement of the law that's out there. So it's hard to think of a reason why that shouldn't be retroactive in all cases.

But the other -- some of the other changes are not. For example, we've -- by taking out (b)(3), we certainly don't want to decertify any (b)(3) class that's out there, and I'd be very surprised to know that there was a (b)(3) class out there, but if there is, we're not trying to pull the rug out from under them.

I'm just not clear where people think the class counsel and those other rules fit in this sort of spectrum.

CHAIRMAN BABCOCK: Yeah. Buddy.

MR. LOW: I have not studied the difference in appointment of class counsel, but, as I understand it, usually it's when they certify the class, and so forth, they're appointed. But somebody plans -- if somebody comes to you and they've got this case and it looks like class and you put a lot of money into it, you expect to be the class counsel because you put it all into it. Some new procedure comes up there. Some friend of the judge or somebody comes up and they're going to certify him, now how would anybody here feel about that? I don't think it would be right.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I do. I mean, it says here that under the new rules it's supposed to be the best interest of the class. I think the notion that because someone who has proposed to be class counsel and has not yet been certified, thinks that he would succeed in being class counsel but is, in fact, not the best one to represent the class, that it's inappropriate --

MR. LOW: But Pete --

MR. SCHENKKAN: -- for him to rely on the notion that because he filed the lawsuit earlier we won't, in fact, have the class counsel who's best suited to represent the class.

MR. LOW: That is -- I preface my remark. Do

you think that always, everything that is just the best and the fairest happens in court --

MR. SCHENKKAN: No. I certainly don't.

MR. LOW: -- and that judges make appointments that way? I'm talking about the reality. I'm talking about the real world, not your theoretical world. So would that be right, if this person is probably equal or better and they put all this and somebody comes up -- he's a shinny guy and the judge likes him and appoints him. That's what I'm talking about.

CHAIRMAN BABCOCK: Bob. Then Richard, and then Frank.

MR. PEMBERTON: Yeah. I was just going to offer a little historical context on this issue of settled expectations of lawyers in planning cases and the role -- you know, whether it's appropriate to change the procedural rules.

You'll recall a few years ago in the discovery rule changes, the witness' statement privilege was removed. Certainly lawyers planned entire cases and defenses around the premise that certain communications would be protected. January 1st of '99, that privilege evaporated with some controversy. I believe that change was made with the support of this committee, if I recall, in fact, retroactively.

CHAIRMAN BABCOCK: Okay. Richard.

MR. MUNZINGER: I just wanted to agree with Peter, that the class action rule, the whole -- I don't mean to be sarcastic, but the whole fiction behind class actions is, they benefit classes and not lawyers. Why would we draft a rule that benefits lawyers if we're going to be loyal to the fiction that class actions exist to benefit classes?

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I think we're talking about three different approaches. One is the prospective approach where we're going to have a cutoff date and say that all suits filed after this are governed by the new rules; all suits filed before this are governed by the old rules. That's the way most of House Bill 4 and most of the tort reform legislation was done. We're all used to that.

The second at the other end of the scale is fully retroactive. The new rules apply to all pending cases. The problem with that is that there may have been some steps taken that have to be undone, and I think we all have problems with that.

And the other approach is, I guess, some sort of limited retroactivity whereby the new rules apply to steps that have not been taken in the lawsuit. Now, that seems kind of intellectually satisfying to me, but before we

again get into some kind of red-versus-blue debate over that, I just have a question: How feasible is that? In other words, people say, "Well, the evidence rules worked that way." I wasn't around when the evidence rules were talked about, but, really, how feasible is it to go through and say, "This step applies" -- "This applies to certain cases. This doesn't apply to certain cases. But this step applies to different cases and not to certain cases"? It's a good idea. I'm just wondering how practical it is to do it that way.

CHAIRMAN BABCOCK: People see practical problems with doing it that way? How about the trial judges -- the former trial judge?

(Laughter)

MR. LOPEZ: He's talking logistics, and I -- candidly, I don't think -- for example, the discovery rule transition wasn't that big of a problem. What I'm hearing the debate about is whether it's good policy or not, whether it's -- you know, the settled expectations idea, and I would just -- I don't think it's that -- the transition period, by definition, is going be short. It's a transition period between the ones that where it obviously doesn't apply and the ones where it obviously does.

So I don't think it's a huge problem in that regard, but I think it's -- intellectually, it's a problem

by whether it's fair to people who have possibly -- I'm not in their head -- but possibly based actions or inactions on what the rule is. I mean, you don't let the referee change the rule in the third quarter just because it was a bad rule. We can agree it was a bad rule, but we can agree it ought to apply until the end of the game and then next year we'll change the rule. I just -- as an general principle, I would stand on that.

CHAIRMAN BABCOCK: Okay. Yeah, Frank.

MR. GILSTRAP: I guess I'm more concerned about the practicalities of it, and maybe -- I don't want to make that decision and figure out we can't draw it. And I guess I'm trying to shy away from the theoretical or theological debate and solve the practical problem first -- see how feasible it is before we go off and have a big fight over which is the best way.

CHAIRMAN BABCOCK: Well, do you see a feasibility problem with the -- applying the rules in pending cases other than for steps that have already been taken?

MR. GILSTRAP: Well, if you say that, you know, how do you draw it? I mean, I can't really think about -- I can't -- you know, "Steps that have already been taken," what does that mean? How does that get distorted in the hands of advocates? I'd like a -- you know, a really

bright line test, and I thought a little about it and I can't really see how we would draft it. That's my problem.

CHAIRMAN BABCOCK: Okay. Any of the trial judges have any thoughts about the practicalities of this?

Judge Christopher.

HON. TRACY CHRISTOPHER: Well, I don't think it will be that difficult to apply it to ongoing cases. For example, the Bernal factors, I mean, those are already the law, regardless of whether they're in this rule or not and -- in terms of ongoing factors. The only one that I can see a possible problem with is the class counsel, but, I mean, right now we have people where another party and their attorney will intervene and then there will be a fight between the two attorneys as to who's the best class counsel. I mean, that happens now.

CHAIRMAN BABCOCK: Okay. Does anybody else have any other thoughts about it?

(No response)

CHAIRMAN BABCOCK: Anybody have an idea about how to frame the issue to vote on it? Frank, you're usually good at that.

MR. GILSTRAP: Well, I think -- I guess we vote in terms of A, their being prospective only; B, they're being fully -- B, their being limited retroactivity; that is, they apply to steps that have not been taken; and, C,

their being fully retroactive, which means they apply to all pending cases. I don't think anybody is really arguing for C. I think those are the three alternatives.

CHAIRMAN BABCOCK: Yeah. I don't hear much of that. So, yeah, I think you're right, probably prospective only and then applying to pending cases other than for steps that have already been taken as of a particular date are probably the two options. Does everybody agree that that's probably the issue -- what we ought to vote on?

Richard.

MR. ORSINGER: I want to be sure that we're not talking about the House Bill 4 mandated changes. Is that clear?

JUSTICE HECHT: Right.

CHAIRMAN BABCOCK: Right.

Okay. Yeah. You're the chair of the subcommittee.

MR. ORSINGER: I just want to be sure. I mean, that's an entirely different debate. I just wanted to be sure that that wasn't a part of this.

CHAIRMAN BABCOCK: Okay. Why don't we see how many people are in favor of prospective only. Everybody in favor of prospective only, raise your hand.

HONORABLE JAN PATTERSON: May I ask a

question before --

CHAIRMAN BABCOCK: Yeah. Sure. Judge Patterson.

HONORABLE JAN PATTERSON: -- for my own edification. I do think it's very persuasive what the expectations are and that should not be lightly set aside, but I also am concerned that there has been a lot of uncertainty with this rule, and, to some extent, that is one of the reasons for the changes.

Among the changes that have been designated, other than selection of counsel, what are the big-ticket items that -- or settled expectations that we would be setting aside? Maybe we've asked that question, but I'm not confident I know the answer.

CHAIRMAN BABCOCK: I think Nina did ask, pretty much, that question, and I wrote down the elimination of (b)(3) and the Bernal factors and the --

HONORABLE JAN PATTERSON: Well, it's a little different. I mean, it's a difference between the uncertainty that we have in the nature of the rule. And perhaps the plaintiff's lawyers who can advise, you know, what are the truly settled expectations? And I think it's a slightly different question.

CHAIRMAN BABCOCK: Yeah. I see what you're saying.

Buddy.

MR. LOW: I have one question. When you say "prospective only," I mean, does that include the Bernal factor -- see, that was where my problem is, just saying, "It only applies after this," because there are certain things in the rule -- the Bernal factors already apply. So I wouldn't vote for that, but I'd vote for other things. So I think you can't just simplify it by saying --

MR. YELENOSKY: Well, prospective with respect to things that are different.

MR. LOW: Oh, different. Okay. I'm sorry.

HONORABLE JAN PATTERSON: Yeah. You'd be talking about consistent interpretation with current practice, and there are no expectations that differ from that.

MR. LOW: Okay. I'm sorry.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Well, you know, Justice Hecht did mention what we're calling "big-ticket items," but, I mean, almost every section of the rule has been altered. I think maybe (b) probably hasn't. Maybe I'm wrong on that. You know, from (c) on, it is a complete rewrite.

Now, maybe it's enough to say, "Well, we really don't intend any substantive changes," but I don't think that's implicit in that, and I'm bothered that, again,

what a lawyer is going to be able to do with this, you know, because the rule is -- the rule is different. The language is different, you know, all the way through. It's a new rule. And I think it's -- I think when you say, "It's going to be retroactive, but it's not going to make any difference," I think you're kidding yourself. I think lawyers are going to make a difference in it. And that may be fine, but let's don't kid ourselves about what the result of making it retroactive is.

CHAIRMAN BABCOCK: Does anybody have anything responsive to Judge Patterson's questions about, "Are there any other settled expectation issues," other than what we've already talked about?

MR. SCHENKKAN: I don't think there's a fair basis for settled expectations. There is no provision under existing law that says, "The first lawyer to file a proposed class action is entitled to be class counsel." There's no such law, case law or otherwise. So by saying that we should appoint the one who's best to represent class -- I mean, it's obviously not the same thing as Bernal where we have the Texas Supreme Court case law in point saying, "These are criteria," but there's no settled expectation to the contrary.

HONORABLE JAN PATTERSON: I agree with that. On that issue, I agree.

MR. SCHENKKAN: Similarly with regard to notice of a settlement at the settlement stage. There's certainly been debate about the extent to which and the circumstances under which you ought to have to send out another notice, but as far as I know, there's no existing case law or other rule that allows anybody to feel entitled to know he's not going to have to allow the members of the class that option to settle out or that the trial judge won't allow that -- that he can count on the trial judge not saying, "All right. Now we're going to send out a notice and see who really wants to be bound by this deal."

CHAIRMAN BABCOCK: There is cost issue to sending out another notice, though.

MR. SCHENKKAN: There is cost issue to sending out some notice, but the Judge's question was, "What were the settled expectations that people were entitled to rely on about those costs?" And the answer, I think, in existing law is, "There aren't any."

What we've done here is -- the Court has done, with input from us and others, is to take a stab at what is -- looks like the best rule to establish some settled expectations about what those costs are going to be. So I don't think for -- when that step has not yet been taken -- there hasn't been a settlement and a notice hasn't yet gone out or decision hasn't been made about a notice

going out -- I don't see how anybody can say, "Well, you know, I spent a million dollars of my own money litigating this case on the assumption that we wouldn't have to send out a notice to the class at the settlement stage." I don't really think there's a basis to make that argument.

HONORABLE LEVI BENTON: Pete, your voice keeps dropping off for us down here.

MR. SCHENKKAN: I apologize. I was saying, Judge, that I don't see that there could be a basis for saying -- if you were the lawyer who had filed a particular class action and prosecuted it and you had now gotten to the settlement stage after this rule goes into effect to say, "Well, I didn't know that we'd have to; I had a settled expectation that we would not have to send out a new expensive notice to the class at the settlement stage to find out who was bound." There isn't the basis under existing law to say, "I had a settled expectation that wouldn't happen."

It's true there isn't a specific provision in the law as is proposed here to say that you will have to do that, but there's no settled expectation that you would not, and so, again, on the assumption that I'm making, that the rule is, in fact, a good rule that you should do that at this stage, which I think this was an issue that the committee was pretty well -- had a pretty strong consensus

on that this was the right policy. I don't see how an individual lawyer would be in a position to say that his interests were legitimately prejudiced.

Certainly an adequate class representative -- the parties would not be able to maintain that they were prejudiced by this if the premise is correct, that notice to all members of the class is, in fact, in the best interest of members of the class. So, I mean, I think the fairer answer is, there are no such settled expectations that are -- as a general proposition, all said. I mean, obviously, one cannot know what individual facts might arise that allow someone in a particular circumstance to make a contrary argument.

CHAIRMAN BABCOCK: Okay. Skip, and then Jeff.

MR. WATSON: I think we're all concerned about changing rules in the middle of a game, but I think the appropriate question is the one that --

MR. MUNZINGER: Skip, can you speak up, please?

MR. WATSON: Yeah. I think we're all concerned about changing the rules in the middle of the game, but I think the appropriate question was the one that was asked, and that is, you know, "What are the specific examples of detrimental reliance?" I haven't

heard it. There may be some, but, you know, it may be that we don't have lawyers in the room that do this enough to know, but, you know, I think if we -- if they were out there, we would have heard them by now. So I'm ready to vote.

CHAIRMAN BABCOCK: Okay. Everybody ready to vote?

HONORABLE LEVI BENTON: No, sir.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I was trying to bite my lip, but I won't. There may well be no settled expectations. I think we -- it's -- you know, it's a popular sport to pick on lawyers that are on one side of the docket or the other, but we lose sight of the fact that lawyers are just businesspeople, no different than a manufacturer in Waco, Texas. And if we were talking about environmental policy, tax policy, there would be no doubt we would say, "Those people made an investment in their businesses. They've employed people."

We ought to do this clearly prospectively, and I think that we around this table can think of no settled expectations that would be trampled upon. It's a mistake to apply them retroactively. I'm ready to be among social dissent.

CHAIRMAN BABCOCK: Well, maybe not.

(Laughter)

CHAIRMAN BABCOCK: We haven't voted yet. We'll see. You may have just swayed a bunch of us.

Judge Christopher.

HON. TRACY CHRISTOPHER: Could I just say one thing? Whichever way the vote goes -- I mean, if we decide to make it only prospective, there has to be some reference to the Bernal factors or, otherwise, that will cause a confusion.

CHAIRMAN BABCOCK: That was Buddy's point.

Frank.

MR. GILSTRAP: We can just solve that by just -- if we need a comment saying that Bernal is clearly a codification in existing case law -- I mean, I think that's what it is. I'm not as troubled by that, but if people are troubled by it, we can do that.

I want to add one thing further for the record. I said earlier that I didn't think there were any changes in Subdivision (b). I'm wrong. (b)(3) has been taken out.

CHAIRMAN BABCOCK: Yeah. Okay. Pete.

MR. SCHENKKAN: I think the comment about Bernal factors highlights the problem of going that route, because I would be very hesitant to imply by such a comment that the requirement that the best counsel represent the

class was not existing law, simply because there is no Texas Supreme Court case on point.

CHAIRMAN BABCOCK: Well, there are a couple of cases pending before the Court right now on class action issues, I believe.

MR. SCHENKKAN: My point is that I would certainly want to be able to argue and think one can fairly argue that is existing law. It just hasn't been declared yet. So -- I mean, I agree with you that the Bernal one is one of the clearer cases and certainly wouldn't want to suggest to the contrary here. And I think the same is true for notice to the class at the settlement stage. I'd be very reluctant to imply that that was not existing law in a -- what is now going to be a -- what is it -- (b)(3) case, one where it's recognized that there are individual issues and common issues, both, and where the ultimate protection, such as it is, of the individuals who have been brought into that class is their ability to opt out at the settlement stage. I would be very reluctant to imply that that wasn't existing law simply because we didn't have a case one way or the other on it yet.

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: Well, rather than having a comment, then, that focuses on Bernal, we could have a comment that just says what is plainly true, that if it's

existing law by virtue of case law, the fact that it's codified here doesn't change the fact that it's existing law -- it doesn't have to specify Bernal -- and then the lawyers can argue about whether or not that's existing law prior to the rule.

CHAIRMAN BABCOCK: All right. I think -- Carlos, do you want to say --

MR. LOPEZ: Every time you're on the record, you run the risk of your silence being taken as acquiescence, so I just wanted to make sure one thing is clear. For example, the notice -- the extra notice and how that affects -- the assumption was made that's in the best interest of the class. I'm not sure that's always accurate. I mean, I may not -- I'm not going to be able to buy a house with my $10 coupon from Blockbuster, but if something from that case had made the case itself cost-prohibitive, I wouldn't have my $10 coupon from Blockbuster. So I think it's oversimplifying to simply say, you know, the more notice procedures we got in there -- automatically assuming that's in the best interest of the class. I don't think that's true.

CHAIRMAN BABCOCK: Okay. Let's vote, if we don't have anything else. The first -- all those in favor of making the rule prospective only, raise your hand.

(Show of hands)

CHAIRMAN BABCOCK: Okay. And all those that want the rule to apply in pending cases other than for steps that have already been taken, raise your hand.

(Show of hands)

CHAIRMAN BABCOCK: The vote is 18 for applying it in pending cases other than for steps that have already been taken and 7 for making it prospective only. So that's the vote of this committee on that issue.

Richard, what's the next issue you'd like to tackle.

MR. ORSINGER: The only other two that I'm aware of that are of continuing interest are the question of what to do with opt-in classes and what to do with what the Jamail Committee calls "inchoate claims," both of which are controversial, and if there's a less controversial pending issue, maybe we ought to take that up first. Otherwise, we can plow into them.

CHAIRMAN BABCOCK: If there's a less controversial issue, I'm not aware of it.

(Laughter)

(Simultaneous discussion)

CHAIRMAN BABCOCK: Chris, you got any --

MR. GRIESEL: No. There aren't any comments that we've received regarding 42 that I think would lend itself to any other easier discussion.

MR. ORSINGER: You want to take the opt-in/opt-out question? That was the proposal that migrated to us from the Jamail Committee. Our subcommittee has made a genuine effort to try to find some literature or body of knowledge that would speak to what the important issues are there. We got a little bit of help from Justice Hecht's familiarity with some federal rules debates. No proposal in the federal rule process ever was finalized and effected.

We found that there's some areas where opt-in is the prevailing rule under federal statutes involving the workplace -- some of the statutes going back all the way to the 1930s, Fair Labor Standards Act cases and age discrimination and employment act cases. And those, by statute, are opt-in cases and the Federal Rule 23 opt-out process does not apply. And that appears to be functional in that context.

However, remember that the pool of people in a workplace suit frequently are employees -- current employees of a company that have been systematically cheated out of overtime or in some other way discriminated against in their job, and those people can be very effectively advised of the pending lawsuit because the notices can be put up in the workplace. They can be sent out in union letters -- a lot of shoptalk among the employees. So it's

probably realistic to expect that people in a work environment who suffer a similar harm will become aware of the pending lawsuit and actually have the opportunity to opt in, and the cost of doing it would not be a disincentive to involvement.

If we were to take a typical opt-out class with either statewide or national pool of potential plaintiffs and for whom actual notice is probably not effective -- so we're going to be relying on publication and using, you know, old mailing databases that may be out of date, and particularly where it's complicated to determine whether you qualify for the class -- for example, you have to own shares of stock bought between a certain date and sold between a certain date or traveled on an airline at a certain time or purchased a certain vehicle with a certain feature to it during a certain time, those are intimidating for people to even figure out whether they can opt in or not.

My personal opinion -- and I don't know if anybody agrees with this, but I think that published notice is pretty much a fiction, and the fact that so few people opt out of our opt-out classes is probably more reflective that people are not aware of the class action and concerned enough about it to opt out; and, therefore, they did nothing or nothing -- nobody knows or nobody cares enough to do

anything, and so, by default, they stay in the class, and -- rather than the fact that the class actions are so attractive to these plaintiffs that almost no one wants out of them. I think few people really believe that.

So, in a sense, if we change our opt-out practice to an opt-in practice, I feel like we're going to be the Lone Ranger as far as these wide-ranging classes are concerned.

CHAIRMAN BABCOCK: What do you mean by that, the "Lone Ranger"?

MR. ORSINGER: Well, what I mean by that is that we can't find a jurisdiction that's using these opt-in classes other than under these federal statutes. If anyone knows of one, let us know, because we haven't found it. We haven't been able to investigate it. It's an intellectual proposition that has floated around, but we're not aware of any jurisdiction that's actually implemented it for their procedures other than in the context of the federal legislation that requires it, and that tends to be in the limited areas that I described.

So if this state were to go to a pure opt-in with no opt-out, in the category of broad numbers of plaintiffs, I think that it would be an experiment on our part. I feel like we would be the only jurisdiction who's actually tried to implement that rule in its --

explicitly.

Now, if we change our rule to where it's an alternative that can be available to the trial judge, that's a little bit less of a giant step into the dark, because we would keep our opt-out procedure, but we might amend our rule to provide opt-in as an available choice to the district judge, and then somehow attempt to define when opt-in would be a good factor. And it's possible we could just provide the opt-in procedure and let case law tell you when opt-in is better than opt-out or we could try to put some standards in the opt-in. But if there were an impetus to move to opt-in, one option as an alternative to just opposing it is to make it an available procedure pursuant to the trial judge's decision subject to appellate review and try that out for a while and see what kind of impediments we reach.

We have a question or comment down there.

HONORABLE JANE BLAND: Richard, I was going to ask: What kind of distinction would you draw for cases that would be opt-in cases and cases that might fall into this category where the trial judge might allow opt-in -- opt-out versus opt-in? I'm not sure if it's -- I mean, I don't know if it's worth trying to draw a whole lot of distinctions between kinds of class actions and say, "Oh, one kind is better for opt-in," unless there is some kind of

natural distinction that already can easily be drawn.

MR. ORSINGER: You know, I think that the answer to your question depends entirely about your philosophy regarding these class actions. If you see a class action as a fiction where plaintiffs' lawyers assert a claim for a class that's basically unaware that they're being represented and that they negotiate with the defendant using the leverage of the mass quantity of plaintiffs they have by default and that the defendant cuts a deal out of fear that whatever small damages there might be could be multiplied by thousands or tens of thousands; and, therefore, some benefit will flow out to all these members of the class who didn't get out by failing to opt out -- if that's your philosophy, then you're likely to feel like the primary purpose of class action this day is to just -- the plaintiffs' lawyers get paid in order to give the defendants a res judicata bar against all of their consumers. It's kind of a cynical view, but some people hold that view.

On the other hand, if you look at a class action as a remedy for people who don't have the money or the education, awareness or interest to bring a lawsuit on their own, but they do actually -- have suffered a harm or maybe they will and they don't realize it, and someone else who has a financial incentive, i.e., the plaintiffs' lawyers

and some representatives -- class representatives get into court and negotiate a deal for them and bona fide benefits flow out to these class members by default, you have a completely different perspective on what's good about an opt-out class. And depending on which perspective, you might find that there's no instances where you want an opt-in class, or, on the other perspective, you want every class to be an opt in because you don't buy into the fiction.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I take a different approach in trying to answer your question by suggesting that the category of class actions where you might want to have this option --

HONORABLE JANE BLAND: I'm just trying to figure out, as a trial judge, how would you make a determination of whether -- if given the choice, what -- how will you make -- what are the factors?

(Simultaneous discussion)

MR. SCHENKKAN: That's what I want to try to suggest it -- is it would be inside the larger category of what are now going to be (b)(3) actions, where you have common issues and individual issues and questions include, "Do the common issues predominate in terms of the effort of the parties and is this a superior way of resolving the

disputes compared with whatever the alternatives are for dealing with disputes?"

Within that large set of class actions -- putting now aside the (b)(1) and (2), the inconsistent, you know, adjudication cases -- the declaratory judgment or whatever -- putting those aside and looking only at these, "Do the common issues predominate over the individual issue cases," in the mass consumer case that Richard has suggested, it's hard to see how you can have opt-in without, basically, abolishing the class action. So I would say that if you're a trial judge, no -- you know, we're not going to do that.

We have a class action. We're not going to now say we can't have one of this type, because, as a matter of inertia, there will never be a case where people who, if they benefit at all are only going to get a $10 Blockbuster coupon are going to opt in. Not enough people will fill out the piece of paper and put a stamp on it to opt in. So it wouldn't work for those.

Now think, instead, about a (b)(3) class action -- common versus individual issue class action -- where a lot of the members of the class -- maybe not all of them, but -- or maybe all of them -- if they have damages, if the liability is real, yet to be determined in the case, and if they have damages, the damages are on the order of

50- to $125,000 or something like that, that's a marginal case for lots of lawyers and plaintiffs. A lot of them might not choose to bring it, but some of them might rather say -- a whole lot of them might say, "I'd rather get my own lawyer to do that."

And so you'd be looking at those cases and then maybe you'd be concerned with, "Well, how many of those people are there" -- the point Richard was making about the Fair Labor Standards Act cases -- "and how easy is it going to be to get them real notice so they can make a real decision?" It might make a difference to you if there was --

HONORABLE JANE BLAND: The universe of planets being a smaller group or a more sophisticated group and more easily detected --

MR. SCHENKKAN: Right.

HONORABLE JANE BLAND: -- for purposes of notice.

MR. SCHENKKAN: You might say, "Managing this case" -- you know, the balance of the individual issues and common issues are going to be a whole lot easier if we're only dealing with the people who really want to be here, and in this case, there's only 1,000 people, potentially, out there, and we've got a pretty good list of who they all are, we're going to do this on an opt-in basis." And, you know,

if the answer is that only 50 of these people opt in, well 50 people trying a case at an average of $100,000 a piece in potential damages, that's still a pretty respectable lawsuit.

So, I mean, that's not a complete answer to your question, but that's kind of in the vicinity of what we're talking about. We're trying to balance this interest of not killing off the class action but letting individual people who really do have some appreciable interest at stake exercise their right to autonomy -- to make their own decisions as opposed to having the decisions made for them by default by somebody they didn't choose to -- you know, to hire to represent them.

HONORABLE JANE BLAND: But if the people are sophisticated enough to want their own counsel, potentially, and the injury at stake that they -- you think they would have a significant interest in the lawsuit, aren't those the same people that would have the wherewithal to exercise their opt-out option --

MR. YELENOSKY: Yeah.

HONORABLE JANE BLAND: -- if it were offered to them?

MR. YELENOSKY: Yeah. Opt-in isn't superior. It's just equivalent in those circumstances.

CHAIRMAN BABCOCK: Alex had her hand up.

PROFESSOR ALBRIGHT: Well, you know, I think in that situation the answer is not that it -- to have an opt-out class. The answer is to say, "That's not an appropriate class action. Join these people that can be joined and let's do the individual issues that way." I've never heard anything that makes opt-in sound like a good idea. I think there have been couple of law reviews written about it, and, from what I understand, it's an idea that I've heard -- what I hear is that it was an idea that one or two academics are playing with.

I think the answer is, if you don't want class actions, abolish class actions, to be honest about it. Two, if it's a situation where you want to have individuals who are representing themselves in an action, then join them. And I just don't see any point to having this opt-in procedure.

CHAIRMAN BABCOCK: Stephen, had you already made your comment?

MR. YELENOSKY: Yeah. That's fine.

CHAIRMAN BABCOCK: Okay. And then Carlos and then Judge Patterson.

MR. LOPEZ: Well, I echo Professor Albright's comment. What I'm demanding is intellectual honesty here. I mean, I can't make everybody agree with me, but I would hope you-all can be intellectually honest. I mean, I

haven't heard a single good substantive reason for why we should switch to opt-in. I mean, I've only given -- I'll give you real-life examples.

I've been a member of three classes, what some people will -- the majority would call "by default." I would like to suggest it was a considered decision when I saw that I would be opted -- that I was in unless I opted out. I got $10 coupon from Blockbuster. I got $10 off my stay at the West Inn because I got overcharged for the electrical situation down in California. And I -- what's this third one? I got some extra miles from American because they did something wrong. I didn't have to opt in.

I mean, the assumptions are that somebody stays in the group because they didn't opt out, but somehow that was a mindless default decision, and I just -- where's the evidence for that statement? Why are we doing this? I mean, I know why we're doing it, because it makes it harder to bring class actions. Let's just be honest. If we don't like class actions, let's do something about it, but let's do it in an honest way.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: Well, we may be ready to vote, but I'd just like to suggest that there's a reason why the federal law doesn't have the opt-in, but

only has the opt-out provision, and that is because, as we've discussed, the factors that we would have to come up with to differentiate among cases really go to the viability of the class in the first place, and it would be hard to come up with additional factors that would distinguish from -- be distinguished from those, and so I don't see any point in pursuing the discussion any further either at this point.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: Chip, I've defended, I guess, four or five Federal Fair Labor Standards Act opt-ins, one with 14,000 potential plaintiffs. There are some real-world distinctions that need to be understood. The first is that the comments are correct, that it tends to be a targeted group of people. It is a workforce. It is incorrect to assume that they are easily reachable. Most of these cases are brought in parts of the workforce that are highly mobile. Mine were in the slaughterhouse industry. Trust me, you stay in that job just as long as you need to to get a check to pay the rent, buy gas and get out of town. And so --

CHAIRMAN BABCOCK: Is that the Lubbock rule?

(Laughter)

MR. WATSON: That's the Amarillo rule.

It is really interesting how they work in

practice as opposed to how they work in theory. In practice, what really happens is that, if there is a perceived wrong -- you know, the workers will talk. The union will talk with the workers. They will find counsel, and the action will be brought in the names of half a dozen or 50 or 200 representative people.

The FLSA says that a worker can bring the action on behalf of himself or herself and anyone else similarly situated. Those similarly situated people have to file a consent to join in the suit. They -- it has to be an actual signed consent to join in the suit.

The fight occurs when the judge is asked to issue notice. Those who have heard about it and want to get in do get in, and at that point, it's like any other mass tort with, you know, 400 names as plaintiffs. I mean, it's just no different than a mass tort, but when the court issues notice, at that point, the notice goes out. It's posted on the workplace bulletin board, but the big thing is the mailing to the last known address, and those folks just don't get reached. I mean, that's the truth of the matter.

But it's also -- the second area defined is in the similarly situated. Is this going to be just the Dumas plant or is going to be it the Grand Forks, the Greeley, Colorado, the Garden City, Kansas -- you know, all of the different plants that have people in exactly the same

position doing exactly the same work, but under, perhaps, slightly different union contracts or slightly different circumstances, and is it going to be all of the things that class actions should be: Cost effective, et cetera, et cetera.

The advantage of that to the class members that I've seen and -- understand this is looking from the other side of the docket, but you can be fairly objective about it after you've been through it a few times. The advantage is is that -- first of all, there is -- because it's federal labor standards, there is no settlement of coupons. You know, it's money. And whatever money is paid is real money that has a real impact on the plaintiffs. And so we have this disparate thing of attorney's fees so outweighing the value of the coupons that are actually cashed in does not appear. What happens is that the gross amount paid out is big. I mean, when you're talking about 14,000 workers and the settlement of the judgment comes down to be 8 minutes per day that they are compensated over a two-year period, well, that doesn't sound like much until you realize that that 8 minutes isn't just straight time. It's usually kicking a 40-hour work week into overtime. That's doubled with liquidated damages and that applies to 14,000 people, potentially, you know, depending on how many of them opt in.

So to the defendant, it is a huge chunk of change that goes out. And to people who are doing brutal work -- I mean, just, you know, demeaning, dehumanized brutal work, the money they get, even if it's perhaps to us a relatively small amount of money, is a big deal. I mean, it is a big deal that changes their lives.

The sophisticated ones -- and this is kind of hard to say, but the advantage of -- to me, of opt-in, if you really work right, is that sometimes several different lawyers will file the same lawsuit. I mean, it's sort of like, you know, product liability used to be the cause of action, and we'd move through things. Several different lawyers will file the same type of that FLSA lawsuit, and each of their plaintiffs are purporting to be representative of those similarly situated.

In the best-case scenario, the thing that I see is that some of those lawyers aren't very good. Some of them are in it to get a fee and are going to sell out for a relatively small number of minutes that the company is going to want to pay to set the threshold, to set the precedent for future settlements. You know, 2 minutes is a big difference from 12 minutes. I mean, just a huge difference. Two minutes rarely pushes it into overtime, you see.

I mean, it has all sorts of implications, and there are lawyers out there that will settle cheap and

quickly if the amount you stipulate to attorney's fees is high enough, and that's the real world, but there are others who will really do a good job and who will hire the experts and who will prove that it's 20 minutes. You know, it really is 20 minutes a day that each of these people need to be paid for. And if there was a way for the plaintiff to know which lawyers were the ones that were really going to fight for them -- and I can't tell if that word really gets out, but it seems to me that the good ones tend to grow in numbers as these suits proliferate and the bad ones tend to shrink because the end result is better for the people who have the good lawyers and that word gets around in the workplace.

So to directly address Karl's question about not hearing anything good about opt-in, from the plaintiff's perspective, I've seen it work. I've seen it have good results for the plaintiffs. I've also seen what I would say for plaintiffs are very bad results, but that's directly attributable to the skill and tenacity of counsel.

And the last thing I'll say is that I think for that reason -- but maybe for a lot of other reasons, there is a -- it's not simple enough to say that the courts just -- the federal courts have all just said, "Okay. It's all opt-in and we're going under this new way of doing it." In fact, that's the minority for you. Texas and

Colorado -- the district courts in Texas and Colorado are really the -- pretty much -- only two that go straight FLSA opt-in. The Southern District of Texas has tended to follow the rest of the nation in saying, "We need the Rule 23 factors to protect the class members even though it's opt-in."

So before we decide to do the critical thing of issuing notice, you know, requiring the employer to post it on the bulletin board; requiring the employer to do mailings to every potential class member giving them the option to opt in; doing it in English, Spanish, Vietnamese, Thai, you know, all of those things, to -- and giving them the form and everything; telling them how to opt in. Maybe the majority of the federal courts are saying, "What we're going to do is do a full-blown class certification, and we're going to determine commonality in the sense of similarly-situated. We're going to do each of the Rule 23 factors and we are going to look very closely at not only adequacy of class representative but adequacy of counsel," and I'm not sure this hybrid approach that's being adopted in the real world.

And the Fifth Circuit has said in Mooney that they're not going to decide which is best yet. I mean, they said, you know, "We have this point of error," that the way it was done was wrong, and they're saying, "We don't

care because the Court made the right decision under either the Rule 23 standard, or, you know, do it on affidavits and do it quickly, the standard of early issue of notice that that class wouldn't have passed muster on either one." The vast majority of classes don't pass muster for notification to the issue; and, therefore, it's just the mass tort.

So the most recent trend is, "Forget FLSA mass filings and just" -- "forget FLSA issuance of notice and just do the mass filing. File the petition with the 2,000 names and go from there and completely avoid the whole thing," which is, I'm going to predict exactly what we're going to be into under our rule regardless of which we choose. People are going to go the mass filing route and stay completely away from the constraints of Bernal and everything else.

I'm not trying to argue for a position. I just was trying to say, that's the way I've seen it work. I do see advantages, but it doesn't work the way you think it works.

CHAIRMAN BABCOCK: Does the Southern District of Texas have a rule that --

MR. WATSON: So Sim Lake has one very good opinion that's out there where he just said, "Here's the choice of the 5th Circuit and Mooney has not given us

guidance of which way to go. I'm going this way because of adequacy of class representation, including adequacy of counsel," and, Chip, I'm -- that's the whole ball game. In the real world, that's it. You know, is the guy in for the quick kill or are they in there to really help the plaintiffs?

CHAIRMAN BABCOCK: Okay. That's interesting. Pete, and then Richard.

MR. SCHENKKAN: I want to just make it clear that there may be people who want to go to opt-in in order to kill class actions, but that is not the only ground on which one can be at least interested in the idea. First, I don't think there's anybody actually at the moment I've heard yet proposing opt-in in this room.

So the question is just, "Why might you be interested," and the reasons you might be interested -- in addition to those who might want it for a lawyer to kill class action -- include, there are some plaintiff's lawyers who are very concerned about what the Jamail Committee refers to as the "inchoate claims issues" that we haven't gotten to yet and that making the class action for those classes opt-in is one way to deal with the inchoate claim issue, short of just saying, "We will not have any class actions if there's any potential for inchoate claims." So it is a middle ground that is intended to avoid having to

put you through the choice of saying, "We will have no class action at all," or, "we will have a class action in which the people with inchoate claims are being commandeered by the plaintiff's lawyer they don't know in a circumstance in which is not realistic to think they will know what their inchoate claims potentially were."

And then a more generalizable version of that that doesn't have recognized constituency support -- I'm not -- no longer talking about the fact that there are both plaintiffs' lawyers and defense lawyers whose interest for clients who are interested in the possibility. But just generically, what the option of putting the opt-in into the judge's toolkit for the (b)(3) class action does is allow the judge a less drastic alternative than to say, "In this case, we have a lot of manageability problems with individual issues. It's a close question whether this is manageable and whether class action is genuinely superior to letting those individuals litigate their own claims, hiring the lawyers if they choose to do so and not getting any relief at all if they don't choose to do that." In that case, the opt-in is a way to try to have some of your cake and eat it, too, or at least to allow some individuals better realistic choices which way they want to go. Do they want to be included in this package deal that some lawyer has already taken the initiative to start -- has

found that at least some class representatives are suitable for that? Do they want to sign on for that by not doing anything more than sending in the card that says, "Okay. I'm in," or do they want to stay out and decide later whether they want to bring their own lawsuit with their own lawyer or do nothing?

So, again, I'm not proposing this. My own view is, we're not ready to talk about this opt-in. We were ready to talk about it. We're not ready to do anything about it. The Legislature has made a lot of changes in class actions. The committee has suggested more. The Court had made some of them.

There are other changes that are being made in statutes and rules that are not directly about class actions that are clearly going to have an effect on class action practice, like the MDL rules and like the supersedeas rules. You know, I don't think we're ready yet, but I would very much hope that the members of this group would keep an open mind as to whether the opt-in option for trial court authority in the (b)(3) context is an idea worth further considering at a later time, because I think it may well be, and for reasons that don't have to do with anybody, wanting to abolish class action suits.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I want to reiterate part of

what Peter said, but I want to preface it by saying that I feel like the committee today would certainly not vote to go completely to opt-in, but the Supreme Court is going to make that decision, and I think we should seriously discuss what would happen if they did, and I -- if the Supreme Court is going to consider opt-in, my feeling, personally, as I already stated is that we shouldn't eliminate opt-out; we should make opt-in an available option.

An example of when you might do that would be something that Peter touched on and which we'll debate in a minute, but it has to do with these inchoate claims, the people that may have suffered a physical injury but that it has not manifested yet. And in the Agent Orange case, the Dow Chemical v. Stephenson case that we've received e-mails about decided by the Supreme Court this year, there were allegations that soldiers in Vietnam were poisoned by their exposure to this defoliant, and some had manifestations they claimed immediately and others didn't, and there was a scientific view that it might take 10, 20 years for manifestations to appear. And there was a big causation problem and there was also a contractor -- a federal contractor defense problem that under some interpretation of the legislation, anybody that manufacturers something for the government for use in war has a complete walk on liability, and if I'm not mistaken, the ones who opted out

of that class and pursued individual litigation ultimately got summary judgment on that defense. But anyway, be that as it may, what happened was, it was an opt-out class that was certified.

And under the settlement, a certain amount of money was set aside for people that had manifested certain kinds of injuries for immediate medical treatment and therapy. There was money set aside for psychological therapy for these people and their families, and then there was money set aside that was approved for the projection of people that would come on-line with these claimed injuries within a certain period of time, which I recall as being 10 years, but I might be wrong.

And the Stephenson case occurred because all of that money got spent, and then these two litigants developed cancers that they claimed were related to Agent Orange. The science was a little more available at the time, but the manufacturer took the position that there was a settlement bar, a res judicata bar against their claims because they were members of the class that did not opt out, but, unfortunately, all the money that was set aside for people who developed subsequent physical manifestations had been exhausted and there was no settlement money left for these people. And the district courts followed the settlement bar res judicata concept. The Court of Appeals

felt that they were not adequately represented, because not enough money was set aside to cover them and gave them a chance to go back to court, and it went to the U.S. Supreme Court, and the scuttlebutt is that Justice Stephenson recused because he had a son that was a Vet that had this illness -- maybe even died. I can't remember -- but anyway, he recused so we had an 8-member U.S. Supreme Court which split 50/50, which was a de facto failure to reverse the Court of Appeals, so those particular -- those two veterans had their shot going back to the court.

But it presents the problem that someone who has no physical manifestation and has no cause of action and can't go into court if they want to might still be stuck in a class that they're really not even aware that they should be concerned with because they've had no physical manifestations and they haven't seen a doctor or that they don't know that they have a problem -- or might have a problem. And by the time they do find out they have a problem, they find out that somebody else settled their claim for them and they never got any money or the money is gone and now they don't get compensated.

So that rub there with that res judicata or settlement bar against people who haven't manifested, you know, has a fundamental sense of injustice about it. And yet, we all know the defendants are not going to settle with

a significant amount of money if all they're settling is a few thousand people now and there's maybe 100,000 people more later. They're going to have to hold back their reserves to cover all the potential claims that might be filed next year and the year after that and the year after that, and the result is, you can't get much of a settlement for any of these class actions.

All of that is a predicate for saying, what if we had a blended rule in Texas and a trial judge were to say, "I'm going to elect for an opt-out class for everyone with physical manifestations from this refinery explosion, but for people who were within a certain zone of exposure -- so many miles or whatever -- but who have no physical manifestations, then the class would be opt-in as to them. And if they opt in, they participate in the class and the settlement. And if they don't opt in, then there's no settlement or res judicata bar against them and then they can come in later on." And that's a possibility where opt-in might be useful to eliminate the inchoate claim problem, and it might be a more -- Buddy doesn't think it's very practical, but let me finish my comments and then --

(Laughter)

(Simultaneous discussion)

MR. ORSINGER: Another example which Tommy Jacks raised in our subcommittee -- and he's not here

today, so I'm going to repeat it, and I hope I do so accurately, in the Sulzer Hip Implant case, there was a strong feeling that there was liability, but there were a lot of people whose prosthesis had not become defective yet, so they hadn't actually suffered harm, but it was expected that they would, but the company was not large enough and the insurance pool was not large enough to compensate fully everybody that had received a hip implant. And there might be a situation there where someone who had the implant but had no manifestation would want to participate in the settlement, because, if they waited, there wouldn't be a defendant left to pay them. And if you have an outright bar against class actions for inchoate claims, then you might be effectively precluding those people from having the remedy.

Another separate point I want to make is -- and Skip may know better. I don't know if he's still in the room -- yes, you are.

It's my understanding that in some of the federal courts on this opt-in litigation -- first of all, it's clear under the Federal Rule 23 opt-out that as soon as someone files a lawsuit and seeks certification that the statute of limitations is stayed as all members of the class, and that's by interpretation of the federal rule, but on the opt-in statutes which are not under the federal rule,

some of the circuit courts are saying that limitations runs against potential class members who have not opted in.

As a result of that, you don't have that automatic protection against the people who are ignorant of their claims in an opt-in process like you do with an opt-out process unless we decide to do something with the limitations running and how it's differentiated between opt-in and opt-out.

Did I misstate that, Skip?

MR. WATSON: Well, I don't know, Richard. I am unaware of what you just said. My stuff has been in the Fifth and Tenth Circuit and the law is very clear in those circuits that limitations begins to run when and only when the person consents to join the suit, and that it runs backwards for two years from the time they filed their consent to join -- in other words, they opted in, and it's precisely because it is not a situation that they have to opt in to be bound; and, therefore, there's no way to say that their individualized cause of action, which -- wages are very individualized. That's one of the big controversies that, you know, how do you prove that this person, you know, took 10 minutes to put on their protective garments when the person next to them only took 6 because they're fast.

You know, it's very individualized damages,

or, as the Supreme Court has said, it's a very individualized claim; and, therefore -- I haven't seen anything that would -- trying to say that at least in the FLSA context that it applied to somebody who did not opt in.

MR. ORSINGER: Okay. So let's take that as a premise, then. We need to understand that if we go to opt-in, we should either -- we should be sensitive to the possibility that it will affect the operation of the statute-of-limitations bar, and, obviously, we control our limitations here in this state probably through legislation, but I think we should be sensitive that on the federal side, if you go from opt-out to opt-in, you don't have the automatic protection against limitations for an opt-in choice that you do on the opt-out choice.

And in the -- lastly, the -- one of the strong arguments in favor of opt-in is that people are not unknowingly bound to a decision they don't like. And nobody likes that. That's why we're trying to require notice of settlements, so that if they're going to get 15 cents and lawyers get $20 million, people are going to come in and stop the train from pulling out of the station.

The whole concept of opt-in carries with it the idea that you don't have a settlement bar or res judicata bar unless you do opt in, but if that, in fact, is a driving force behind our desire or the Supreme Court's

desire to have an opt-in rule, perhaps we could address that better by squarely targeting the scope of the settlement bar or res judicata bar rather than flipping the class action procedure from opt-out to opt-in so that we're not cutting people off without their knowing that they're being cut off and having a say-so in it. That's all I have.

CHAIRMAN BABCOCK: Okay. Bill.

MR. EDWARDS: This business about these personal injuries that may not have occurred yet and so forth in a class setting is just -- it's just nice discussion, but under our law there ain't no class action for that kind of thing. If you have a refinery explosion that sprayed the neighborhood, everyone is in a different position. You cannot have a class action; it won't work. Commonality loses out to individuality, because everybody -- for example, if there's a release of a gas cloud, where were they located? What was the concentration? What was the duration of the concentration? Every one of them, it's a morass that doesn't work. And if you haven't been there, you don't know what I'm talking about, but we're in the process now of closing out a case with 5,400 plaintiffs that could not be a class action, and just trying to find just 5,400 is almost impossible. We ran an ad this week -- about 150 -- said, "If you don't get in in 10 days, you lose your settlement," because sending out investigators, certified

mail, putting a bounty on finding them -- literally paying $50 a head for people to go out and find them and bring them in, and there's still 150 we can't find.

So all of these things about, you know, "if you go get the word out," maybe so, but after a period of three or four years, you're not going to know where any of them are and there is no class action jurisdiction in this state for a mass personal injury situation that I know of. I don't care if it's a plane crash or two planes hit each other and you got 500 people killed. They're all different, and you're not going to get a class action. You've got a mass tort.

CHAIRMAN BABCOCK: Okay. Well, before we take our morning break -- Justice Gray.

HONORABLE TOM GRAY: You want to go first or you want me to go first?

CHAIRMAN BABCOCK: No. Go ahead.

HONORABLE TOM GRAY: I'm on the topic we just had. In deference to the problems that Justice Scalia has found himself, I will be cautious with my --

(Laughter)

HONORABLE TOM GRAY: -- and I will respond on a -- I guess on a very personal level. I want to know why it serves the greater good that if I do not want an attorney, if I do not want a claim litigated on my behalf,

if I want to be left alone unless I choose to act, why do I have to find the envelope, pay for a stamp, find the address and mail it? My right to control my destiny should remain with me. And so I have no problem with opt-in classes.

CHAIRMAN BABCOCK: Okay. Judge Christopher.

HON. TRACY CHRISTOPHER: Well, one other thing that we should consider -- and I'm not really sure which way it cuts, if Texas becomes an opt-in state only and we're the only one in the nation that becomes an opt-in state, any potential class action affecting Texas residents will probably be somehow brought in federal court. Now, you know, maybe that's fine with the Supreme Court Justices, but, you know, that's what's going to happen.

CHAIRMAN BABCOCK: Richard, then Buddy.

MR. MUNZINGER: There is more at stake than the right -- refutative right of the class member. There's at stake the social good of putting to rest all of these claims. There's also the stake of res judicata so that the defendant or defendants may have some assurance that if the claim is settled they don't face a second claim down the road. The Court is making rules that apply to society as a whole and not just to individual class members, and certainly not just to lawyers, but an opt-in rule, it seems to me, militates against finality of judgment and assurance on the part of the defendant that the defendant has put this

matter to rest once and for all, and it would have a very major impact on me if I were a CEO of a company or I were on the board to be told that if I paid a million dollars or a thousand dollars or whatever it is, I would be able to get rid of cases 1 through 7, but I would have no assurance that I would have any protection against future claims.

In answer to Justice Gray's question, it seems to me, there is -- there are interests other than those of the class members, and an opt-out rule provides for finality of judgment and assurance to the defendant of res judicata, apart from any questions of inchoate claims, which, to me, are a logical non sequitur, but that's another argument.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, I've had some minor exposure representing both plaintiffs and defendants, and their interests are pretty much the same. The plaintiffs feel that they've been harmed and they want everybody that's been harmed -- they want those people to have the opportunity to participate in whatever they're getting. The defendant -- "I want to buy my peace." I mean, when I'm defending a class action, you know, I say, "Okay. I want the protection. I don't want my client to come back and live with this. We'll not admit we did any wrong, but we're going to put up this pot," and so forth.

So, to me -- I agree. There's a lot more than just Judge Gray as an individual class member. There's much more behind it than that, both ways.

CHAIRMAN BABCOCK: Okay. Stephen.

MR. YELENOSKY: Well, one other interest that I don't think has been mentioned is the class action is very often served as a private Attorney General function, and I don't have any particular investment in my individual control in whether or not somebody sues Motorola and I get a $10 coupon, which I got, but I'm happy that somebody held them to the law and there was a finding that they had -- if I recall, it was an antitrust case or something like that -- or price gouging or whatever. So the coupon didn't matter to me, but there was a collective interest in enforcing civil law.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I think two things are going on here. First of all, we're having this discussion -- this kind of red/blue discussion about, "Opt-in or opt-out, is it a good idea?" And I think, as Richard points out, that really kind of boils down on how you see the usefulness of class actions. I think you can probably -- that probably is driving a lot of that debate. And I think, if we just had an up or down vote on that, I don't think it would carry a lot of weight with the Supreme Court. I really don't.

I think what we're -- the other thing we're doing is exploring the feasibility of some middle way. Is there some way we can come up with the idea -- with a concept that allows opt-in in certain classes -- in certain cases?

Judge Christopher said, "Well, what are some of the factors" -- you know, how do we go about doing that? And we've identified several factors that we might consider in making -- tailoring that kind of rule. The role of limitations, the role of res judicata, whether claims are inchoate, the requirements of notice -- I mean, is there a heightened notice requirement? Can notice effectively be given?

At the same time, I think Skip Watson's comments are very sobering to me. You know, we can talk about this, but how are they really going to work -- how are these processes really going to work out in the real world? I don't think we really know. So if we were being -- you know, if we were making the decision and we were being prudent, we would say, "Let's study this. Let's look at what the federal courts are doing and come back to it again some time when we know a little bit more," but I don't think that that's going to happen, because I think there's a political process going on here.

There are a lot of people in the state who

want to get rid of class action in the business community. There's nothing wrong with that. They have -- they can act through the Legislature. They did in the last Legislature, and we saw a sea change in certain areas. I think there's a good chance that will happen in the next Legislature. I think there's also a chance -- I think there's also the idea that maybe the Supreme Court likes to get out in front of these things so that the rules are changed by them and not by the Legislature.

So I think there's a political process that's going on here that might drive us toward trying to come up with something that is both procedurally and politically feasible as a way of a limited opt-in -- opt-out approach -- excuse me opt-in approach, and I think we ought to continue that and realize that we don't have all day.

(Laughter)

CHAIRMAN BABCOCK: Does anybody have any other comments?

(No response)

CHAIRMAN BABCOCK: What I was about to say a minute ago was -- before we take our break -- Richard, is there a way that you think we should frame an issue to vote upon?

MR. ORSINGER: Well, I think, clearly, we ought to show the sense of the committee on whether we ought

to eliminate opt-out, go entirely opt-in. I doubt any of us will be surprised by that vote. And then maybe we ought to consider --

CHAIRMAN BABCOCK: Well, let's just stop there. Nobody is in favor of that, are they? Is there anybody in favor of that?

MR. EDWARDS: Repeat --

MR. YELENOSKY: Exclusively opt-in.

CHAIRMAN BABCOCK: Yeah. Eliminate opt-out, nobody is in favor of that? Judge -- we have one person. Judge Gray is in favor of that.

MR. ORSINGER: So then the next question is --

CHAIRMAN BABCOCK: The lonely dissenter on the --

(Laughter)

MR. ORSINGER: -- do we want to go on the record on whether we ought to permit an opt-in option for the trial judges? And if that's true, then my subcommittee needs to go back to work, because we're going to have to kind of invent them. They won't -- I mean, we can be kind of copy what happens over there in Skip's kind of litigation, but that's not going to work that well in all areas, and it will take us a while and we probably may need to get ahold of some other people to assist the subcommittee

if we're going to try to flesh that out.

CHAIRMAN BABCOCK: Okay. This is a vote, really, on whether you should be assigned more work.

(Laughter)

MR. YELENOSKY: Then we'll know how it will go.

(Laughter)

(Simultaneous discussion)

MR. GILSTRAP: We need a blue ribbon committee on this.

MR. ORSINGER: I don't know -- if I knew right now that the Supreme Court was not going to do this and the Legislature was not going to do this, then I would say, "Let's move on to the next subject." But if either of those two are going to do this, I would rather do it based on investigation, committee process, discussion, opportunities and comment.

So -- I don't know. Since there isn't anybody here who can speak for either the Legislature or the Supreme Court we have to kind of decide, but if the decision is --

(Laughter)

MR. ORSINGER: -- that the subcommittee is supposed to explore how to write a feasible blended rule and articulate some standards for when opt-in would be useful,

you know, there is not any of us who would want to do it, but I think we all will do it.

JUSTICE HECHT: Well, I don't think the Supreme Court -- and I can't speak for them, but my sense of it is that the court is not interested in just sort of marching out into this area of where there has been a large amount of national debate and the issues are not clearly defined, but, talking with legislators during the last session, I think it's a very real possibility that the Legislature may be more definite in a future session than they were this time.

And so I take -- I think my court takes the charge in House Bill 4, which is to go write fair rules for the fair and efficient conduct of class actions to mean -- and, you know, two years from now, we're going to be looking at it and maybe we'll like what you did and maybe we won't. Just like offer of settlement, I think by the time we all got through this, including my court, we were sort of overcome with the difficulties of an offer of settlement proposal, but that wasn't up to us. And if we hadn't done all that work, we wouldn't have had the opportunity to have influenced the legislative process for what I think was the better.

People can disagree, I guess, but at least we had some input into how that was going to come out.

So I think from the Court's point of view, although I can ask them, that they would like to see more work done on this so that if there is nothing else to be done, at least we can report back in the next legislative process that we've looked at this and this is the best that can be done, or if there's, you know, as you say, some middle ground or some other things to explore, we can say, "We've tried this and we think that's enough."

CHAIRMAN BABCOCK: And I'll just add to that, this -- as a member of both the Jamail Committee and this committee, that offer of settlement thing, I think, did benefit greatly by the fact that so much work was done. It wasn't satisfying to everybody, but we certainly knew more about the issue and about where the pitfalls were by virtue of some early work on the subject than if we had waited until the legislative session and then had to start with, you know, 60 or 90 days to go. So at least, in that example, I think it was helpful to everybody.

So, Richard, you want to have a vote on whether we should do further work in the subcommittee on opt-in in as an available option for a trial judge under certain circumstances and --

MR. ORSINGER: Yeah. My only reservation is that if we come up with something good that somebody is likely to enact it, so --

(Laughter)

(Simultaneous discussion)

MR. YELENOSKY: Yeah. I'm concerned about the vote being taken as a ratification of the idea. I'd rather just have a vote on whether Richard ought to have more work. I can vote on that.

(Laughter)

PROFESSOR ALBRIGHT: Why do we need to vote on that? If the Court wants us to work on it, we need to work on it. If we need a vote, it should be, "Does anybody think it's a good idea or not?"

(Simultaneous discussion)

MR. ORSINGER: You know, I think that all of us would appreciate knowing whether there's anybody that really wants us to do this or not.

CHAIRMAN BABCOCK: Well, I think you just got the answer to that. So more work for you, Richard.

MS. SWEENEY: Go Richard.

(Laughter)

CHAIRMAN BABCOCK: And we want it to be really good, too.

(Laughter)

CHAIRMAN BABCOCK: Let's take a break.

MR. SCHENKKAN: -- but not effective.

(Laughter)

(Break: 10:55 a.m. to 11:17 a.m.)

CHAIRMAN BABCOCK: Can we go back on the record?

MR. WATSON: Do we have to?

CHAIRMAN BABCOCK: Yeah. We have to.

CHAIRMAN BABCOCK: And the issue is inchoate claims.

MR. ORSINGER: Okay. The subcommittee's --

CHAIRMAN BABCOCK: Do you want to tell us all what an "inchoate claim" is?

MR. ORSINGER: Let me say that the Jamail Committee had made proposals that we take away from the trial court the power to certify a class involving inchoate claims. The subcommittee was of two views as to what that meant. One was the mass personal injury/disaster type of inchoate claim like in the Agent Orange case, which I had already discussed a little bit, where people didn't manifest until later.

The other view was cases involving manufactured products that allegedly had a defect that could result in an injury to someone but either had not yet resulted in injury or it only injured a few but had not injured the many, but it had the potential.

And I'm sorry that Bill Dorsaneo is not here this morning, but I assume that I can repeat what he said,

and I'll try to be a little vague but accurate.

Bill has represented a defendant car manufacturer in a lawsuit -- a class action was filed alleging a defective seat belt, that in certain kinds of accidents the seat belt would not protect occupants. And the potential settlement, which I don't know how far the case has migrated, might call for a recall notice to go out, that people could bring their car in and receive a replacement seat belt, and then that would be about $150 cost to the manufacturing company multiplied by, you know, a million cars or whatever. It's a lot of money.

And Bill's perspective, being on the defense side of that is, the manufacturer did not believe that the seat belt was defective, but there were experts that the plaintiff's lawyers had that said that it was, and that if -- the potential of having to conduct an enormous recall like that gave the plaintiff's lawyers a lot of negotiating leverage even though the defense did not believe that there was any defect at all. It's just that if you consider the cost of a ruling of conducting a recall -- recall campaign, then, obviously, there's some level at which you'll settle.

And so he was more concerned with the manufactured item -- and I hope that Buddy will comment on this in a minute, because I know he's done the same thing in the computer area about defects that can result in a problem

but don't necessarily, and so having had those two views of what "inchoate" might mean, the subcommittee's feeling was that the problem with barring inchoate claim certifications is the one that I mentioned earlier that Tommy Jacks raised about the Sulzer Hip Implants, that there's only a limited pool of money and there's a lot of people out there that we know eventually are going to have the problem and it's probably better to let them participate even if it reduces everyone's pro rata share than to say that the people whose implants are not -- have not yet broken or become defective cannot participate knowing full well that when they suffer their personal injury there will no longer be a defendant or an insurance pool to compensate them.

So there are situations in which people whose claims are inchoate probably should have the right to participate or even be forced to participate unless they elect out so that just a complete banning of inchoate claims, as intuitive as that might be to somebody, isn't necessarily good. And so, as a subcommittee, we don't have a recommendation -- we're not -- the subcommittee never agreed that we should ban inchoate claims like the Jamail Committee did, and we always felt like a better way to approach the problem is to discuss the scope of a res judicata bar or a settlement bar.

I mean, let's just take for example, if

somebody has a car with the defective seat belt, if the settlement is that you have a coupon to come in and replace the seat belt, you're in an opt-out class, so you have that benefit. You didn't opt out. You didn't even know about it. And then you have a wreck and your spouse is paralyzed because of the defective seat belt. Was your opportunity to get that seat belt replaced -- does that create a bar against your suing for those personal injury that resulted from the defective seat belt which you didn't replace before the wreck? You know, obviously, it's not very fair if the personal injuries can't be compensated because of some $150 fix that you didn't know about, and, yet, as has been mentioned before, the defendants aren't going to be settling class actions if they can't buy some kind of effective bar, because there's no reason to forego the litigation opportunities to avoid liability -- put up a bunch of money and have that just be for the few people that came to this party but you have another three or four or five or ten or five hundred to go in the future.

As, I think, Richard said before, you know, no CEO is going to put any money of significance into a class action settlement if it doesn't buy their peace. So our subcommittee has not recommended that we adopt the inchoate problem, but that if there is a concern about how inchoate claims are affected, then maybe we ought to

investigate settlement bar or res judicata bar concept, which is probably not a rule of procedure anyway. It's probably law that the Texas Supreme Court needs to hand down or the Legislature needs to issue.

CHAIRMAN BABCOCK: Can you summarize for us, Richard, your understanding of what the Jamail committee proposal was on inchoate claims?

MR. ORSINGER: Yes. My understanding of the Jamail Committee proposal was that no class certification can include a category of people whose claims are inchoate. So in the personal injury context, inchoate would typically mean no physical manifestation because you cannot file a lawsuit without a physical manifestation.

In the manufacturing arena, an inchoate claim would mean, you know, that you have an arguably defective product but the defect hasn't caused an injury. From a commercial standpoint, you have suffered a loss: "I paid X dollars for something, and because it was defective, it was worth $500 less or $22.50 less." So you have suffered a claim in the manufacturing concept, in the commercial sense of getting something that's worth less than what you paid for it, but what we're all really worried about is how that might manifest itself into a more severe injury -- particularly a personal injury.

CHAIRMAN BABCOCK: Okay. So the Jamail

Committee proposes that inchoate claims be excluded from class actions. Your subcommittee unanimously thinks that that's not the way to go.

MR. ORSINGER: No. I wouldn't say that. I would say that we never developed a consensus to buy into that. I think there are aspects of banning inchoate claims that some people like, but some people don't like this idea of a settlement or res judicata bar against someone who's ignorant and who might later have a really severe injury that they can't compensate. So that's not to say that something shouldn't be done with inchoate claims, but the idea that the thing to do with inchoate claims is to ban them from class actions, the committee never got there. So we had no proposal we were agreed on.

CHAIRMAN BABCOCK: Okay. Well, let's see if we can get discussion on what people think about banning inchoate claims from class actions as a general proposition.

MR. EDWARDS: Let's define what we mean by "inchoate claims."

CHAIRMAN BABCOCK: Well, that's --

MR. EDWARDS: What are we talking about?

MR. LOW: Jamail didn't define that and the committee did not define it, so the definition means whatever it means to whoever reads it.

CHAIRMAN BABCOCK: Well -- yeah. Richard.

MR. MUNZINGER: Well, case law, as I understand it, says you can't file a cause of action for a personal injury that hasn't manifested itself by way of example. I think almost saying the words "inchoate claim" is a logical non sequitur. It's an oxymoron.

How can I be held to have been barred from asserting a lawsuit -- be it property damage or personal injury -- when I have no injury? Statute of limitations doesn't begin to run until I've been injured.

To attempt to set aside monies for people who might have a cause of action takes money away from those persons who do have a cause of action, for one thing. Secondly, it's setting money aside for people who may never be hurt. I don't -- I think the courts are going to get themselves into a morass. And I don't recall the Supreme Court of Texas case, but there was one recently that indicated, "If you ain't got a claim, you ain't got a claim." And I cannot imagine that we are going to have a class action that says, "Somebody may get hurt in the future, and we're going to protect those people who may get hurt in the future."

It depends upon the experts. The courts themselves have recognized you can hire an expert to say anything -- both the federal courts and the state courts all recognize that experts are for hire. They've said that

repeatedly. I know I'm speaking for the record, but that's what the truth is.

So why should we be having inchoate claims to protect people who can't take a claim to court? And the argument that the seat belt may break and may hurt somebody down the road and may then work to have res judicata bar them, I question that res judicata would bar the subsequent personal injury claim. I think it's a false issue and a false concern, and I don't think the courts ought to be having class actions for inchoate claims, because there's no such a thing. There is no right to be vindicated in court at that time.

CHAIRMAN BABCOCK: Buddy, then Carlos.

MR. LOW: First of all, on the bar, I mean, in most cases like that where you say you didn't get the benefit of the bargain, you exclude consequential damages. You can't sue for consequential damages. You got a defect and something happened, you can't sue, as you say, at that time for your consequential damages.

But if you've got a Firestone tire that even your own experts and your own documents show that on about 65 percent of them, the tread is going to come off like that, are we, as a nation, going to say "Get killed and then bring your lawsuit; we can't protect you"? Is that what we're for? I don't believe so. There's been no damage

except other than you didn't get the benefit of the bargain, but I don't want to ride on those tires, and I don't think anybody would. And that way, they can -- Firestone can get some protection.

The res judicata is not such an issue. There are things that you can't bring -- I can't bring a class action for damages -- personal injury damages. I can't do that. And the law -- I mean, if it's something you can't bring; you're not barred. In the asbestos area where somebody has got cancer, the Supreme Court says, "No," you know, "You have to have it." They're not barred because they have this. They get cancer; they can come back.

So I think there's more to it than just saying, "Okay. When you" -- "You can't have a class action, but when you get killed, your heirs, then, can sue for damages." Now, I'm not saying that there couldn't be abuses of the system. I'm not saying that there are not. There are abuses of our court system every day, but I think it should not be eliminated.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: The difficulty, I think, is in the -- necessity as well is in properly defining "inchoate." And we just need to be careful, because I think there's a difference between -- like the Bustojofsky (phonetic) case that came down was -- you know, the issue there was whether

it was really a separate injury. Are we talking about separate injuries or not? And there was some debate about whether it was. And the fear-of-cancer cases, it doesn't manifest itself, but I think -- I've read plenty of cases that say that fear that you now have, if the jury believes is reasonable -- and not some made up BS -- is recoverable. And so there's a difference between that and saying a hard drive that hasn't failed -- we don't know if it will.

Maybe there's an increased chance that it will -- I mean, what some people have called truly an inchoate claim -- it's a fine line, I realize, but it is important to make that distinction properly in whatever we end up doing.

CHAIRMAN BABCOCK: Okay. Yeah. Judge Bland.

HONORABLE JANE BLAND: I just want to note, it looked to me like on the first page of the Jamail report they have a definition. I don't know if it's one that this committee agrees with or not, but it says, "Injuries or claims are considered wholly inchoate where there has been no discernible or detectable manifestation of injury or damage using admissible expert evidence."

MR. LOW: What damage does that mean, economic or personal injury? What kind of damage?

MR. BOYD: Well, doesn't that -- excuse me. Doesn't that depend on what claim is asserted in the

pleading? I mean, to me, "inchoate," I'm not sure what -- I don't know if Garner has even got that in his dictionary. I don't know that that's a word that's part of our jurisprudence.

Legal injury is the standard. It goes to the question of case or controversy justiciable claim. If you file a lawsuit for property damage or breach of contract or warranty, then you are seeking economic damages unrelated to any injury that may come later from that, but you have an inchoate claim. You have a claim for the loss of the benefit of the bargain as opposed to the claim that you would have later if you didn't take the recall and sure enough the tire blows and you end up with a personal injury.

Now, I guess the question is: What if I'm a member of a breach of warranty class action against Firestone and I don't opt out and yet I don't go turn in my tires and two years later the same old Firestone tires that I had a right to exchange and didn't, I then have a rollover and I bring my personal injury suit, is there some bar there? I think there's a defense there, but not a res judicata bar as to the personal injury claim because that personal injury claim was never previously asserted.

So I guess my view on this is, it's -- you talked about asbestos and the Bustojosfky (phonetic) case.

I'm thinking about the other cases dealing with plural injury or plural plagues in the asbestos context where we know you had exposure, we know you breathed in fibers, on an X-ray we can see some sign of scarring, but you have no manifestation of impairment whatsoever.

Well, that's not an inchoate issue. That's a legal injury issue. "Is that a legal injury, justiciable or not," which I'm not sure the rules are capable of addressing. I think substantive law has to address that in the court and an opinion -- or the Legislature -- as to what is and is not a justiciable legal injury.

So I think we overcomplicate the issue by trying to address this in a class action context, because it really goes back to a legal injury context.

CHAIRMAN BABCOCK: Richard, and then Carlos.

MR. ORSINGER: One of the things I think to keep in mind is that if there's a limited fund, if all you do is allow the people with current demonstrable injuries to participate in it, they may get the whole fund. And it seems to me that there could be situations in which we can expect subsequent manifestation that the class action that involves the people with present manifestations should also have an advocate in the courtroom that we need to save enough money of what's available to take care of the people who manifest their illness or injury later on, and,

obviously, their interests are not the same. The inchoate class members want to have as much money set aside for future development and the people with current manifestations have present medical bills to pay and families to support. So they're irreconcilable in a lot of instances.

And if our rule says that the only people in the courtroom who are going to be dividing up the expected total fund for the damages are people with current injuries, then who's there advocating to preserve some assets for those who manifest later?

PROFESSOR ALBRIGHT: Can I just ask a quick question about --

CHAIRMAN BABCOCK: Yeah.

PROFESSOR ALBRIGHT: Okay. There is Rule 41(b)(1)(B), which is a limited fund mandatory class action. I've never been involved in one. I'm not sure I've even read a case about one, but, I mean, I keep thinking we've got rules that are intended to let courts deal with some of these issues case by case, and it sounds to me like we have so many different considerations. To try to make a broad rule will really complicate things, and perhaps it's better to deal with these issues on a case -- you know, if there was a case in controversy, it's probably for a reason. It seems like if you have a limited fund case, you could have a

mandatory class in a group and everybody who has manifested injuries or not yet manifested injuries and deal with it that way. Is that what they've done in the past in some of these -- aren't there some asbestos limited funding? I just don't know.

HON. TRACY CHRISTOPHER: We don't have class actions in personal injuries in Texas State Courts. There's no reason for us to worry about it --

PROFESSOR ALBRIGHT: That's true. That's true.

(Laughter)

HON. TRACY CHRISTOPHER: -- and to talk about it.

PROFESSOR ALBRIGHT: I forget about that.

HON. TRACY CHRISTOPHER: It's not one of our rules.

MR. LOW: Well, let's just create one.

(Laughter)

HON. TRACY CHRISTOPHER: It's unnecessary to talk about any aspect of personal injury in connection with this rule, because we don't have it.

MR. LOPEZ: But the fact that we don't have it, I've heard that argument a dozen times before. "Judge, this really doesn't change anything, so don't worry about implementing it, because it doesn't change anything." The

other side says, "Well, Judge, if it doesn't change anything, why are they so strongly asking you to adopt it?"

I kind of agree, inchoate claims, there really isn't -- you can't have a class action without an action, and so I agree with that. But why does that mean we have to write a rule then saying, "You can't have an inchoate claim class action"? If you can't have it -- we all know that you can't have an inchoate claim class action, because you don't have an action in the first place, why do we need to say it? I mean, it's the classic chicken-and-egg.

MR. LOW: The first place is whether that class representative as an individual would have a claim. He's got to meet that test or you can't have a class. So as Jeff said, you look at his pleadings. Does he have a cause of action? Is he likely to be able to prove a cause of action? And if so, you know, you can certify class. But if he doesn't have a class -- if he doesn't have a suit, he's out, all of his buddies are gone, too. So you look at the pleadings to see.

CHAIRMAN BABCOCK: Richard, do you have any sense of what the Jamail Committee was trying to -- what harm they were trying to fix with this concept?

MR. ORSINGER: No. I mean, I have my own personal opinion, but there are people in my subcommittee

that don't agree. I think that they were worried about, like the Stephenson case where people are expected to develop a cancer years down the road, but other people have manifested right now and there's a fight between the money, but then Dorsaneo read the same language as I said and said, "This has nothing do with personal injury. It has to do with manufacturers who create a product that you have an immediate cause under the UCC, but there's a danger of a personal injury at a later time." And I don't think that we ever had a single mind, so we were trying to cover both bases to give Bernal and other cases say, "There's no class actions involving no large groups of plaintiffs with the same personal injury, then let's refocus on what the manufacturing angle is."

We had no clear understanding of what this was supposed to accomplish, but a lot of concerns about what it might do, I would say.

CHAIRMAN BABCOCK: Yeah. I was on the committee, but I wasn't on the subcommittee that worked on this, so I must say, I --

MR. ORSINGER: I think that subcommittee was one person, as I understand it.

CHAIRMAN BABCOCK: That would be a reason why I wasn't on it.

(Laughter)

MR. LOW: What was the name of the committee?

(Laughter)

CHAIRMAN BABCOCK: Justice Hecht, do you have any sense of what this was trying to tackle -- what problem this is trying to tackle?

JUSTICE HECHT: Well, the committee first started meeting two years ago, and -- the Jamail Committee, and so there may have been in their thinking some of the, then, just sort of departing from the stage asbestos or personal injury class actions where subclasses were certified of everybody who hadn't got this yet but may wake up some day with it and trying to settle those claims.

I think Tracy and others are right. I mean, that's pretty much behind us now, but I suspect that some of them were thinking about the commercial claims that Dorsaneo has mentioned. So -- I don't know. I mean, this may be something they need to look at again or that we just need to consider in that light, because I do -- I do think -- the point has been made several times that it's not fruitful to talk about personal injury --

CHAIRMAN BABCOCK: Right.

JUSTICE HECHT: -- litigation.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: But, see, if you had -- I mean, I can see a situation where a manufacturer puts out a product

that they know is going to cause more harm -- has a greater risk than they had anticipated and some lawyer files a suit and they all kind of get together and they say, "Okay. We're going to have a class action. We're going to bar all of these potential claims and we're going to pay you lawyers a bunch of money and these people are going to have -- they're not interested, because they haven't been hurt yet, and then they're barred."

Maybe they were thinking about something like that, but that -- bigger bar than that, and that is, you know, personal injury or damages -- so many things you just can't have reliance. You -- I mean, are individual issues --

CHAIRMAN BABCOCK: Well, I mean, it does happen that the cell phone class action cases -- the claim was that cell phones cause cancer and that there's an easy fix, and that is a headphone and that the manufacturers are not including headphones as standard equipment in the package; and, therefore, there ought to be a nationwide class certified, and the relief that the Court should award is headphones and should say to the manufacturers, "Hey, you've got to provide a headphone with your" -- you know, an ear piece and a wire -- "so as to make the cell phone safe."

None of the individual plaintiffs -- the

representative plaintiffs had any manifestation of injury. They didn't have any -- didn't have brain cancer. They didn't have, you know, ticks. They didn't have, you know, anything.

MR. LOW: I agree, but they are not -- their suit, as Jeff points, is to do that and not to compensate for something that may happen in the future. So you got to look at their pleadings. Their pleadings were to do that. And I have no disagreement with that, but I think maybe the committee had gone beyond that and taken it a step further.

CHAIRMAN BABCOCK: Well, is that an inchoate claim or not?

MR. LOW: You know, I've been trying to find out for a year and a half what an inchoate claim is, and I don't know.

MR. EDWARDS: The claim for not getting what you paid for is not inchoate. You didn't get what --

CHAIRMAN BABCOCK: No. You paid for the cell phone. The cell phone --

MR. EDWARDS: You paid for the cell phone and the cell phone --

MR. LOW: Reasonably.

CHAIRMAN BABCOCK: It works.

MR. EDWARDS: -- it works. It performs as a

cell phone, but only with danger beyond what you would expect. Let me put it -- let's take the cell phone out of it and make it a parachute.

(Laughter)

MR. EDWARDS: The parachute manufacturer has defective landing gear that testing shows that 2 out of 100 are going to fail and you've sold 100. Does everybody in the 100 have a cause of action to get their money back or do they have to wait to see whether they're one of the two?

(Laughter)

MR. EDWARDS: Okay? It's easier to see that way.

(Laughter)

CHAIRMAN BABCOCK: You certainly looked at that example differently.

(Laughter)

HONORABLE JAN PATTERSON: That makes it all clear to me.

(Laughter)

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: Yeah. I thought Jeff's answer to that earlier made sense. I mean, you're talking about a product claim -- product liability claim which is not inchoate in any way if you can prove your point that you

were sold something that doesn't meet the implicit standard of being reasonably safe or whatever. That -- there's nothing inchoate about that. That exists. That's separate from the possibility that somebody could get hurt later.

And I guess I don't -- is the current state of law that somebody who sued for a product liability claim could establish res judicata that would prevent a later claim by somebody who unknowingly used that defective product? Because if not, then what are we talking about?

MR. EDWARDS: First of all, there can't be a product liability claim if the only damage is to the product itself.

(Simultaneous discussion)

MR. EDWARDS: Number one. It's not a product liability claim.

MR. ORSINGER: It's like a breach of warranty claim.

MR. YELENOSKY: Breach of warranty claim. So it's a breach of warranty claim. So can there be a class action breach of warranty claim which leads to res judicata on future tort claims?

MR. LOW: Well, there's an argument, but it's hard to see how you would be res judicata on something you couldn't have even brought to start with.

MR. YELENOSKY: Well, right. And I think

Jeff said there might be defense raised, which is, "Why didn't you go in and exchange it," but I don't see how it could be res judicata.

MR. BOYD: Well, that's two --

CHAIRMAN BABCOCK: Go ahead, Jeff.

MR. BOYD: Do you know, in your case -- in the cell phone case, what cause of action was pled?

CHAIRMAN BABCOCK: Well, it was different, though. They were filed all over the country and there was different claims. The first one that was filed was in Louisiana and the cause of action was redhibition.

(Laughter)

MR. SCHENKKAN: Which we're all into.

MR. ORSINGER: Spell it for the record.

CHAIRMAN BABCOCK: It's spelled I-N-C-H-O-A-T-E.

(Laughter)

CHAIRMAN BABCOCK: Okay. Here's the -- with the Court's permission, I wonder if we ought not to do this: What if Richard and Bill and I talk with the Jamail Committee and sort of update each other on where we think things are right now, and if we need to put pencil to paper and come up with some additional language, then we can do that for the next meeting. And if the Jamail group thinks that the law has outpaced their draft and it's not a problem

anymore, then we can do that.

Does that sound like a plan of action?

MR. EDWARDS: If Dorsaneo, who's on the other side of that seat belt case, is going to be in on that conversation, I'd like to be in on it.

CHAIRMAN BABCOCK: You bet.

MR. EDWARDS: Since I'm on the other side.

(Laughter)

MR. LOPEZ: We might just get it mediated.

CHAIRMAN BABCOCK: We'll, see if Jamail can settle your case for you.

(Laughter)

MR. LOPEZ: Charge $350 an hour.

CHAIRMAN BABCOCK: What is that, admission or a --

(Laughter)

CHAIRMAN BABCOCK: Go ahead.

HONORABLE TOM GRAY: And it may or may not play into what you-all are going to be looking at, but somewhere rolling around the back of my head is something about, the Legislature this time passed a statute of repose for used equipment or manufacturing equipment or something that may play into that factor of whether or not you would want to do this type of thing for an injury that had not yet occurred, or something. You-all may want to see if I'm

right on that.

CHAIRMAN BABCOCK: Okay. We'll look at that.

Richard, that was all I had on my list of class action issues, the effective date, the opt-in and the inchoate claims. Anything else that you wish to bring to our attention?

MR. ORSINGER: No.

CHAIRMAN BABCOCK: Okay. Then the next item on our agenda is the ad litem, which is the subcommittee chaired by Bobby Meadows and which Judge Bland took us through some of the issues in August.

Bobby, where are we on this?

MR. MEADOWS: Well, I want to go back -- we have a draft proposed rule that I think was taken up some -- briefly at the August meeting. The discovery subcommittee met twice by telephone in preparation for this discussion and examined the existing rule and the draft rule put forth by the Jamail Committee and came up with its own alternative.

Jane Bland has been the closest to it and did the actual drafting of what came out of our subcommittee. She led the discussion in my absence at the August meeting. And if it's all right with her, I'm just going to let her pick up where she left off and invite other members of the subcommittee, as well, to join in.

CHAIRMAN BABCOCK: Okay. Judge Bland.

HONORABLE JANE BLAND: Well, as I remember it -- and you-all will have to remind me, because I left my transcript at the hotel, and I meant to look at it this morning, but as I remember, we didn't get past -- on the subcommittee draft that's being passed out, 173.1(a), and I think we had kind of ended our time in the middle of a discussion about whether we needed to have definitions of a guardian ad litem and an attorney ad litem as the -- if you have a copy of the committee draft and then a copy of the Jamail Committee report, the Jamail Committee report sets out two different definitions, one for an attorney ad litem and one for a guardian ad litem, and the subcommittee took that out, because their view was that it just was a basis for confusion and really that this rule was only to apply to guardian at litems and that there were other rules that set up the appointment of an attorney ad litem, like service-by-publication rules and those kind of rules.

So I think that's where we left off. And I'll just now invite comment, if there is any other comment on that issue.

CHAIRMAN BABCOCK: Judge Bland, the draft that is being handed out has a 173.1, .2 and .3, and the prior draft that we were talking about had a Subsection .4 and .5 and .6.

HONORABLE JANE BLAND: I think --

HON. TRACY CHRISTOPHER: That's the Jamail report.

CHAIRMAN BABCOCK: Is that the Jamail Committee report?

HON. TRACY CHRISTOPHER: That's the Jamail report.

CHAIRMAN BABCOCK: Okay.

HON. TRACY CHRISTOPHER: Ours -- the committee was always the smaller -- the shorter one.

HONORABLE JANE BLAND: The committee took the Jamail draft and went through it and felt like it could be shortened, and so there are -- and that's why -- I thought it's helpful to have both in front of you in case there are things that the committee took out that ought to be left in and that kind of thing.

CHAIRMAN BABCOCK: Great. Thanks.

MR. YELENOSKY: Chip, I do have a question.

CHAIRMAN BABCOCK: Yeah, Stephen.

MR. YELENOSKY: On your point about distinguishing guardian from an attorney ad litem -- if I heard you right, you were saying, the point was that this would just applies to guardian ad litem. And under "Compensation," there's a provision, "if the person is an attorney, to be paid a reasonable hourly fee." Why would

that be?

You know, I mean -- are you saying that -- I mean, if the person --

HONORABLE JANE BLAND: Well, a guardian ad litem -- and it's contemplated under this rule, is an attorney and acts as an attorney, but that's different than an attorney ad litem rule. Normally, the guardian --

MR. YELENOSKY: Could be an attorney, but wouldn't necessarily be. Right? The guardian ad litem.

HONORABLE JANE BLAND: The guardian ad litem?

MR. YELENOSKY: Would it necessarily be an attorney?

HONORABLE JANE BLAND: You know, there's nothing in the rule that requires -- under the old rule, there's nothing in the rule that requires the person be an attorney, but I think, typically, when an appointment is made, it is an attorney. And at that -- and if the person is an attorney, the statement under "Compensation," that's from the Jamail rule. I don't think we changed that.

I guess the idea being if you appointed a guardian ad litem who's not an attorney, then perhaps they are not compensated.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: Could a person be -- could a lawyer be appointed as an attorney ad litem for a child and

escape the terms of this rule?

HONORABLE JANE BLAND: Escape the terms of what? I'm sorry. I didn't hear you.

MR. ORSINGER: This rule.

MR. ORSINGER: A guardian ad litem who happens to be an attorney is on an hourly rate, but what if you're appointed as an attorney ad litem and not a guardian ad litem?

HONORABLE JANE BLAND: Well, I mean, although the terms are often used by lawyers interchangeably, a guardian ad litem is somebody appointed to represent the minor interest -- the interest of a minor child or an incapacitated person. An attorney ad litem, at least as we use it in Harris County -- and I understand there might be some confusion about this, which is, I think, why we got into a discussion about, maybe it is important to define the roles, but an attorney ad litem is somebody who's appointed in the absence of the litigant to go find the litigant, usually --

MR. ORSINGER: I don't see -- I think --

HONORABLE JANE BLAND: -- like under the service rules.

MR. ORSINGER: Your compensation provisions are needed, but I think that for you to not specifically say that someone who is appointed as an attorney ad litem

only is not subject to the limitations of 173.2 is going to be used as a vehicle by trial judges and lawyers in various parts of the state to escape the limit of a reasonable fee for time necessarily spent.

HONORABLE JANE BLAND: Well, if they're appointed under this rule at all, they're subject to those compensation provisions. So to the extent somebody is appointed under this rule -- I don't care how you characterize it -- they should be subject to these provisions.

MR. ORSINGER: You know, I just can tell you that that's not the way it's done around the state. There's a lot of people that are appointed as an attorney ad litem either under this rule because they don't say -- they don't say their authority. They just appoint them either under this rule or with no authority at all and I --

HONORABLE JANE BLAND: So you'd feel more comfortable if we had the two definitions and included both in the rule?

MR. ORSINGER: Well, certainly, I would. And the family lawyers have fought over this for 20 years and we now have a very, very elaborate distinction between an attorney ad litem and a guardian at litem, but I'm not telling you you have to define it. I'm just saying that maybe you ought to take -- make this rule apply to an ad

litem and not limit it to a guardian, because where the abuse occurs is likely going to be because the trial judge is complicit in the abuse. And so if the trial judge feels that you can appoint an attorney ad litem, forget citing the rule and that it's not under this rule; and, therefore, it's not under this restriction, then you're going to end up with some kind of enormous fee representing a minor and not doing much work.

So it seems to me that --

HONORABLE JANE BLAND: Would it be better, Richard, if we just left -- just called it "ad litem," and then that way it would apply to any ad litem, and we wouldn't have to define the rule?

HON. TRACY CHRISTOPHER: Don't we have a whole separate rule concerning ad litems in family court? Isn't that what --

MR. ORSINGER: Yes.

HON. TRACY CHRISTOPHER: -- House Bill 1815 is.

MR. ORSINGER: We have more than just that. We have -- but we do have a scheme in the family code that draws those distinctions, and so I don't think that this rule would be used in a custody case or a termination case.

HONORABLE JANE BLAND: No. It excepts out -- it excepts out, you know, ad litems that are permitted by

statute or other rule, which would be the family ad litems or probate or any other situation where they're being appointed under something other than this rule.

MR. ORSINGER: You know, all I can -- and I don't want to even take you into this debate that the family lawyers have had, but all I'm saying -- the only point I'm making is that I very strongly support the idea of not giving the trial courts total discretion on how much compensation to give to an ad litem, and I don't want this rule, which everyone thinks is going to restrain that practice, to be easily avoided by a trial judge appointing an attorney ad litem, not citing any authority, and then saying, "Since they're not a guardian ad litem, Rule 173 restrictions don't apply."

HONORABLE JANE BLAND: All right. So maybe it would be better if we went to the Jamail -- back to the Jamail report's definition or possibly just say "ad litem" and not try to characterize the nature of the relationship.

MR. ORSINGER: Well, then -- I mean, to me, if you don't say "under this rule" and if you were to say, "A person appointed as an ad litem," that might fix it and you don't even have to define the difference between attorney, because I think your -- I think it's unwise, but I can understand that you're perpetuating the current practice that, you define a guardian ad litem, but when you say

they're an attorney, then they also have all of these powers of an attorney ad litem. That's what this does. That's the way the law is. That was the problem in family law. And what do you do if you're both the guardian ad litem and an attorney ad litem and the child you're advocating for takes a different position from the one you think is right for the child? And the family code depicts that by staying, you withdraw as the guardian ad litem and you stay on as the attorney at litem and you advocate the child's views without regard to your own personal opinion.

You guys haven't gotten to that degree of sophistication, and that problem does exist here. But the only comment I'm making now is maybe we can change 2(a) so that some judge and lawyer couldn't get around the control over the compensation by signing an order that doesn't have words that it's not under this rule.

HONORABLE JANE BLAND: That's fine, because I don't think anyone on the subcommittee was contemplating possible circumvention of the rule based on the characterization of the appointment. So if you want to just say "an ad litem" and not characterize it -- and I do think across the state, it appears -- at least from talking to people, that there is -- sometimes those terms are used interchangeably to mean the same thing, i.e., representing the interest of a minor.

CHAIRMAN BABCOCK: Okay. Judge Christopher. Then Paula, then Buddy and then Stephen.

HON. TRACY CHRISTOPHER: Well, there's a whole section in House Bill 1815 about how ad litems are going to be paid. So I thought we should have this rule just to cover civil suits and not family -- you know, parent/child relationships. I mean, we have a whole statutory scheme in 1815.

MR. ORSINGER: I think that's a great idea, but the problem I'm addressing is the problem on the civil side.

MR. MEADOWS: Is there another mechanism for appointing an ad litem other than by this rule?

MR. ORSINGER: If you look at any of these files, you're going to find that they don't invoke a rule and often they don't tell you what you are. They just say, "You're ad litem." It's a very sloppy practice around the state. And even though, intellectually, you're -- maybe you don't have authority under the rules to appoint an attorney ad litem other than for an absent defendant. There's a very poor understanding of the distinction between the two.

I mean, if you guys don't see this problem, then I'll just shut up, but I see the problem all the time.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: It is definitely a problem.

Judge, here's the issue that I wish you-all would address, because I think you-all started to work at it.

The real-world problem that we started talking about last time in the meeting -- and we were kind of rushed -- is this: You know, you're sitting in your office and you get a call out of the blue from some judge saying, you know, "You're ordered to be an ad litem," and it's a huge case and you're expected to go down and be an ad litem. And the spectrum of opinion as to what that means goes all the way from "walk in, read the file, meet the client and tell the court, 'Yes, it's in the minor or disabled person's best interest,' or, 'No, it isn't.'"

At the one extreme of not having huge involvement; two, at the other extreme, if necessary, take over the case and try it because counsel is inadequate or there is no counsel and settlement is inadequate and you should blow the settlement, take on representation, go get witnesses that haven't been gotten, spend a ton of money and a lot of time because it's your obligation to represent the best interest, as you've got here, a party's interest that is not otherwise adequately represented.

So if you've got language like "to protect the party's interest that is not otherwise adequately represented," and then you, at the same time, go to the other end and say --

HONORABLE JANE BLAND: She's referring, I think, to 173.2(b). Is that right?

MS. SWEENEY: Yes.

HONORABLE JANE BLAND: Just to know.

MS. SWEENEY: Proposed limited participation of proceedings, Section (b), first line on the second page.

So that's on the one side. When you have that language in there, it is -- not just by implication, it's almost clearly stated that you have to represent interest not otherwise adequately represented. That's saying you have to lawyer the case -- or at least it can be argued that way and it might end up with me faced with a malpractice suit against me based on ad litem representation. This is what they're going to be hanging their hat on.

So you've got that on the one hand. On the other hand, you're telling the lawyers in the court that you can't take into consideration in weighing the amount of risk, the size of the case in setting the fee, and you're trying very much to limit the role that the lawyer is supposed to be taking.

This rule -- my point is, there has to be a policy decision made, and I think it's one the Court has to make, and I think that direction should come before the rule can be written, that either the ad litem is, you know, on

the horse representing the client the whole way, do whatever needs to be done to get the best possible outcome for that client and maximize the recovery, which some people think that's your job, get in a big fight with all the other plaintiffs and hoard as much of the money as you possibly can, regardless of every decision that's been made by everybody else, for who you're assigned to represent, or, at the other end of the scale, just go in there and tell the Court it is or is not in the person's best interest, based on your evaluation in the case.

And I don't really have a strong feeling either way which way that should go, but until that decision is made and this committee can maybe vote and make a suggestion on that to the Court or not, if the Court is interested. But until that decision is made, it's really hard to write this rule, because you don't know the scope of the representation.

It's a terrible real-world dilemma right now for ad litems.

MR. LOW: One of the -- I had underlined exactly what she's talking about, "otherwise adequately represented." You don't know that unless you read those depositions and do all that. You shouldn't have to do that.

So what I have done, I've been appointed -- first time I got appointed, I blew the settlement because

they were claiming it wouldn't be taxable, and back at that time if you knew what a structured settlement cost, then -- there's constructed receipt and it's taxable. So that settlement got blown. I didn't get asked to be ad litem for a while.

(Laughter)

MR. LOW: So after that, I got asked, and I had represented a couple of ad litems that got sued because of what happened to the money. So I became more aware now of a little self-interest and protection.

So what I did, I told the judge, I said, "Judge, I will do that, but I want it outlined in the order appointing me that my duties are not to evaluate the value of the case. I want an order that the plaintiff's lawyer is adequate to do that, is doing that. I can assume that the overall case -- any settlement, that's a fair value and so forth, and I represent the minor only to the extent of dividing those as there is a conflict." So every time I've been appointed, and I put in the order that as soon as the money is deposited into Court, my duties are forever relieved. Now, maybe that is wrong, but that's the only way I would do it.

So I put it in the order, is the way I do it. And I think one of the evils -- I was defending a case, and one of the evils was, the best lawyer in the case was the ad

litem lawyer and he got a lot of money out of it that I didn't really want to pay, but -- I saw it and we paid a bunch of money.

Well, then it came time for the ad litem fee and the Fifth Circuits held that, you know -- I didn't find a Texas case, but the Fifth Circuit says you can't get paid for being the lawyer unless you -- you know, you get it from them. So we had a big fight in court. And I think that was what gave rise to this thing is, people were appointing -- judges were appointing their friends and they'd get a big fee. And so -- but I think it can be done, perhaps, in the order.

And then I have one more problem with it, and that is, it talks about when an appointment is required. That is when a party has no next friend. Okay? Assume -- usually, you file a lawsuit with a next friend, and sometimes it won't be the parent, it will be an uncle or somebody that's getting nothing, but he doesn't know anything. So you got that. A party's represented by someone who appears to have no adverse interest. He has no adverse interest, but he doesn't know anymore than my grandson about the lawsuit. Well, then, in that case -- it says "when required," but the judge should be able to and should appoint one in that situation and not just because of adverse interest. Just because the next friend doesn't know

-- I mean, he wouldn't have any idea, and there's not an adverse interest. So I think this should be another provision.

So if I can sum up, I have objection to that. I also think that the order can probably take care of it, because otherwise you won't know whether they're adequately represented.

CHAIRMAN BABCOCK: Stephen, did you have something?

MR. YELENOSKY: No.

CHAIRMAN BABCOCK: No. Judge Christopher.

HON. TRACY CHRISTOPHER: Well, I guess maybe the subcommittee was too heavily Houston, where we have a pretty clear practice that guardian ad litems are in civil lawsuits for the children, do not act as attorneys, and attorney ad litems are when you have an absent defendant. And, you know, I occasionally get orders in asking me to appoint an attorney at litem for a minor, and I always scratch it out and put guardian ad litem, because they have distinct roles in case law, but it sounds like that that distinction is not being followed in the rest of the state, and it would be useful to have a rule that outlined that.

So we in the committee will go back and work on that.

MS. SWEENEY: I have one more suggestion to

you-all. On 173.1(a)(2) where -- under reasons, "The party is represented by a next friend or guardian who appears to the court to have an interest adverse to the party," I would really, again, re-urge the point we made last time, that we need the language "may have."

This is almost an implied finding of conflict of interest, which is unfair in most cases. It ought to be "may have an interest adverse" as opposed to the implication here that it does have an interest adverse. So if you-all could draft to that, unless there's objection to it, because I think, otherwise, it's sort of an unfair slam at folks who --

MR. LOW: Or potential even --

MS. SWEENEY: Yeah. Yeah. That's --

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I was just going to say, in response to Buddy, when he first talked about this before, I liked the idea, except that it occurred to me, I don't know how a court makes findings that the plaintiff is otherwise adequately represented. So I don't know how any judge would --

MR. LOW: They can't accept -- when Mike Gallagher is the lawyer, you pretty well presume, "Well, Mike is going to get everything." You can't -- maybe you shouldn't, but -- and I'm not --

CHAIRMAN BABCOCK: You make certain assumptions about Gallagher, I would say.

(Laughter)

MR. LOW: Well, now that -- I'm not talking about all of them.

HONORABLE LEVI BENTON: But, I mean, everybody's got a bad hair day.

(Laughter)

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: Let me ask -- following up on Paula's policy question and then Buddy's question. If the minor truly is not being well represented in the case otherwise, would it be preferable to send -- to suggest that the minor go to the -- that probate proceedings be instituted to really have a guardian appointed? Because that's not something that I don't -- that a civil trial judge ordinarily is going to know a great deal about. It involves a whole lot of other issues rather than just what -- the lawyers making good arguments in the court.

I mean, if it's an uncle or, you know, somebody and you're afraid they're taking advantage or they don't know anything -- are they really going to hurt the minor -- that's really something that a probate court or somebody needs to look into and get somebody appointed that can actually guide the lawsuit as opposed to an ad litem

who, I think, the Jamail Committee had more in mind -- Paula was just going to do -- the last thing you mentioned, which was going to look at the case and say, "Okay. Dad, you're the kid and I think this is probably okay."

MS. SWEENEY: I think you've got issues at different stages of the lawsuit there. I mean, if you're already at the settlement stage, it's really going to be too late, most of the time, to send them to probate court and start over. You know, there might be a policy decision to write into the rules a procedure somewhere along the way for someone to make that motion.

You know, I see huge upheavals in litigation if we do that, but I don't think at the prove-up stage would be a good time to derail everything and go get a separate appointed guardian and start from scratch there.

MR. LOW: Right, because the judge, at that time, has got to decide, you know, the interest of the minor, and you put the people on, but it -- you know, if people just say "Yes, yes" to the questions -- and you're right. The judge can't know, because he doesn't know about all of the depositions and to ask the judge to find that they're adequately represented, that's probably gone too far, but he should -- he could and should outline the duties of -- because I got sued one time -- not me, but I represented a person that did because of some investment

later on. I mean, you know, where do your duties end? And I want it in an order, what I'm supposed to do and when I'm rid of it. And maybe that can be done.

JUSTICE HECHT: The Jamail proposal had a provision to that effect.

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: I've identified at least two sources of my confusion, and now there's maybe a third, but one was that Houston, apparently, does things a little differently, and the second source of confusion was, I guess I wasn't thinking about this being exclusive of the family law context, but -- and, therefore, this may not be a problem.

But, Richard, at least in the family law context, you can have an attorney ad litem and a guardian ad litem. Right?

MR. ORSINGER: Yeah, but usually they're combined, because -- just out of interest.

MR. YELENOSKY: Usually. But in my sort of peripheral experience with this, I've seen attorneys have been appointed attorney at litem to address a particular issue, and there is also guardian ad litem there. But regardless of it's confined to family law -- maybe it's not an issue here -- but I guess we should think about, "Does this rule work if you have both," because at least in that

context -- I mean, the guardian ad litem in the -- and there can be a separate attorney ad litem.

MR. ORSINGER: Well, I mean, it seems to me if a layperson is appointed as a guardian ad litem and they don't think that -- let's say typically it's the parents and the child and the conflict is inside the family. If they don't think that the plaintiff's lawyer hired by the parents is protecting the child's interest, then the only thing that the nonlawyer guardian can do is to go hire a lawyer, I guess, under this -- right -- because you guys don't believe the Court can appoint a lawyer. But if the lay guardian says, "This child needs an advocate in the depositions and in the mediation and I'm not a lawyer and I can't do that, so I'm going to resign as guardian and allow you to appoint a lawyer -- appoint another guardian who's a lawyer who's going to exercise legal judgment and exercise legal authority to negotiate, file pleadings, cross-question witnesses and all that" -- in family law, we've finally grown to differentiating the role of a guardian who in family law frequently is called to testify to their personal opinion about what the court should do and an attorney ad litem who never testifies to their personal opinion but is allowed to pretend he's a lawyer and ask questions and make objections and file pleadings.

And frequently we combine those two together,

at least to start with, on the assumption that, hopefully, the child will want to do what the guardian thinks is best, if the child is old enough to have an opinion. And then we start finding out, well, sometimes kids have different opinions from what the guardian/lawyer wants. So then what the heck do you do?

And the national standard and the one that's been adopted in Texas is that if -- you should -- if you're a guardian/attorney, you advocate what you think is right, but if the child disagrees, you have to inform the Court of the conflict and you have to withdraw as a guardian and just be an attorney for the child and let the Court appoint someone else to be a guardian to advocate what they think is right.

MR. YELENOSKY: Well, let me just get out my third -- I don't know if it's confusion or just point -- and was raised by Justice Hecht's comment that maybe we want to send things into probate -- remember that this rule is going to apply also for incapacitated adults and the considerations about throwing things into probate for incapacitated adults may be different, because certainly Advocacy, Inc. has always encouraged the courts to appoint an ad litem if necessary for a person, but not necessarily to shift that into probate when it's not necessary.

CHAIRMAN BABCOCK: Judge Christopher.

HON. TRACY CHRISTOPHER: I mean, I -- you know, again, maybe this is Houston practice, but I take the position that if you have an incapacitated adult, you have to have a probate proceeding brought for them, because there is no natural next friend to an incapacitated adult. The wife is not the natural next friend for the incapacitated husband. You have to go over to probate court and get the guardianship set up.

MS. SWEENEY: Not in Dallas. That's not the statewide practice by any stretch.

HONORABLE JANE BLAND: Well, what I suggest is that we go back and include in the rule some outline or definition of the duties of a guardian ad litem, call it "guardian ad litem representation" and put something in about when the representation terminates and -- based on the discussions today.

I've looked through the Jamail rule, and they don't really have that, either. So we can put that in and set out the role of -- you know, of the appointment with a little more detail so that there won't be, I guess, confusion about --

CHAIRMAN BABCOCK: Carlos, and then Justice Duncan.

MR. LOPEZ: Judge, when you do that, I would

suggest the committee give some thought to not -- everybody talks about settlement. I had -- it's been suggested to me when I was on the Bench many times that they be allowed to consider --

HONORABLE JANE BLAND: Well, we're going to get to that. That's under the next section. I was trying to move us down to the -- the next section on 173.1 is representation for more than one party, and this was to address the concern of siblings or others who are -- apparently, there's a common practice of appointing a separate ad litem for each minor, and this rule encourages one ad litem to the extent that ad litem can represent all minors faithfully, because there has been some concern -- and I think Harvey Brown -- I don't know if he did it on the record -- articulated to me the last time we were here -- Casey was familiar with where there were five minors and there were five ad litems appointed and they all charged -- they all did duplicate work and all charged a high fee, and that that was perceived to be overkill. And so this would encourage --

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: Are you talking about redrafting the rule to just address guardians ad litem?

HONORABLE JANE BLAND: Well, to take out the

family code, which I think we discussed last time, but specifically set forth that this is not to apply to House Bill 1815 or at the family code at all, to -- basically, to except out family law cases, and then say -- and then set forth what we think this rule is in terms of the duties of a person appointed under this rule.

HONORABLE SARAH DUNCAN: I see. That's circular. Are you talking about writing a guardian ad litem rule or a rule that addresses both guardians ad litem and attorneys ad litem?

HONORABLE JANE BLAND: I think, you know, we would try to address both.

HONORABLE SARAH DUNCAN: Address both?

HONORABLE JANE BLAND: Yes.

MR. ORSINGER: See, the problem that you're facing is the same problem that the family lawyers grappled with, which is, if you have a rule that authorizes guardians, but sometimes the guardians are lawyers -- they can to lawyer-like things and sometimes --

HONORABLE JANE BLAND: In fact, almost always in civil cases they're lawyers -- almost always.

MR. ORSINGER: Okay. So I think that what -- we have this old rule that goes way back, but, in reality and in practice, we've migrated to an attorney ad litem appointment practice -- in reality, and there may be reasons

to have a guardian ad litem who's not an attorney, but the duties to the children are different, if you actually look at this around the country.

And so if you say that we're going to have an attorney ad litem practice, then you have ethical rules that say that if your child is old enough to express an opinion, you have a duty to the child to advocate what the child wants, which is one reason, of course, to have a guardian, is because the guardian has no duty to the child to advocate what the child wants. And so as long as we're --

HONORABLE JANE BLAND: Well, that's why we said "guardian" --

MR. ORSINGER: I know that.

HONORABLE JANE BLAND: -- but I think there's enough confusion about the definition that we ought to include "attorney," and we're going to have to go back and we're going to have to articulate those roles and put them within this rule. But I think, even across the state, when civil courts appoint ad litems, they're not thinking of it in the representative capacity that an attorney ad litem in family court. They're thinking of it in a guardian capacity. In other words, they may not advocate the interest of a child.

MR. ORSINGER: If you appoint an attorney, as everyone here will tell you, they'll --

HONORABLE JANE BLAND: I mean -- I'm sorry. They advocate the best interest of the child, but the child may disagree.

MR. ORSINGER: If you appoint an attorney, they are going to be expected to act like an attorney to meet the ethical requirements of an attorney and will probably have duties of an attorney. And if you're attempting to call them guardians so that they can do what they think is best rather than what the child wants, then you walk the lawyers into the problem.

MR. LOPEZ: We've been doing that in Dallas for as long as I can remember.

HON. TRACY CHRISTOPHER: Case law says that a guardian ad litem has a fiduciary duty to the child. It is not an attorney/client relationship. I mean, there's case law that says that.

Now, apparently, that is not widely known or understood throughout the state, but that's the case law at this stage.

MR. SOULES: That's a guardian ad litem.

HON. TRACY CHRISTOPHER: The guardian ad litem.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: At the risk of showing my own stupidity, I don't understand an attorney ad litem in the

non-family law context. I don't understand that there is such an animal. I don't understand that there is a need for such an animal.

You've got a problem. I'm a plaintiff's lawyer and I'm hired by the Jones family, and I represent Mr. and Mrs. Jones who act as next friend of their minor children. I have an attorney/client relationship with the next friend who has signed a contract with me, and I pursue that litigation. The only time, as I understand it, that the guardian ad litem is required to be appointed is when there is a conflict of interest, which it seems to me comes up when there's a limited dollar fund to be divided among people who have competing interests.

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: I don't understand the concept of an attorney ad litem coming in and saying, "Wait a minute, Judge. Munzinger is asleep at the switch. He's got a Medicare card. He's too old to handle this case."

(Laughter)

MR. MUNZINGER: Let's get another guy to do this.

HON. TRACY CHRISTOPHER: Well, you and I are on the same page, but apparently the rest of the state isn't.

MR. MUNZINGER: You've got to be careful

before you start talking about attorneys ad litem, unless I've missed the boat somewhere and there is such a concept outside of the family law arena.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: There are attorneys ad litem. I know a couple of trust funds that have paid them hundreds of thousands of dollars when there was absolutely no conflict between one generation and another, and it's because all of the vagaries of ad litem law that I advocated at the last meeting -- and I still advocate -- that we need a rule that encompasses both. And if you want to abolish attorneys ad litems, fine, but let's have a rule that says so so that a group of defendants can't come in and force the plaintiffs to the higher -- pay attorneys ad litem for every single group of grandchildren beneficiaries.

I'm not disagreeing with your interpretation of the law, although I don't think it's as clear as you have said today. All I'm advocating is that, if we're going to go through the trouble of writing a new rule on ad litem representation of whatever varieties, let's make it clear, let's make it discrete and let's make it final.

CHAIRMAN BABCOCK: Justice Gaultney.

HON. DAVID GAULTNEY: I just want to say that I think that there has been a practice developed of attorney

ad litem for settlements. I mean -- and the problem is compounded by the fact that the case law is not clear. You'll look at the appellate opinions, if you get one of these type of cases, and you'll start reading them, and the appellate cases sometimes refer to them as "attorneys ad litems" and sometimes as "guardian ad litems." So there is confusion in the law.

I think we have a great deal to learn by the experience of the family law practitioners who deal with this every day in terms of the definitions and the duties they're using as applying to guardian ad litems and attorney ad litems.

So I would just recognize that there is some confusion in the law but try to address exactly what the duties are in this -- and I think some of this, frankly, is a lack of understanding of what the duties are, so that an attorney gets hired to represent -- gets called by the attorney, says, "You want to be attorney ad litem or guardian at litem in this case? We've got a settlement." Well, what are his duties? Well, he knows "guardian" is a big word. So they don't want to take on the duties of a guardian. I'll be an attorney ad litem in your case. I won't be a "guardian" in this $5,000 case.

I'm just telling you this practice exists at least in some parts of the state for small cases, and I'm

afraid it has gotten into the case law to the extent that you can -- there are law review articles commenting on the lack of distinction in the case law between these two roles.

So I think that this rule is an opportunity to define the two differences, but I also would suggest that we take advantage of the experience of the family law practitioners who have studied it in great detail.

CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE KENT SULLIVAN: I think there are two distinct issues. One is exactly the one that David outlined, and that is, there's just some confusion over the proper naming of the role. And I think that, you know, with respect to that, we can clear that up, hopefully, over time.

I think Jane and Tracy certainly have set out exactly what the law is and what the precedent is in the area, but I think, de facto, there is an issue that I've certainly run into historically, although it's been a number of years, and that is -- it's very similar to the one that Paula Sweeney outlined, and that is, someone is named guardian ad litem, and we'll, I'm sure, get to this with 173.2(b), and then there is some communication to the Court that the guardian ad litem needs to get active in the case, and often it is de facto a representation that -- much like Richard said -- the plaintiff's lawyer is not up to this. That is really what is being communicated in the case.

And then the question is: What happens now, where the guardian has communicated, "I need to attend the depositions. I need to be active in the trial of this case," which is clearly, I think, not contemplated, but the implication is that that's the only way the minor is going to be adequately represented, and there is something of a true dilemma there.

Anyway, I think that's the serious issue that is -- that is raised, and we hit it again in 173.2 Subpart (a).

CHAIRMAN BABCOCK: Judge Benton and then Carlos.

HONORABLE LEVI BENTON: I want to address something that Richard said and something that has come up this morning, and that's presented by 173.1(2), and that's when a appointment is required and the suggestion that it's required when there's a limited amount of money and there's a minor plaintiff and an adult plaintiff.

It does seem to me that even when there is more than just limited amounts of money available that an ad litem might still be required. It's my sense that an ad litem is required once an offer is made, and I think that ought to be -- because the adult's motives will be what they are, but might not necessarily be in the best interest of the child.

So even if it's a self-insured American Airlines or General Motors with lots of money, an offer is made that might be in the best interest of the child to take but the adult has other motives and interests; there's no -- that in my mind -- my view, rather, presents a conflict. Let's define the appointment of an ad litem.

CHAIRMAN BABCOCK: Carlos, and then Judge Bland.

MR. LOPEZ: Judge Benton, I think the way the rule is written, even right now, that would be your call.

HONORABLE LEVI BENTON: I don't think it's clear enough. I mean, I have arguments about it.

MR. LOPEZ: Well, I don't mean this -- I don't mean the proposed rule. I mean, the rule right now -- the existing rule 173. I think you would be able to decide that if you thought the adult had a conflict.

I think we run the risk of second-guessing the plaintiff's lawyer just because there's a conflict. I mean, the magic is not that it's a minor, really. I mean, ultimately, the magic is that -- if there's a conflict. And as a trial judge, I always felt I had cases where the ad litem was like, "Plaintiff's lawyer is not getting it done," and, you know, does that really -- does the judge have a duty to a minor to make sure the minor has great representation any more than the judge has a duty to any

other litigant in the court?

I mean, I've had cases where a lawyer stood up and did a terrible job and every lawyer in the courtroom came back -- unrelated to the case came back and said, "Gollee," and I said, "I know." Maybe a federal judge would throw that lawyer out and say, "You can't practice in my court if you don't know what the heck you're doing," but I think state judges have been a little more loathe to do that.

I just -- you know, I don't have an answer. Those are considerations the committee might want to take into account when you try to -- if you're going to go down the road -- a slippery -- very slippery slope of specifically delineating the duties, then you'd better go all the way and get very specific, because it's a morass.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: I pass.

CHAIRMAN BABCOCK: Pass to Judge Christopher.

HON. TRACY CHRISTOPHER: Well, could I just throw something out, which I don't know was talked about the last time with respect to this.

As a trial judge, I feel like we appoint ad litems too often. And when someone comes in -- you know, perhaps the injury is only to the child but the parents are, you know, getting their expenses and attorney's fees out of

it. So everybody says, "Well, that's a potential conflict, so please appoint an ad litem." So we appoint an ad litem and we listen to five minutes of testimony that, you know -- "$200 in medical bills and the kid is fine," and, you know, the settlement is $2,000 and we have to pay an ad litem 750 bucks to take on the fiduciary duty of representing that child or 500 bucks or, you know, whatever it is.

I don't know whether the sentiment is here, but I would like to have a much more narrow definition of when there is -- when the parents are adverse to the minor, when the parents can no longer, you know, decide that the $2,000 settlement is in the best interest of the minor.

So I'm throwing that out. I don't know whether other people feel the same way.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: That happens, and a lot of times, insurance companies will just say, "Okay. I'll just take a little release from the parent" indemnifying the release or something. They're avoiding it because they don't want to pay this $750 for a $1,000 settlement, you know.

CHAIRMAN BABCOCK: Luke.

MR. SOULES: And this is a real, of course, nest of problems, but say an attorney ad litem is appointed and determines that's there's not just the potential

conflict but there is an actual conflict between the minor and the parents and the ad -- the guardian ad litem says, "I want to hire another attorney because there is an actual conflict." Under those circumstances, under some of our ethical opinions, the lawyer who represents the parents in their individual capacity as a next friend would have to withdraw for everybody, and I think the committee should consider writing something into this rule that the -- if it should become necessary for a trial judge to appoint an attorney ad litem to represent the interest of a guardian ad litem or a minor, that that would not cause the lawyer who's handling the case to be disqualified.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: If we go back to the drawing board, maybe we ought to reassess whether we ought to stick with the guardian concept, anyway. If, as a practical matter, we're only appointing lawyers, then the only reason I can see to perpetuate the guardian concept is to try to say you have a duty to the court, not a duty to the child, which I have a serious problem with anyway, and we have a dysfunctional problem, that if we have a nonlawyer guardian who feels like there's a conflict, then they have to go get an attorney to represent the guardian. So now we're paying two people.

I really think maybe we ought to just

reassess this, because this -- we inherited this from the Middle Ages, I'm sure, or sometime way back before Texas was a state, and maybe we ought to just clean this up, eliminate the role of nonlawyer guardians in personal injury litigation, go directly to attorneys ad litem and say that they have duties to the client.

MS. SWEENEY: "Attorney ad litem" doesn't mean a guardian ad litem who is a lawyer, and that -- you know, just because somebody is a guardian ad litem and happens to be a lawyer doesn't spill you over into the realm of becoming an attorney ad litem and having to take on representation, try the case, advocate, et cetera, et cetera.

And that exactly is the problem that we're having in Dallas and other places where there is no demarcation as to what your job is. And if you stop short of taking over and trying the case, asking questions, getting experts, you run into the risk of a malpractice lawsuit and you become Buddy's client on down the road. So that's, again, why I think that we really need to crisp up the distinctions.

CHAIRMAN BABCOCK: Justice Jennings.

HON. TERRY JENNINGS: Well, it occurs to me that with the new committee draft -- the subcommittee draft, they purposefully left out some language here that was in

the old Jamail Committee draft, which was the old 173.1, "A court's power is limited. A court may not appoint, authorize or compensate an ad litem representative except as permitted by this rule or by statute."

Would reincorporating that language in any way or any different version help to solve this problem that's been identified?

HONORABLE JANE BLAND: Well, Terry, it is -- what -- we just didn't set it out separately. The language is there in Subpart (a), "When appointment required."

HON. TERRY JENNINGS: Well, it says "except as otherwise permitted by statute, the court shall appoint" -- mine says "shall appoint a guardian."

HONORABLE JANE BLAND: "Only if."

HON. TERRY JENNINGS: "Only." Okay. Got you. Never mind.

(Laughter)

CHAIRMAN BABCOCK: All right. Any more comments about this rule, or -- Judge Bland, anything else you want to discuss?

HONORABLE JANE BLAND: You mean the whole rule or just this part of Subpart (a) that we've been talking about?

CHAIRMAN BABCOCK: Subpart (a) and then the rest of it.

HONORABLE JANE BLAND: Does anybody have any comments on Subpart (b) about representation for more than one party?

CHAIRMAN BABCOCK: Frankly, I think we've been wandering around the whole rule, and not just Subpart (a), but --

HONORABLE JANE BLAND: Well, I mean, there are some other important changes on the back.

We talked a little bit about limited participation in proceedings, and I thought, you know, people may want to have more comment on that. It sounded like Paula was advocating that we make that less fuzzy and more specific.

MS. SWEENEY: Well, you just have to make a decision. You either don't participate and you only recommend to the court and you're a guardian ad litem, or you do participate and you're an attorney ad litem and it's your job to make sure the interests are adequately represented. I mean, it's got to be one or the other.

(Simultaneous discussion)

MS. SWEENEY: What you codified in the rule is exactly what we're dealing with, but it's not going to help us with --

HON. TRACY CHRISTOPHER: So the "except as necessary" is the problem.

MS. SWEENEY: Correct.

MR. WATSON: Yeah. You got it.

MS. SWEENEY: Exactly.

MR. LOPEZ: And there's a little drafting issue on (2).

MR. LOW: One thing we don't want to overlook is -- the thing that really brought this to the attention was people getting big fees for doing all of that and so forth, and we want to write something back in the rule that's going to allow the judge to appoint him. So we don't want to just do a whole circle and come back.

MR. MEADOWS: Is the sense of the room that we would have a limited scope of responsibility, and you accomplish that, at least for purposes of this discussion, by removing everything after "except as necessary"?

MR. WATSON: Unless you want it Richard's way.

MS. SWEENEY: Everything after "proceedings."

MR. MEADOWS: Right. I'd like to -- you know, I'd just like to -- before we go off and write it this way, it's fair to see whether or not that's the way the committee feels about it, because that's my sense of where we're headed with this.

MS. SWEENEY: Yeah. That's the -- it is the policy choice. That's right.

CHAIRMAN BABCOCK: Justice Hecht, do you have any comments about that?

JUSTICE HECHT: No. I agree. That's the policy choice. And if you don't limit it to that, then it seems to me that I don't know where we draw the lines, because you'll always have -- if the conflict that the ad litem representative perceives is over whether to take a deposition or who to call as the next witness, then that's going to be a huge -- I mean, that conflict never ends. And if the conflict is only, you know, the parents are going to get $500 and the minor is going to get $1,500, then that's -- it doesn't take very much work to perceive that's okay.

And, too, while I worry about the situation where a minor is obviously underrepresented -- and I've encountered that a couple of times on the trial bench, it seems -- two things: That there's another process for that, and that is the probate court -- the probate process. You need to go get a guardian. And that's a serious problem. And the second one is, I don't think a trial judge with a civil docket is in a position to make those kind of decisions most of the time.

And then, thirdly, just a huge amount of abuse -- not in Harris County, I assume, but around the state, there's a huge amount of abuse.

CHAIRMAN BABCOCK: Of fees you mean?

JUSTICE HECHT: Yeah.

MR. LOW: But, Judge, if you stop it, as necessary, the judge is going to give an unreasonable fee. He's not going to be very embarrassed to find "necessary," and so, therefore, I go in, and, "Well, this is necessary. I want you to do all this" --

MR. MEADOWS: No. No. We're not talking about that. We're going to put a period after "proceedings" and strike every -- "except as necessary," from thereon.

MR. LOW: Oh, strike "as necessary." I thought you meant --

MR. MEADOWS: No.

MR. LOW: Okay. Because --

MR. MEADOWS: My understanding was, put a period.

(Simultaneous discussion)

MS. SWEENEY: He said it wrong the first time.

MR. LOW: I'm sorry.

CHAIRMAN BABCOCK: Okay. Judge Bland.

HONORABLE JANE BLAND: This language came from the Jamail Committee, so I'm not sure why they had the exception put in, but I think it might be because -- not because of the expectation that the lawyer will substitute

in and participate in trial and depositions and discovery as they've set out, but it may be necessary for the ad litem to attend mediation, and, obviously, to attend the hearing to approve the settlement -- and do some work associated with that. So I -- you know, I don't have any problem with stopping at "proceedings." That sounds good to me, but, you know, there are things that -- there are times when -- there are cases where some ad litem participation and settlement negotiations is useful.

MS. SWEENEY: How about "except as ordered"?

HONORABLE JANE BLAND: That might be good.

MS. SWEENEY: Of course, then you're back to Buddy's problem.

MR. LOW: Right. And to participate, what if the judge says, "Okay. You don't have to participate, but you're going to have to be at every one of these depositions. You're not participating, but you're going to read them all"?

CHAIRMAN BABCOCK: Judge Benton and then Carlos.

HONORABLE LEVI BENTON: You know, at the end of each -- these minor settlement hearings, I almost want to always have the ad litem tell the court that the settlement is in the best interest of the child. And I don't know how an ad litem can do that if we really hamstring them in the

manner we have just proposed.

There are occasions where, in order to fully assess the case, you need to attend a deposition to assess a witness. I don't know how many -- I mean, if you need to do it in your capacity as a trial lawyer, I don't know why you would not need to do that in your capacity as ad litem if you're expected to look the Court in the eye and say, "Your Honor, this settlement is in the best interest of the child."

MR. MEADOWS: Can I speak to that just quickly, though, because it may be that we can improve the language, but I think the concepts are captured where we are. For example, if you look at the compensation and the entitlement to it, there's room for this. Under (b), you cannot participate in discovery of trial, but under (a), you can be paid a reasonable fee for necessary services rendered. And so if you need to attend a deposition to evaluate something for settlement -- or the mediation, maybe, is a better example --

HONORABLE LEVI BENTON: How about if you put "except on leave of court"?

MS. SWEENEY: But Buddy's point is, the same court is giving the $400,000 case --

HONORABLE LEVI BENTON: Yeah. Yeah. I'm sorry. Excuse me.

(Simultaneous discussion)

MR. MEADOWS: I just think there's room for this minor participating -- this minor involvement that's not actual participation in the representation.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: You may want to finish that line of thought, because my little drafting thing, it has nothing do with that. So I don't mind waiting.

CHAIRMAN BABCOCK: Okay. Remind me. Stephen.

MR. TIPPS: Well, a quick possible fix would be to say, "A guardian ad litem normally should not participate." I mean, you still have -- which would create the problem of an abusive judge to be going against the norm every time. I think that sends the right message.

HON. TRACY CHRISTOPHER: Well, that -- I don't think that helps Paula.

MS. SWEENEY: It doesn't help me.

HON. TRACY CHRISTOPHER: I think it would be better to have, "Don't do it unless you get a court order doing it." And then if the judge is abusing his or her discretion with that court order, that can be handled.

MS. SWEENEY: But then do I have a duty to get an order? Do I have a duty to make a motion every time? There's lawyers -- legal malpractice lawyers who will argue

that I have a duty to make a motion to get leave to participate. And, I mean, they're doing it now. There have been lawsuits like this.

There's -- it's a real difficult issue, and any time -- if you have anything in here other than "familiarize yourself with the case and make a recommendation to the Court," you step off the cliff into open-ended duty, and the arguments that can be made later, that, "No. You should have A, B, C, D and E," and, you know, you've got some little kid in a wheelchair and you're a defendant lawyer in front of a jury, that's an unenviable position to be in.

CHAIRMAN BABCOCK: Richard, and then Buddy.

MR. MUNZINGER: You might solve the problem by putting at the end of the current version of (b) so that it would say "protect a party's interest that are not otherwise adequately represented as determined by the court file a motion and a hearing thereon," because then if Paula has a concern that the plaintiff's lawyer is not doing his or her job, she tells the judge.

The judge now has to have a hearing. Buddy's concern that the judge is going to pat his friend's pocket is troublesome because that judge now has the competing interest that to pad his friend, the guardian ad litem's pocket, he's got to determine that the plaintiff's lawyer is

not doing his job. And that's a pretty stiff thing for a trial judge who's elected to say about a plaintiff's lawyer who is going to contribute to somebody else's campaign and fight him. He's going to have to be pretty careful about what he says in such an order.

CHAIRMAN BABCOCK: Carlos, and then Buddy.

MR. LOPEZ: I was contemplating suggesting that earlier, and I thought maybe it was too radical. So I'm glad somebody else did it --

(Laughter)

MR. LOPEZ: But the one time where -- I've done it. I mean, I've cut the plaintiff's lawyers fee pretty dramatically, because it was clear that he didn't know what the heck he was doing -- didn't do any of the work. You know, I didn't abuse it, but, you know, I paid the ad litem for every little thing they did and it worked out in the wash and everybody was happy. But if it was in writing, it might be better, if it was part of the rule.

CHAIRMAN BABCOCK: Yeah. Yeah. Buddy.

MR. LOW: Tracy, did you look at -- the Fifth Circuit case that I relied on when I was defending, they wanted a $2 million fee, the guardian ad litem did, and it was a Fifth Circuit case, and I don't remember -- it's fairly new, within -- when I say "new," it's within the last five years, I think -- that outlined, pretty much, the

duties and more or less that if you're going beyond that, you could -- should be compensated, but the court should order that it come out of the fee -- you know, not the -- that the defendants shouldn't have to pay for it. It's a Fifth Circuit case. I'll see if I can find it if you don't --

HONORABLE TRACY CHRISTOPHER: Of course, then we're confusing the rules of a guardian and an attorney again when we do that, and we're giving the guardian a financial interest in the outcome, which we try not to do.

MR. LOPEZ: No. It wasn't a percentage. It was still paying them hourly for all the stuff they did that they shouldn't have had to do had the plaintiff's lawyer done it. So it was just -- you know, we were being generous, but we weren't giving them an interest.

CHAIRMAN BABCOCK: Okay. Judge Benton and then Justice Patterson.

HONORABLE LEVI BENTON: I think Richard's suggestion is a good one, and I could live with it, except for I don't know that it would really be applicable to a circumstance where you have, maybe, American Airlines on the other side, unlimited amount of money and an ad litem might say --

MR. SOULES: Some days.

(Laughter)

MR. TIPPS: Continental.

(Laughter)

HONORABLE LEVI BENTON: American's stock is up. Their stock is higher than -- never mind.

(Laughter)

HONORABLE LEVI BENTON: There might be money on the table and an ad litem might say that -- money on the table for the minor and the ad litem might say, "Taking that amount of money is in the best interest of the minor now," and the adult and the plaintiff's attorney might have other interests and motivation. So I don't -- I think that's -- the suggestion you make is good. I just don't think it's applicable to that circumstance.

CHAIRMAN BABCOCK: Okay. Justice Patterson.

HONORABLE JAN PATTERSON: Okay. I hate to take us back to settled expectations, but --

(Laughter)

HONORABLE JAN PATTERSON: -- it seems to me that one of the problems is the expectations that change over time, and, obviously, they -- sometimes they have to, but it would be helpful to have some sort of expectations set out in the order at the beginning, and I wonder if we couldn't just alter the written order required to set forth the appointment and the scope of representation so at least there's an effort early on to address expectations and to

avoid the slip between the cup and the lip.

MR. MEADOWS: But doesn't that make it open-ended again? I mean, I think the scope should be restricted and defined in the rule.

HONORABLE LEVI BENTON: Yeah. I don't think that's any different than what Judge Patterson said, except for, I wouldn't call it "representations." I would say "duties."

MR. MEADOWS: Oh. I thought you were saying, Judge, that you would have an order that would set out the scope of the representation, and it could vary.

HONORABLE JAN PATTERSON: Well, it seems to me that -- perhaps you have more the outer limits of duties in the rule but that if there's a specific form of work contemplated by the parties at the beginning of the appointment.

CHAIRMAN BABCOCK: Stephen, and then Skip.

MR. YELENOSKY: Why isn't it the role of the guardian to determine that the attorney is not up to snuff and make that known to the court, or does the guardian, in fact, have the ability to hire another attorney? Why are we contemplating the role of the guardian in assessing the attorney with the guardian becoming the attorney once he or she assesses the attorney is not doing his or her job?

At least if there's a distinction -- clear

distinction between those two things, you know when you've got an attorney who's then been appointed by the court or whatever to serve as an attorney with all of the intended responsibilities and malpractice issues come with it.

I mean, we don't -- in other cases where you don't have an incapacitated person, you can have a bad attorney. You don't then call another attorney in to run along side that attorney. Presumably, the capacitated person realizes that they've got an attorney not doing their job and hires another one or complains about it in some way. I don't know.

MS. SWEENEY: I do like that option, that you are a guardian ad litem. You may not step in and try the case. You may, however, recommend to the court that another lawyer needs to be retained, or something. I mean, I don't know that you'd write that in the rule book, but conceptually that option is -- that ends the slippery slope, because you can't start sliding down it. You just tell the court, "I don't recommend" -- whatever -- "in the settlement. I think you need to go hire a real aviation lawyer," or whatever.

MR. YELENOSKY: Yeah. We're trying to make up for the incapacity of the individual to do what a nonlawyer would do in that situation, not to become a lawyer.

MS. SWEENEY: The only drawback to that and to the suggestion someone down there made -- and I can't see everyone, so I'm not sure who it was -- about having to go in and tell the court and get a finding that "This lawyer isn't doing his job," is that there's already so much unpleasantness in the practice, that, you know, now let's codify another way for lawyers to swing at each other. That's just so distasteful.

CHAIRMAN BABCOCK: Skip, and then Richard.

MR. WATSON: This is just a question about the rulemaking. To me, this is an area that, obviously, is crying out for clarification, and the question is: Is it -- it's mighty tempting to me to define whether you use the word "duty" or not to define what the duties or responsibilities are in the rule, that, "This is what the guardian shall do," and perhaps, you know, it can be done negatively, "Shall not do these things," or -- but on the other side of that -- and this is really addressed to Justice Hecht. Is that also the kind of thing that is more appropriately addressed by opinion? And I'm not expressing an idea. I just don't know what the Court's desire is on the idea of expressing -- clarifying confused duties in a rule by setting forth areas of responsibility and areas of nonresponsibility.

JUSTICE HECHT: Well, no. I mean, I think we

could clarify in the rule what this person is expected to do. And maybe there are different levels or -- but I don't see any impediment to clarifying this. I think the history of it is -- somebody said earlier, we've had this rule since God was two, and --

(Laughter)

JUSTICE HECHT: And back -- a long time ago, people all were on the same page, but it's obvious from listening to the discussion here that we're not, and some of the stories I hear from lawyers around the state are that there are just immense differences in how this old rule language is applied. So I think we should try to do our best to clarify it.

CHAIRMAN BABCOCK: Okay. Justice Duncan, and then Richard.

MR. ORSINGER: I was in line next.

(Laughter)

CHAIRMAN BABCOCK: Sorry, Sarah. You've been overruled by --

(Laughter)

(Simultaneous discussion)

CHAIRMAN BABCOCK: Two more comments, and then we'll have lunch.

HONORABLE LEVI BENTON: Okay. I was going to say, I don't know about the rest of the state, but at the

215th, we eat lunch at noon.

(Laughter)

CHAIRMAN BABCOCK: Two more comments. I was hoping we'd get through this, but I don't know if we're going to do it.

MR. LOPEZ: Let me slip in my 10-second drafting comment. Now's a good time as any.

CHAIRMAN BABCOCK: Okay. Richard, will you yield to a 10-second drafting comment?

MR. LOPEZ: I promise it will be quick. I just offer this for the committee's consideration.

173.1(b), where it says, "The same ad litem representative may be appointed for more than one party if it appears to the court," if we're going to be consistent and we're scared about what we're scared about, we ought to put the word "only" in there as well. "May be appointed for more than one party only if it appears to the court."

HONORABLE LEVI BENTON: I'd rather come back to that whole provision, but after lunch.

(Laughter)

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I feel the same way that Skip does, this whole rule tells you you can appoint somebody, but it doesn't tell them or us what that person does, and we're all assuming that they are going to squeal to the

district judge if they don't agree with the settlement, but it doesn't say they can or should. It doesn't even say they should evaluate the settlement. It doesn't say they have the opportunity to file a written recommendation or testify, prove up or whatever and -- I mean, I think we ought to ask ourselves, "What are we expecting the guardian ad litem to do?" And if they're never going to do anything that a lawyer does, then let's have them perform some kind of testimonial function where they testify to the judge to their own opinion about whether the settlement is good or bad, or if they are going to have the role of a lawyer, well, obviously, they can't testify, but this rule doesn't -- this rule doesn't tell you what you can do and as modified, it basically says, even though you're a lawyer and you're appointed as a guardian, you can act like a lawyer, but we don't give you the authority to do anything else.

So I agree with Skip, we ought to say in here what are you expected to do if you're a guardian, and maybe we ought to have an appointment for settlement purposes and maybe that ought to be more narrow, evaluate the settlement and tell the court whether you think it's fair to the child or not. And maybe we ought to have an appointment for other purposes besides just for settlement, in which event, maybe they could have a role to participate like a lawyer in

depositions sending discovery or even hiring an independent expert to evaluate some claim.

But this rule really says, "We appoint somebody. They can't be a lawyer, even though they are a lawyer, but we're not going to tell you what they can do."

CHAIRMAN BABCOCK: Okay. Final comment before lunch. Justice Duncan.

HONORABLE SARAH DUNCAN: Just two points. I would urge the subcommittee to consider that an ad litem -- probably going to denote from her -- is not just appointed in the settlement context of car wreck cases or cases in which the ad litem is going to be paid by the defendant. There are self-financed plaintiffs all over the state who may have to pay these fees as they accrue.

Two, I don't understand why the only person who gets paid a reasonable hourly fee is an attorney.

MR. SOULES: Is a what?

HONORABLE SARAH DUNCAN: Is an attorney. That smacks of self-interest to me.

HONORABLE JANE BLAND: I'm sorry, Sarah. I didn't hear the very end of your first comment or your second.

MR. WATSON: Say it again.

HONORABLE SARAH DUNCAN: I just urge the subcommittee to consider that ad litems are appointed in

cases other than --

HONORABLE JANE BLAND: I heard all that part. I didn't hear the last bit of it in your second --

HONORABLE SARAH DUNCAN: Well, I don't know what the last bit of the first part was.

MR. MUNZINGER: She didn't understand why do only lawyers get paid an hourly fee.

(Simultaneous discussion)

HONORABLE SARAH DUNCAN: That was the second point.

MR. ORSINGER: The way this rule is written, a layperson guardian cannot get compensated, but a lawyer gets an hourly rate. She says, "Why shouldn't a layperson get compensated?"

HONORABLE JANE BLAND: Okay. That's what I didn't hear, then. Yeah. I agree.

CHAIRMAN BABCOCK: Okay. For planning purposes, I think it is likely that we're going to go into Saturday, no matter where we are in the agenda. Don't you?

JUSTICE HECHT: Yes.

MR. SCHENKKAN: Chip, could we have just a brief, kind of overview of what your intent -- present intentions are as what points we'll take up in what order?

CHAIRMAN BABCOCK: Yeah. We're going to finish this. And then we're going to go to the evidence

issues that Buddy Low is the chair of. And then we're going to take up the Rule 76(a), which Orsinger has got. I don't know how extensive that conversation is, but it's an important issue. And then we're going to do the prefiling investigative depositions, which is Rule 202.

MR. SCHENKKAN: And so the notion would be, we would think, that the evidence would take us deep into the afternoon and we'll get into 76a late in the afternoon?

CHAIRMAN BABCOCK: That's what I would suspect.

And we'll have lunch.

(Lunch recess: 1:00 p.m. to 2:00 p.m.)

CHAIRMAN BABCOCK: Okay. Back on the record. And Judge Bland or Judge Christopher will continue to lead us through this.

HON. TRACY CHRISTOPHER: Judge Bland will.

HONORABLE JANE BLAND: Okay. We were on Subsection (c) on compensation, which is a hearing on completion of representation, and it sets forth -- I think it basically codifies existing case law and sets forth that the Court has to conduct a hearing to determine the amount of fees and expenses that are reasonable and necessary and they must be based on a reasonable hourly rate. They may not -- the Court may not consider compensation as a percentage of any judgment or settlement, and that was to

prevent ad litem fees being a contingency fee in nature or, you know -- in other words, a very, very large settlement doesn't necessarily mean that the ad litem should get a very, very large fee.

MS. SWEENEY: Can I comment on that, Chip?

CHAIRMAN BABCOCK: Sure. If it's all right with Judge Bland.

MS. SWEENEY: What's that? Is it all right?

HONORABLE JANE BLAND: Oh. Of course.

MS. SWEENEY: If we are going to draw the line that we've talked about, then that makes perfect sense. In other words, your only duty is to advise the Court. If that line doesn't get drawn, then I think that -- this has to be looked at, because you're creating an exposure to the ad litem of millions and millions and dollars in liability and yet --

HONORABLE JANE BLAND: It's not commensurate with their payment.

MS. SWEENEY: Exactly. And so if you're going to require the ad litem to step in and lawyer and represent and advocate and take on all those additional duties that many do believe ad litems are required to do, then I think the fee has to recognize the risk to that. Otherwise, this proposal makes perfect sense.

MR. MEADOWS: I think that's an important

observation, Paula, but I think -- again, it's just an opportunity for us to get clarification that that is the direction we're headed, because -- I mean, that's the way we intend to write the rule, what's been discussed today.

HONORABLE JANE BLAND: In talking at the break, what we've proposed to do is to take all these comments that I think have been pretty conceptual in nature and come up with some language and some alternative language for the committee to look at -- you know, several choices for the next meeting.

CHAIRMAN BABCOCK: Okay. Bill.

MR. EDWARDS: Somewhere in the back of my mind I recall some cases where there's some immunities that befall some of these folks, and I don't know what they are. Does anybody?

(No response)

MR. EDWARDS: In other words, they do some things in which they have the Court immunity or -- it just seems to me there's some cases out there that say something about it.

MR. SOULES: Masters.

MR. EDWARDS: Masters?

MR. SOULES: I don't think there's any immunity for ad litems.

MR. EDWARDS: I think there's some cases out

there that address --

MR. SOULES: You think?

MR. EDWARDS: I think.

MR. SOULES: I hope you're right.

MR. LOW: I don't know. I hope there's not.

MR. SOULES: I couldn't find any.

MR. LOW: I've been an ad litem, and I didn't find them.

(Laughter)

(Simultaneous discussion)

MR. SOULES: Buddy and I both have been looking for them for a long time. We haven't found them yet. When you find them, will you send them to me and Buddy?

(Laughter)

MR. EDWARDS: I'll look and see if -- I had some research project. It's been a long time ago, but it seems to me I remember something to that effect.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: I don't think it's wise to have the phrase in (c) that says "unless all parties agree." I just don't know how a non-compos can agree, if a minor can agree. I think that the Court ought to have the obligation to determine -- we seem to emphasize that in the first part of (c), and I think the Court could take into account that

parties -- that there may be no objection by the parties, but that could just -- should just be one factor. I don't think it ought to be something that prevents a -- some sort of a court adjudication on amount of fee.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I totally agree with that, because in the few courts in this state where this is going to be abused, the lawyers involved in the process are going to go along with the abuse, and so what we have to do is kind of like a class action, we have to force these trial judges to have a hearing, listen to evidence and make findings which then somebody -- like the defendant -- is just sick of getting screwed like that in that county; they can appeal it to the Supreme Court probably before they'll get relief. But at any rate, they'll have something on the record where they can get some kind of independent review. And if everybody can just agree that this limitation doesn't apply, then in the cases where we really want it to work is where it's not going to work.

HONORABLE JANE BLAND: Well, what's the need for a hearing if that defendant agrees? This is only if -- this is only unless everybody agrees to the amount in payment. And the reason it's here is because, you know, an oral hearing in every case in which there is a settlement on the reasonableness and necessity of fees --

MR. ORSINGER: You're going to have to have a hearing on the settlement anyway, aren't you? Don't you always prove these up in court, get the judgment signed and have somebody testify?

HONORABLE JANE BLAND: Yes, but we don't generally have a separate evidentiary hearing.

MR. ORSINGER: It doesn't have to be separate, but I think it would be -- I think it has a lot of public good if somebody has to go to court. I mean, I would be willing to support a registry in which the district judges have to publish in the newspaper a list of the lawyers and how much they pay each one of them every year.

(Simultaneous discussion)

MR. LOPEZ: Little known fact: There is one.

(Laughter)

HONORABLE JANE BLAND: We report --

(Simultaneous discussion)

(Laughter)

HONORABLE JANE BLAND: No. That is -- we report -- every time we approve a settlement, including an ad litem fee, whether or not the parties agree -- okay? Whether or not they agree, we -- they fill out a form and they note that they are either agreement or disagreement, the amount of the fee and that report becomes part of the

file, and, not only that, the district clerk's office compiles those statistics. So if you wanted to go see every fee I have approved, you could.

MR. ORSINGER: Okay.

HONORABLE JANE BLAND: They're published every month.

MR. ORSINGER: Well, then, maybe we don't need the hearing, then. If we're already forcing that information to be public and --

JUSTICE HECHT: That's in Harris County, keep in mind.

HON. TRACY CHRISTOPHER: Well, it's supposed to be statewide.

HONORABLE JANE BLAND: I thought it was supposed to be -- I thought there was a --

JUSTICE HECHT: It is supposed to be.

HONORABLE JANE BLAND: -- rule that we -- a Supreme Court form.

JUSTICE HECHT: Oh, and, you know, you think it would be complied with.

(Laughter)

HON. TRACY CHRISTOPHER: You guys need to file some actions.

HONORABLE JANE BLAND: I mean, we already have disclosure of the amount of the fee, whether or not

it's agreed to and the case -- and the parties, the names of all of the parties and the attorneys that are -- on a form that's promulgated by the Texas Supreme Court. And I just think that --

MR. ORSINGER: That's around the state. Right? Justice Hecht was kidding when he said --

HONORABLE JANE BLAND: My sign says "Supreme Court" --

HON. TRACY CHRISTOPHER: Reported fees.

HONORABLE JANE BLAND: -- "Reported Fees."

JUSTICE HECHT: Chris says that --

MR. GRIESEL: 32 district courts in all -- in all of the district courts in a county don't file reports, and 40 county courts haven't.

MR. ORSINGER: They're required to, but they don't?

HONORABLE JANE BLAND: In the state?

MR. GRIESEL: 40 counties in toto, the district or county clerk do not report at all, and some of those are for periods of several years, and they have been reminded about the issue.

HON. TRACY CHRISTOPHER: But the judges still fill out the forms.

MR. GRIESEL: We don't know that. What we do know is that the thing that's supposed to be on the sixth

floor in the office court administration, David Gunn's office, isn't there.

HONORABLE SARAH DUNCAN: So when is the Supreme Court going to enforce its rule?

MR. GRIESEL: The Supreme Court has asked -- sends out an annual -- the office of court administration, which collects the data, sends out an annual reminder to the district clerks and the county clerks to comply, and it is attempting to follow up on that.

HON. TERRY JENNINGS: What's the sanction if they don't comply? No sanction?

(Simultaneous discussion)

HONORABLE JANE BLAND: In any event, that was the reason for not requiring a hearing, in the event that everyone agrees, but if you think that that's necessary, I think we should probably discuss it.

MR. ORSINGER: If it's public information -- otherwise, then I don't see any reason to enforce the hearing if somebody -- if the defendant wants to appeal, they can, and that wouldn't apply, but if we're not getting compliance -- and I would suspect that some of the people who are not complying are not complying because they don't want the information to be collected in Austin. And then maybe we ought to give them a little boost here.

MR. SOULES: Yeah. Make them exchange

benches with Loving County.

(Laughter)

CHAIRMAN BABCOCK: Bill.

MR. ORSINGER: Maybe we ought to have the fee award approved by a court that's at the geographically opposite part of Texas.

(Laughter)

CHAIRMAN BABCOCK: That would be interesting.

MR. EDWARDS: The problem I've seen is where the amount of the fee that's being asked is excessive and the defense ultimately caves in and pays it. That's the problem, and maybe it's something that we need to have -- "Fee is going to be in excess," some baseline in excess of $5,000 or $7,500 or some number that there has to be a record on it.

CHAIRMAN BABCOCK: That's an idea.

MR. EDWARDS: I can tell you, anecdotally, the Supreme Court decided a case -- Valley Baptist Hospital case, and there was a $43,000-some-odd-dollar fee awarded and the Supreme Court reduced it to $3,000 or some such number. A few years later our firm was involved -- same court, the same ad litem. The demand of the fee this time was $85,000, which was the 40 they didn't get from you --

(Laughter)

MR. EDWARDS: -- 40 for this one and then the

ad litem fee on top of it that we couldn't -- couldn't be sustained if they went to the court -- through the courts of appeals. And for some reason that ad litem was never available to look at the file or talk to the people, and the judge didn't have a date for a hearing. There was no help anywhere. Finally, it was a capitulation suggestion that it ought to be taken out of the settlement, and finally capitulation, and it was paid and agreed to. That wasn't right, but they got their $40,000 judgment.

(Laughter)

JUSTICE HECHT: Lots of ways to skin a cat.

(Laughter)

CHAIRMAN BABCOCK: Judge Bland, what do you think about the suggestion that maybe a fee in excess of some amount of money, there has to be a hearing?

HONORABLE JANE BLAND: I think if you're going to have a hearing, then we probably just should have a hearing. I don't think we should try to have a level -- safe harbor or something like that. I think it's easier just to go ahead and have a hearing.

MR. WATSON: I think if you set an amount, people will expect that.

HON. TRACY CHRISTOPHER: Right. If you say $5,000, that will be the --

(Simultaneous discussion)

MR. EDWARDS: That's the problem. I agree with that. But I tell you, in federal courts you have a hearing on the --

CHAIRMAN BABCOCK: One at a time, everybody.

(Simultaneous discussion)

MR. EDWARDS: -- every time in federal court.

CHAIRMAN BABCOCK: Okay. Any dissent to have a hearing, whether it's agreed or not?

MR. ORSINGER: And I would go further and say, in the hearing, the lawyer has to testify to the fees and the necessity, because at the very least, we ought to make them perjure themselves if they're going to try --

MS. SWEENEY: No. We're officers of the court. What is it with this testifying stuff? I'm sorry. I object. I won't be an ad litem ever again if I have to stand up there and swear to something that the court asked me to do, that I did in good faith as an officer of the court, as a service to the system. What is this having to swear yourself in stuff?

MR. SOULES: You're too smart to ever be one again.

MS. SWEENEY: Huh? Yeah. They find you. Then send you an order. It's already signed and stamped and it's official. It's got blue stuff on it. You have to do it.

HONORABLE JANE BLAND: So there's consensus that we ought to go ahead and just require a hearing?

CHAIRMAN BABCOCK: I think so, unless Judge Peeples --

HONORABLE DAVID PEEPLES: No. I don't agree with that. You're letting the 1 percent that need hearings require hearings and the other 99 percent -- when everybody agrees and there's nothing improper -- admittedly, the hearing wouldn't take long, but aren't there better ways to get at the 1 percent than requiring a hearing in every case?

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: What if you require a hearing if either party requested it, so that if a defendant who's going to pay the fee thinks he's getting screwed, he can say, "Let's have a hearing on it. You testify."

HONORABLE JANE BLAND: That's what we currently have. I will say, you know, on this Valley Baptist -- in this situation -- and do we honestly think that this ad litem, you know, who demanded this exorbitant fee wouldn't come in and testify and the judge wouldn't go ahead then and award -- I mean, if they're willing to put aside all standards of case law governing ad litems to award an exorbitant fee, I'm not sure that having a hearing will, you know --

MR. LOPEZ: Embarrass them, as Buddy Low

says.

HONORABLE JANE BLAND: -- mollify them to the extent that they would lower the amount awarded, or maybe even worse, they'd lower it to, you know --

MR. SOULES: Chip, are these Supreme Court forms filed in each case?

(No verbal response)

MR. SOULES: They are?

CHAIRMAN BABCOCK: They're supposed to be.

MR. SOULES: Are they signed by the lawyers?

HONORABLE JANE BLAND: And the judge.

MR. SOULES: Well, then why don't we just say, if those are filed, no hearing. If they're not filed, then you have to have a hearing.

CHAIRMAN BABCOCK: That's an interesting idea. What do you think about that?

MR. SOULES: Get the representations in the record.

MS. SWEENEY: Well, what you're basically saying is, "If you defy the Supreme Court order, fill out the form" --

(Laughter)

MS. SWEENEY: -- because they're already under order to do it.

CHAIRMAN BABCOCK: Richard, then Judge

Benton.

MR. MUNZINGER: The form itself doesn't require to set out what you did or what hourly rate is paid or anything like that. It's a form that says "X got Y from Court Z." And if you're worried about the 1 percent that's abused -- and you're an optimist if you think it's 1 percent in my personal opinion -- let one of the parties complain about it and make them come down and testify. You say, "What's the prophylactic effect of it?" There may be somebody that's got some shame. Some of these judges may have shame if they have to rule on the record.

HONORABLE JANE BLAND: And I agree with if one of the parties requests a hearing, we, obviously, should have a hearing, and that's the current rule, but the question is whether or not we require a hearing in every case so as to say, "Look. We really" -- you know, I think it would send a message that we're serious about the fees and the need to be responsible in the amount that you charge.

CHAIRMAN BABCOCK: Judge Benton. Then Paula.

HONORABLE LEVI BENTON: Actually, Richard said exactly what I wanted to speak on. The form just has an amount and signatures, not the number of hours.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: But do you all remember, before

you decide to do a hearing in every case, a lot of these are $2,000 cases, with, you know, $100 ad litem fee. I mean, and you're going to add defense costs for the hearing and -- having a hearing in every case is not necessary or a good idea.

HONORABLE JANE BLAND: Well, and the ad litem, I assume, would ask for the compensation related to their --

MS. SWEENEY: To that hearing.

HONORABLE JANE BLAND: -- preparation of -- you know, the $750 ad litem fee significantly affects the amount charged.

CHAIRMAN BABCOCK: Judge Gray.

HONORABLE TOM GRAY: It's a comment that I've made before. It may or may not be important to what you-all are doing here, but there is a concept of having a hearing that is not in open court. You used the term a while ago, an "oral hearing." Somebody else referred to "evidentiary hearing." All I'm asking that we're clear what kind of hearing you're talking about in the rule.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I would suggest that even if we have the hearing that we have some language in there requiring -- whether it's by form or affidavit or testimony, I really don't care --

MR. ORSINGER: Can't hear you down here.

MR. WATSON: I'm sorry. I suggested that whether or not we have the hearing, that even if there is a hearing, that there needs to be the requirement that there be, you know, either a form or the affidavit or something that puts in the number of hours and the hourly rate. And I say that -- I would have never said this three months ago, but I know Amarillo is a long way from Houston -- but Judge Hecht and his friends are just intent on transferring that Houston docket to Amarillo, and in doing that, I learned for the first time that after a hearing in a personal injury case, a judge would actually sign an order awarding a $500,000 ad litem fee, at which point, I had the task, as the appellate lawyer, of explaining that the Amarillo Court of Appeals has never seen a wrongful death case worth more than $1 million, ever.

(Laughter)

MR. WATSON: And, in fact, it's sort of like the flat-earth theory, the zeros will fall off the page if you write any more than that, and unless we had an appellate remittitur before the appellant's brief was filed, his clients or the children's fee would be remitted -- or award would be remitted down to a tenth of his fee. And that's literally the conversation that we had.

And that would have been a whole lot simpler

for me and for everybody involved if there had been criteria for that Houston trial judge to know that there was no way that this number of hours or this hourly rate is going to add up to $500,000, and it's just -- to me, that's kind of basic to have that in there.

HONORABLE JANE BLAND: Did all of the parties agree to the fee in your case, Skip?

MR. WATSON: No. It was an order.

HONORABLE JANE BLAND: So in that case, there would be -- under this current version, there would be a hearing.

MR. WATSON: No. There was a hearing. There was a hearing.

HONORABLE JANE BLAND: But there's no evidence to support the award made by the judge from the hearing.

MR. WATSON: I was on the side trying to say there was.

(Laughter)

HONORABLE LEVI BENTON: In the interest of full disclosure.

(Laughter)

MR. WATSON: We had a voluntary appellate remittitur of the appellate fee, and that's the whole point. You know, it was, "No. We're the good guys here. The trial

judge is crazy. We're the good guys. We're reasonable."

CHAIRMAN BABCOCK: Justice Jennings.

HON. TERRY JENNINGS: On (d)(2), there's a pretty severe sanction if you don't comply with the other aspects of compensation. Would it be possible to craft a provision putting the burden on the ad litem to file the paperwork with the Supreme Court, and if they don't comply -- is that a possibility?

CHAIRMAN BABCOCK: Sure. Anything is possible. What does everybody think about --

HON. TERRY JENNINGS: Putting the burden on the ad litem itself to file the appropriate paperwork with the Supreme Court, and if they don't, then they're subject to the sanction in (d)(2).

HONORABLE JANE BLAND: We could add that in.

HON. TERRY JENNINGS: Then they have to serve all counsel in the case with a certified copy -- or whatever -- that they filed it.

MS. SWEENEY: But you-all are confusing the person who does it once every five years as a service to the Bar who you want with the person who does it as often as they possibly can because it's their primary source of earning a living who you don't necessarily want, and the more burden you add to this, the less likely you are to have Type A and the more likely you are to have Type B.

HON. TERRY JENNINGS: Yeah, but you just fill out the form to the Court, put it in an envelope --

MS. SWEENEY: If it was that easy, the judges who are already under order to do it would be doing it, wouldn't they.

HON. TERRY JENNINGS: There's no sanction, though.

MS. SWEENEY: Well, let's talk about that, instead.

(Laughter)

HONORABLE JANE BLAND: Well, actually, it's not just the judge. It's currently an obligation of all the parties to submit an order that each sign and indicate their agreement or disagreement to the Court -- to the trial court.

MS. SWEENEY: But then getting them down to the Supreme Court is what the trial court is supposed to --

HONORABLE JANE BLAND: The District Clerk is not doing that, but I don't know, if -- you know, if in those 32 counties it also means that they're also not filing the forms as part of the case file or not.

MR. SOULES: I agree with Judge Peeples, though, having a hearing is not going to add that much. I mean, maybe the Supreme Court could change its form to require that the ad litem state how many hours it spent at

what rate, but as long as that's in there -- and that's not the only paper that's in the file. There's a judgment in the file, too, at some point, I assume, before the ad litem gets paid. There's quite a bit in one of these files for somebody to look at to decide whether or not a fee is outrageous or fair.

It just seems to me like maybe some slight modification of the form to require the hours and hourly rate and then a hearing only if the form is not filed is all we need.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: For those that litigate in this area so much, if the duty of the ad litem were limited like we've been talking about sort of off and on all day, how much is the -- how much is a reasonable ad litem fee going to be? Let's just say that as a preface to saying, it sounds like to me we're awfully close to pro bono, almost.

MS. SWEENEY: It depends how long it takes you to review everything you have to review. Some of these files take a bunch of hours just to read through the medical, the care plan, the -- meet the family, see the kid, talk to the doctor, find out life expectancy, look at the annuity, look at the trust.

MR. SOULES: I'm sure that there are people

sitting around this table that it costs them $100 an hour to open their door before they pay a penny to any lawyer.

MS. SWEENEY: Do what?

MR. SOULES: It costs $100 an hour to open your door and run your office before you pay a penny to any lawyer, any associate, any partner, any anything, to the people around this table, it costs that. And anybody that can get it under $70 is doing a pretty good job of managing things. Secretary -- I'm including paralegals -- paying paralegals, paying secretaries, paying all the IT stuff you've got to have now, paying for your books, paying for your legal research and all that that, $70 to $100 is common.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, we've talked about so many things, I kind of lost what we're trying to accomplish.

(Laughter)

MR. SOULES: Well, Justice Hecht wants to know: What are reasonable lawyer fees?

MR. LOW: Well, basically, if I understand right, we're trying to prevent unreasonable fees, people, you know, just getting them automatically, and trying to outline directly what the duties are -- I mean, you know, so the ad litem will know. What are other major objectives besides those two -- what other evils exist, basically,

other than those two? Are there -- is that what we're trying to accomplish? I'm asking.

HONORABLE JANE BLAND: Those two, and I think Paula articulated a third one, which is that you don't want the ad litem's exposure to be greater than the job that they were hired to do, and so they shouldn't be brought on to try the case.

MR. LOW: Right. That's what I'm saying, but I put that in the category of what their duties are, because of their exposure, and we've talked about so many things that, basically, those two things are what we want to accomplish, and we're getting off into a lot of other things. I mean, I don't see how a lot of these things fit into those objectives, because you can always pick this sentence apart and that and that.

JUSTICE HECHT: Well, I was just asking that -- I mean, I don't know if this is a good approach, but if you limit the responsibility, limit the liability, then is there any reason to pay them anything and doesn't the whole problem go away?

MR. LOW: Well, Judge, it may be --

JUSTICE HECHT: Now, if you're going to ask them to go do a bunch of work and have a lot of risk, then I think it -- you know, it's only reasonable to pay them.

MR. MEADOWS: But everything follows the

definition and the scope of work, if you ask me -- the risk, the exposure and the reward. And I think you're basically right: Once you define it, if we're off in the direction you seem to be, it probably will -- most of the fees will be less than $10,000.

MR. SOULES: You're not talking about zero time.

JUSTICE HECHT: I'm not talking about zero time. I'm just talking about: Why not turn it into pro bono hours?

MR. WATSON: Yeah. I think that's where he's going, is that it's a public service, period. It is noncompensated time.

HON. TRACY CHRISTOPHER: You're going to give them immunity? And how would we do that?

MS. SWEENEY: In a rule of civil procedure.

JUSTICE HECHT: But if you're saying the only thing they have -- if you say they have to go explore the fairness of the settlement and the way the case has been prepared or is going to be tried, then I don't see how you can give them immunity from anything. But if you're only asking them, "Is this a fair split of the pie," then I don't know that you have to give them immunity, but how much is the risk?

(Simultaneous discussion)

CHAIRMAN BABCOCK: Hold on. John Martin has been patiently --

MR. MARTIN: Just to answer your question, I think for 99 percent of the cases, Judge Hecht, you might be right, but I've been involved in a couple of the other ones -- 1 percent -- including one recently where the guardian ad litem literally spent a year and a half resolving primarily the allocation issue. It was very complicated, involving people in a foreign country and possible application of foreign law and where the trusts were going to be and so forth, and he earned every penny, if not more, of the fee that he was awarded.

And I go back to the Delta accident case that you may be familiar with involving the woman who was in a coma for nine years, and the guardian ad litem there was instrumental in resolving a very big family fight between her spouse and her children that could not have been resolved without his intervention.

Again, that's a small percentage of the cases, but I don't think those people could have done that pro bono.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: I just want -- generally, everybody seems to agree that it really is -- it's egregious when it happens, but it is fairly uncommon, thankfully. I

just think we should be very careful to adopt something for the benefit of what's happening in 1 percent of the cases. If we could find a perfect way to do it, great, but, in the real world, if you're going to do that by burdening the other 99 percent, I question, ultimately, the long-term wisdom of doing that. I mean, you know, let's not let the tail wag the dog.

MR. LOW: But one of the things -- in order to know the split -- like it's a child that's pretty badly injured -- you really need to find out the kind of care the parents are giving. You need to find out maybe some family things -- in other words, even for the split, and you might need to do some investigation or some inquiry. I don't mean taking depositions. So it would require some work -- not a lot, but it would require, in most cases, some work or inquiry, because you can't just say, "Okay. 20 percent is fine for the child." I mean, you know, you need to do something if you truly do your job, and I'm afraid if we do it as pro bono, they'll say, "We think it's good -- good for me." And sometimes you get what you pay for and sometimes you don't.

CHAIRMAN BABCOCK: Okay. Judge Sullivan.

HONORABLE KENT SULLIVAN: There is real potential liability for an ad litem -- real potential liability. I mean, if you have a two-year-old child, you're

looking at -- what -- an 18-year tail. And that, alone, scares malpractice carriers.

MR. SOULES: Us, too.

HONORABLE KENT SULLIVAN: No. I -- two-year-old child, I got them to 20 -- right?

(Laughter)

HONORABLE KENT SULLIVAN: That adds your two in. But I think it really is significant. No one, I think, in their right mind would take a case for no compensation, given the potential liability in it. And, of course, even this rule still leaves ambiguity as to how much you might need to do or someone could argue you should have done. So unless we're going to give somebody iron-clad immunity, I just don't think it would work.

JUSTICE HECHT: Well, I don't -- I'm just interested in hearing, but surely people take on pro bono cases. I mean, everybody claims they do, turns in a bunch of hours saying they do. It looks like there's exposure there. Why should we treat this different?

(Simultaneous discussion)

MR. SOULES: Not much exposure in a no-asset divorce.

CHAIRMAN BABCOCK: Yeah. A lot of the pro bono is just -- you know, they need a lawyer to just get them through the process.

MS. SWEENEY: And these are by court order, too. I mean, they sort of arrive, and you don't really have a big choice unless you've got a conflict. So, you know, mandatory pro bono, it's only one segment of the Bar, because most ad litems are plaintiff's lawyers, so, you know -- we just had a really nice legislative session now and let's also assign a bunch of free work.

(Laughter)

CHAIRMAN BABCOCK: As a reward.

MS. SWEENEY: To fill those empty hours.

(Laughter)

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: When it says "unless all parties will agree" -- Ralph and I were talking down here, who's going to agree on behalf of the incapacitated party that the ad litem's fee is fair? Is it the ad litem? And if it is the ad litem, then who are we deluding ourselves into thinking that an agreement is a good reason not to have a judicial assessment of the reasonableness of the fee?

CHAIRMAN BABCOCK: Rhetorical question.

HON. TRACY CHRISTOPHER: That's a good point.

MR. ORSINGER: Well, I mean, we're getting answers to everything down there, maybe there's an answer to that one.

(Laughter)

HON. TRACY CHRISTOPHER: I just said it was a good point.

(Laughter)

HONORABLE DAVID PEEPLES: I have a proposed -- okay. The problem is this: The judge chooses the ad litem, and it's going to be somebody who's friends with the judge. Okay? The judge sets the fee for his or her friend, and in some small percentage of the cases, it's an outrageously high fee. This is compounded by the problem that if one party has the guts to appeal that and ask for a hearing and want to appeal it and goes to an appellate court, there's differential review. The trial judge found the facts and so forth.

What if we said this: If anybody doesn't like the fee that is set by the judge for his or her friend --

(Laughter)

HONORABLE DAVID PEEPLES: -- which that's the reality, then that person has a right to have it reviewed de novo by somebody else, not the judge, and let the Supreme Court come up with a list of people to review these in any other state.

HONORABLE TOM GRAY: The MDL panel.

(Laughter)

HONORABLE DAVID PEEPLES: For no extra pay. Yeah. Somebody other than somebody who's buddies with the judge take a look at it and I think that will chill a lot of this nonsense and give a realistic review to the aggrieved person.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: But it depends on how much the review is going to cost that person. I mean, is he going to have to pay a lawyer? If not and they don't have to pay, they'll say, "We might whittle this down." "Oh, we'll just shoot it on down the line," and then you're going to have a lot of those up there and then you're going to be having somebody doing a lot of work for nothing. But if it's kind of outlined and you want to but it's going to be costly -- it's not enough -- it's not going to do any good, and that's going to be the majority of the cases. So either way, I don't think that would be the answer.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: On the pro bono issue, generally the ad litem fee is paid by the defendant who is not indigent, and so there's not a way of not compensating ad litems, but, on occasion, either the case goes to trial and there's no settlement and the plaintiff loses and the minor loses and then the case becomes a pro bono case for the ad litem, because the ad litem is not -- has no way of

getting reimbursement for the fee. And so there is some, you know -- I don't think -- I don't think it can be pro bono in every case, and I don't even think it's necessary, because the defendant often pays the fee when they're not indigent, but sometimes it works out that way.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: Judge Bland raises a really important point that needs to be drafted into the rule, which is, there are cases in which ad litems are requested early in the process by the defense to benefit the defense to try and pressure the plaintiff's lawyer to settle, or whatever. There is, obviously, a reason they want an ad litem. The ad litem, then, attends everything, because currently they think they have to -- or they can or they want to -- and runs up a great big bill. The plaintiff loses and then the plaintiff gets taxed with the cost of something they didn't request, didn't want, didn't need, was -- shouldn't have been appointed, and so now you've got a losing plaintiff that's been taxed costs well over what would ordinarily be the cost of the case.

And that's a real current problem now, where the, you know, ad litem is the defendant's buddy and not on the plaintiff's side, per se.

So under -- the way I'm understanding the rule and the direction it's trending in, we wouldn't have an

ad litem appointment because there would be no settlement to review anyway, probably, but if the rule is going to be written such that a court could appoint an ad litem early in the process and they are going to stay involved and run up a big bill, I think the issue has to be one of considering, "Against whom do you tax that and should it be the party requesting the ad litem," which is almost always the defendant, so that they -- they can't pile on even more costs?

MR. LOW: But, I mean, I wonder, how does this fit in with our offer of judgment -- or tender of judgment, court costs, so forth. That complicates it a little -- even a little bit more.

MR. MEADOWS: Isn't all this just additional reasons for having a limited and defined rule? I mean, these are -- I agree with your observations, but it's just another one for why we need to change it and streamline it and limit the scope of the representation and the responsibility. I mean, I think we ought to go rewrite it and bring it back.

MS. SWEENEY: Should we vote on that concept?

CHAIRMAN BABCOCK: Yeah. I think we probably should, because we're going to have to rewrite it anyway. But aren't there going to be circumstances where the ad litem is going to have to do more than just the minimum? I

mean, you can't by rule just carve it down so it's so minimalist that you would be precluded from doing something that really needs to be done.

MR. MEADOWS: Well, you could, but maybe there ought to be different types of duties, and there would be sort of a basic, more limited duty and then there could be some other expanded role that would require court order or something of that nature.

But I think in the -- the way I'm understanding it, if we were going to have a rule, it would require very little participation. It would probably be in the context of settlement.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: I was going to say that, what it seems to me what we're trending toward is writing a rule that addresses the role of the ad litem in approving a settlement. I mean, that's 95 percent or more of what we're talking about, and it may make a lot of sense just to write a rule about that. And the issue is -- the duty is to review the settlement and advise the court whether it's fair or not. And if the advice is, it's not fair, then the ad litem is -- or Paula has discharged her duty and she is not expected to step up and try the case.

Now, there may be a few other situations in which there's a need for an ad litem, but perhaps those

would be dealt with elsewhere.

CHAIRMAN BABCOCK: Yeah. Aren't there circumstances where -- let's say it's not in the settlement context. It's not a minor, but it's somebody who's incompetent but is a litigant -- either is a plaintiff or defendant -- doesn't a guardian have to be appointed in those?

MR. TIPPS: I mean, I think there may -- but it may well be that this rule shouldn't try to address that.

MR. LOW: Maybe we could have -- you know, you're going to have one, but maybe we can have a rule like our discovery levels, you know, that one that took care of most situations, but then you could be hit -- another level if you showed certain things and then another level, but you had to prove those things up when you were asking for it, and then -- I can't draft one, but I can envision something like that.

CHAIRMAN BABCOCK: Aren't we going to have to deal, though, with the broader role of a guardian in order to adequately replace the existing Rule 173? Because the existing Rule 173 covers a whole bunch of circumstances.

MR. LOW: That's what I'm saying, but the real rule would be one that would take care most of the cases, I'm talking about, and then you would have

maybe another category -- even potentially an extraordinary --

CHAIRMAN BABCOCK: Yeah. That's a good idea. Justice Duncan and then Stephen.

HONORABLE SARAH DUNCAN: Just to tack on both to what you said and what Paula said, there are still self-financed plaintiffs. So it may not be a question of taxing these things. I mean, as Paula has said, one good reason to require -- to try to get the court to require ad litems is to run out the plaintiff's resources to try the case, and this is not something that just happens in the settlement context. And I think if we try to write a rule that only fits the settlement context, we're going to be either missing an opportunity to clarify what should be the law in other contexts or imposing rules that don't work at all in other contexts.

HON. TRACY CHRISTOPHER: Could you explain that a little bit more?

HONORABLE KENT SULLIVAN: Give us an example, would you?

HONORABLE SARAH DUNCAN: Well -- I can't. I'm sorry.

MR. SOULES: Like in a trust litigation?

HONORABLE SARAH DUNCAN: Yeah. Yeah.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Well, there may be some sense -- I mentioned this earlier, but it wasn't as meaningful then. Maybe we ought to draft a subpart of the rule for someone who's appointed for settlement purposes, which could have way more restricted responsibility but permitted upon court permission -- court authority to engage the services of an expert, or whatever, and then have another part of the rule for someone who's going to be brought in, basically, to litigate to conclusion somebody's position, because the representative that brought them into court has a conflict. And maybe that would ease up on this.

CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE KENT SULLIVAN: I'm just wondering if there's some way to write the rule to give some insulation to an ad litem to provide them with some added confidence that their role truly is circumscribed, because if you don't, then you do face the prospect that you get a lot of unwanted conduct from people who are just trying to be overly cautious. And my concern is that if the default position is that by reaching some threshold -- perhaps it's obtaining a court order -- you could do more than this minimum that we keep talking about. Then the ad litem is always subject to having the criticism made 15 or 20 years later that you should have done that. And I'm wondering if there's some way to write the rule to really show how

extraordinary the circumstances need to be in order for that to -- for that threshold to be met.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I think that goes back to a lot of what Judge Hecht was saying and some of us have been saying. To me, it makes sense, but it may not have been done before, is just to start fresh and say that a guardian ad litem's duty flows to the court and that -- whereas currently, as I understand it, that duty is both to the court and to the child, that we just get a clean piece of paper and say that the guardian ad litem's duty is simply to advise the court about the guardian ad litem's judgment as to whether the settlement -- or whatever it is, is fair, and then have a second criteria, and that would be, say -- coin a phrase -- an attorney ad litem, and upon application to the court or on the court's own motion the court believes that the minor or the incompetent or someone else needs someone to actively engage in representation, that that shall be an attorney ad litem and that attorney ad litem's duties flow to the incompetent or the minor.

CHAIRMAN BABCOCK: Okay. Richard.

MR. MUNZINGER: It may be -- and, again, I may be exposing my own ignorance, but it may be that we are having so much difficulty with this because we are merging roles and concepts in the discussion.

Envision for a moment a person who requires a guardian because they're non-compos mentis or they're a child. The court appoints a guardian. That guardian is not necessarily an attorney. The person becomes a guardian for the purpose of protecting that person's person or property or whatever it might be. You look at old Rule 173 and you look and new Rule 173, they both say, "When you have a person who requires a guardian but doesn't otherwise have one and he or she is a party to a lawsuit, then the court shall appoint a guardian." The court could appoint the Chase Manhattan Bank as the guardian, it could appoint Joe Schmoe as the guardian. That guardian, then, has the obligation to protect the minor or the non-compos mentis for purposes of litigation, which would require that guardian to hire a lawyer.

The guardian ad litem that we keep thinking about in personal injury and other litigation where minors are parties arises in the situation where the minor has a conflict of interest with the next friend because of the division of a limited settlement sum. We may be merging these two concepts here and causing the problems ourselves -- and I may be showing how stupid I am -- but it does seem to me, just looking -- for the moment, let's look at old Rule 173. It says, "If somebody needs a guardian, you appoint a guardian." It doesn't say they have to be a

lawyer and doesn't say that the lawyer has a fiduciary or attorney/client relationship with that person. That would be foreign to the concept of guardian. It's a guardian ad litem for the purposes of the litigation. That's what it's for. It's not a full-blown probate guardianship for Richard's son who is 9 years old and has no parent or Richard who is a crazy old geezer who needs a guardian. And so I think we may be causing a problem here because we're merging two concepts in our discussion.

CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE KENT SULLIVAN: And maybe we can use that to our advantage in writing this rule. Perhaps what we could do is clarify, finally, and say that the court ultimately makes a decision as to whether to appoint a guardian ad litem or -- and I do this with caution -- or an attorney ad litem. I may be using improper terminology still, but the point would be, if you're appointed as a guardian ad litem, then, for example, under 173.2(b), there would not be any suggestion that "except as necessary to protect a party's interest that are not otherwise adequately represented," i.e., you couldn't cross over the line. You would be there for only limited purposes. And the court's order to that effect would be absolutely legally dispositive of the role that you could play. And we could, perhaps, write that into the rule.

And to the extent that the case was unique enough that the court determined that someone needed to be appointed to play a role that is beyond that, you'd have to call them a different name, and they then could play a different role. The point being is that, I think it's as close as you can get to circumscribing the conduct of the guardian ad litem in a way that is helpful to them, creates real certainty in the process and literally the court -- the court's order would determine which role it was, together with the way the rule read saying you couldn't do anything other -- basically assist in the dividing of the settlement.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: Let me correct one thing that was said and add to Paula's point. The Woodruff case denied -- and the Supreme Court denied writ -- holds that a guardian is a fiduciary. A guardian is fiduciary.

Under Arce, you don't have to be guilty of malpractice. It doesn't take a lot to violate a fiduciary rule. So this is a role -- unlike what we said, a guardian is a fiduciary under the law in Texas under Woodruff. And so, therefore, I add to Paula's point, that unless we change something, there is -- there is a great burden when you're appointed guardian.

MR. YELENOSKY: I think there is a great burden, and, I mean, I think the person should be and is a

fiduciary to the ward; and, therefore, I don't think that their role should be limited to being beholden to the court, because if they are, there still needs to be somebody who's speaking for this ward in the proceeding, but I do believe -- and I said before, and, Richard, I agree with you -- I mean, if it was stupid, I'm also stupid, because I still think that it can be circumscribed to the non-attorney role, even if it's -- the person is appointed earlier in the case, I don't see why that person has to serve any functions of an attorney. There is an attorney in the case. That person should serve the functions of a fiduciary acting in the best interest of the ward, and I don't -- somebody please explain to me what case requires that somebody be appointed -- function as an attorney when there already is an attorney.

MR. LOW: I'm not saying --

MR. YELENOSKY: No. I know you're not, but I was just building on what Richard said.

MR. SOULES: Is there an actual conflict or a potential conflict?

HONORABLE SARAH DUNCAN: How about just a perceived conflict?

MR. YELENOSKY: The conflict, if there is one, is with the representative that came into court, the parent or the next friend. Right? And so the point is to

put someone in that person's stead who doesn't have the conflict. Why does that call for putting somebody in the attorney role?

MR. SOULES: Because the attorney has the conflict.

CHAIRMAN BABCOCK: Justice Duncan, then Stephen Tipps.

HONORABLE SARAH DUNCAN: I think that's the danger, is, you know, we all know from just looking at conference law and attorneys without regard to incapacitated persons or minors, the conflict is frequently in the eye of the beholder. And when you've got $100 million involved, nobody wants to be responsible for anybody not getting their share, and so even if you have the purest of motives, you might perceive there to be a conflict that does not, in fact, exist. There might be other reasons for at least saying that there's a conflict that doesn't exist, and to write this rule as though the only time an ad litem is appointed is for settlement purposes, I reiterate, I think is a huge mistake.

MR. YELENOSKY: To answer Luke's question, if there's a conflict with the attorney, then aren't we talking about appointing somebody to fill the role of what we've been calling "attorney ad litem" and not guardian.

MR. SOULES: I think Buddy's committee had

written a rule that says that if a lawyer represents multiple parties, if a conflict comes up, he's got to resign from all parties.

CHAIRMAN BABCOCK: Justice Hecht, did you have a comment?

JUSTICE HECHT: Yes. As a practical matter, I think we will have to be more detailed than we might otherwise be about what these representatives are going to do, because Chris has pointed that House Bill 1815 says, "This is what an guardian ad litem does," and it's a page of things; "This is what an attorney ad litem does," and it's another page of things. And if we're going to use the same words over in civil rules, people are going to think they mean the same, and if we don't mean the same, we're going to have to say so. And we're going to have to do that in some detail, because, as time passes, the whole thing is going to get even more confused than it is now.

MR. LOW: Are you suggesting, Judge, that the drafting should keep in mind legislative things, not to be inconsistent with the legislative definitions and duties?

JUSTICE HECHT: Well, I thought the Jamail Committee approach and the subcommittee approach was good, in that it didn't have to go through a lot of detail about what these people are and what they're going to do, but then when you have a statute that uses the same words and says,

"This is what they do," then we're going to have to either use different words, which I don't think we could do that, or else say we mean something different.

CHAIRMAN BABCOCK: Judge Christopher.

HON. TRACY CHRISTOPHER: Well, can I throw out another radical idea, eliminate ad litems in civil lawsuits when the minor has a next friend, their parent, and an attorney representing them. And if the plaintiff's lawyer finds himself in a conflict, then the plaintiff's lawyer has to follow the kind of rules that they should normally follow when they find themselves in a conflict situation.

What does the ad litem do that is -- that the plaintiff's lawyer shouldn't be doing for his clients?

MR. LOW: The old Pluto case, that's what they got busted for. And it's old law. Older than I am, if you can imagine that, and it hadn't --

(Laughter)

(Simultaneous discussion)

HONORABLE TRACY CHRISTOPHER: Well, we can change it by the rule by saying it's not required.

(Simultaneous discussion)

MR. LOPEZ: Are you talking about something other than when there's a limited amount of money and Mom is grabbing for the money and the sone is grabbing for the

money at same time?

HON. TRACY CHRISTOPHER: Well, the plaintiff's lawyer is in a conflict if he's allowing that to happen -- right -- if he's representing both of them?

MR. LOPEZ: Right, but that's --

HON. TRACY CHRISTOPHER: Well, and why are we making a court-appointed ad litem that the defendant has to pay for when, in fact, it ought to be the plaintiff's lawyer's responsibility to have another lawyer there?

MR. EDWARDS: Because you got the parent -- you got the adult and you got either the child or the incompetent on the other side, and it's not an even fight between the two of them. So you get the ad litem as somebody that's looking after the incompetent or minor's interest and seeing whether what the lawyer and the parent or the next friend is doing is fair.

HON. TRACY CHRISTOPHER: But the lawyer has the same duty to the child as he does to the parent. I mean, the lawyer has a duty to the child.

MR. EDWARDS: I understand that. But there's no one looking after the child's interest to see whether the lawyer and the parent are doing it right.

HON. TRACY CHRISTOPHER: Well --

MR. YELENOSKY: Her point is that the

plaintiff's lawyer then has to get another lawyer.

HON. TRACY CHRISTOPHER: When the child grows up, the child sues the lawyer, the one that got the money from the case and admitted to malpractice.

MR. EDWARDS: Well, you want to put the thing to rest and you want to put it -- and the defendants want it finally put to rest. Because it isn't just the lawyer that's going to be in there, it's the defendant who's going to be back in there. There's going to be a lawsuit to set aside the settlement. I've done it for a minor that didn't have an ad litem.

HON. TRACY CHRISTOPHER: But if we, by rule, say "not necessary," how would they be able to sue the defendant?

MS. SWEENEY: Because they were hurt by the defendant in the first place. They weren't represented. The settlement is void or voidable. "No settlement. Come on back."

HON. TRACY CHRISTOPHER: They were represented. They were represented by a next friend that they can sue and they were represented by an attorney that they can sue.

MS. SWEENEY: But they were injured by defendant. They're a minor. The statute hasn't run. "Come on back." They weren't adequately represented. It's a --

the whole thing is a sham and a fraud. Here they come right back at General Motors.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: And it's just not necessarily true that they are represented by the plaintiff's lawyer. They may not even be parties to the case.

MR. SOULES: They may not even be alive.

HONORABLE SARAH DUNCAN: And Luke understands, I'm under a confidentiality order, and I can't -- I can't talk about this in the kind of detail that I'd like to talk about it, but all I'm pleading for is that you go beyond the cases -- my views of ad litems are from solely one case, and I think probably each of us around the table have cases that we think of when we're thinking "ad litem." We can't write rules that way. Our rule-writing process has to encompass all the kinds of cases that these things can come up, and this discussion has been, in large measure, limited to basically one context.

HON. TRACY CHRISTOPHER: Well, we have a whole set of rules for the family -- for a parent/child relationship. We have another whole set of rules, I'm sure, involving trusts in the probate code about attorney ad litems and guardians ad litems. I'm not familiar with them, but I assume we have another set of rules in that

department, don't we?

MR. ORSINGER: You have another set of rules on the parental bypass appointments, too, which are pretty well thought out -- and there's a good Law Review article that Bob Pemberton wrote on it, in case you want some ideas.

HON. TRACY CHRISTOPHER: So, I mean, I am looking at this rule from the point of view of just your average civil litigation. Now, what are we missing? You say, "No." Give me an example. I know you can't talk about your case, but give me an example.

MS. SWEENEY: Finality. Finality. Everybody wants finality, and it is assumed in the jurisprudence of the state that the best way to get finality for everyone is to have an ad litem and to have a court decision that the settlement is in the best interest of the minor, because if you have that court decision, then everybody has something to hang their hat on should the minor or NCM come back sometime later.

And I don't propose doing away with that system.

HON. TRACY CHRISTOPHER: But you've told me there's not finality there, even if the court approves the settlement, even if an ad litem is appointed, the minor can still come back and sue the ad litem.

MR. MUNZINGER: But you have a judgment

that's res judicata that's entitled to all of the presumptions of the litigated judgment, but there's, by court record, that involves a recommendation of a person who has a fiduciary obligation to the child telling the judge the defendant and the plaintiff, "In my opinion, this is a fair settlement." Now, what evidence is there going to be to set aside that judgment? If you don't have that, then you've got -- we can sue -- anybody can sue me for anything they want to. They got to win, but they can sue me, but that's the whole purpose of the ad litem situation, is to protect what we're talking about.

HONORABLE SARAH DUNCAN: And it's not just a settlement. I mean, it may start with not just who you think the settlement is fair to the minor, but do you think this lawsuit is being prosecuted properly from the get-go?

HON. TRACY CHRISTOPHER: Well, that's certainly expanding the role of the ad litem, if we're going to include that as one of the ad litem's duties.

HONORABLE SARAH DUNCAN: It certainly does.

MR. LOPEZ: That's how we do it in Dallas. I mean, in Dallas, the ad litem is considered by the defendant a very cheap insurance policy. They love it. They have no problem paying a fee, generally, because, hopefully, we don't do the 1 percent we're talking about, but in your typical case, you know, they move for it because they are

the ones that are affected by it.

HON. TRACY CHRISTOPHER: All right. I withdraw my radical idea.

(Laughter)

MR. MUNZINGER: I just want to say, again, it's a judicial determination. The courts are set up to answer the question, "Was this fair to the baby?" And now a judge has said, "Yes, it's fair." You've got a final judgment. All parties represented by counsel, all parties there, due process handled, testimony taken, it's over with -- it should be.

MR. LOW: We had the same situation where they tried to set it aside, but we had gotten approval from the probate court, the district judge. So, sure, they can file a suit. They claimed fraud, but they just didn't get very far with it because we had all that in place.

MR. SOULES: But you had a probate court.

MR. LOW: No. We got the probate court first to approve it. Then we had the guardian that was appointed by the probate court to go to the district court and do what we used to call a "friendly suit." Well, we don't call it that anymore. And then still got sued -- well, they had to allege fraud to get it set aside, and, of course, they didn't get very far on that, but if we hadn't had all that.

CHAIRMAN BABCOCK: Who knows?

Judge Bland.

HONORABLE JANE BLAND: Could we go ahead and move on to compensation? I think, again, we're talking about the role and I just think it's going to take some thought and putting pen to paper.

CHAIRMAN BABCOCK: Yeah. I was just going to suggest that. Yeah. Let's do it.

HONORABLE JANE BLAND: Okay. Other compensation prohibited, Section (1) says, "A person appointed under this rule may not receive, directly or indirectly, anything of value in consideration of the appointed representation other than as provided by this rule, including without limitation, any payment, referral fee, or consultation fee in any other matter, or any payment from any insurance or financial" -- and it says "broker," but I think institution would be a better word -- "institution involved in structuring a settlement."

And the section second section of (d) is a sanction provision that says, "If a person receives a payment in violation of the rule, the trial court shall, after notice and hearing, order the party to forfeit the compensation and to pay reasonable attorney's fee to the parties participating in the hearing."

MR. LOW: Just put a sanction. I mean, that's not very much for doing something you shouldn't do,

even without rules. That sanction is up to the court because -- I mean, nobody should do that now, and to say, "Well, I've got to give it up if I get caught," I think -- I don't think it goes far enough.

HONORABLE JANE BLAND: Okay.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: What about, instead of "insurance" or "financial institution," "any payment from any person or entity"?

HONORABLE JANE BLAND: That's fine with me. I don't know if, initially, the thought was to put insurance and financial to be abundantly clear.

HONORABLE LEVI BENTON: I just don't know that it's broad enough to --

HONORABLE JANE BLAND: Right.

HONORABLE LEVI BENTON: We want to capture the whole world, obviously, so --

HONORABLE JANE BLAND: Right.

MR. YELENOSKY: How does this relate to other claims that a party may have against that individual based on violation of fiduciary duty. Suppose this -- how does this work if it's discovered later?

MR. LOW: Well, that's what I'm saying, that --

MR. YELENOSKY: Well, is this intended to be

exclusive?

MR. LOW: Well, I mean, assume somebody says, for instance, "I agree to" -- I mean, I'm guardian ad litem. I think they ought to tie the lawyers, too -- you know, the plaintiff's lawyer, but -- and I get them to set up the trust or something and the bank then suddenly buys me a prize bull, or something like that, that's the way I look at it.

MR. YELENOSKY: You should be for liable for more than giving the bull back?

MR. LOW: Yeah.

MR. YELENOSKY: And my question is: Is the other means by which you get more than that -- is there a separate claim of violation of fiduciary duty and how does that relate to this rule?

MR. LOW: Well, there is a claim, under Arce -- I mean, I'd imagine it would be a big claim under Arce, because -- you know, make them give back the bull and all the bulls that came after.

(Laughter)

MR. LOW: But, no, seriously, that wouldn't preclude a civil suit.

CHAIRMAN BABCOCK: A bunch of bull.

MR. YELENOSKY: Right. If it wouldn't preclude a civil suit, should this attempt to incorporate

what a civil suit would do or should it explicitly leave that separate or what?

CHAIRMAN BABCOCK: Well, why would you try to write into this a cause of action or a suggestion of a cause of action?

MR. YELENOSKY: I don't think you should. I was just asking -- because Buddy thought that that wasn't enough, I was suggesting that there are separate cause of actions, but, presumably, it wouldn't be precluded by this rule.

MR. LOW: It wouldn't preclude any other civil remedies, but --

CHAIRMAN BABCOCK: Well, the Jamail suggestion on this was just that there be a provision that a person who makes a payment in violation of the rule may be sanctioned, and I guess --

HONORABLE JANE BLAND: Contempt of court, I think, was what they said. Theirs is -- was "a person who makes sanction for contempt of court."

CHAIRMAN BABCOCK: Right.

HONORABLE JANE BLAND: And the problem with that is, a contempt of court -- a contempt proceeding requires lots of due process and a hearing, and I'd rather have -- it may not be -- this sanction may not be rough enough, but I'd rather have, you know, the penalties set

forth in the rule so that anybody can go to the rule and figure out what the penalty is, because contempt can mean a lot of different things. It could just be nothing. It could just be a slap on the wrist, you know.

MR. LOW: I mean, the Bar Association, we can't deal -- can they set grounds for being suspended? Surely should be, but this is -- wouldn't be exclusive, or civil remedies, but it ought to be some sanctions, and I don't -- I can't say what under -- now, we couldn't take the sanctions under our rule and deprive them of defenses and the death penalty, because that doesn't apply. So I don't know what sanctions would mean.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: Am I reading this correctly, that if someone is appointed an ad litem -- I don't know if I'm reading it correctly. If someone is appointed an ad litem for a minor in a particular lawsuit, does (d)(1) prohibit them being engaged in related litigation and receiving fees for their services?

HONORABLE JANE BLAND: In related litigation, I think it does.

HONORABLE SARAH DUNCAN: They're not appointed in the -- they have no formal role in the related litigation, but they provide services in the related litigation. Does this (d)(1) prohibit them receiving

payment for those services?

CHAIRMAN BABCOCK: I wouldn't read it as reaching that.

HONORABLE LEVI BENTON: I would read it as reaching the fees of a plaintiff's lawyer in a companion case filed in another court. I think that's -- is that what you're suggesting? I mean, I --

CHAIRMAN BABCOCK: Yeah. I think that's what Sarah's saying.

HON. TRACY CHRISTOPHER: Right. And you don't want the plaintiff's lawyer slipping the ad litem extra money.

HONORABLE LEVI BENTON: Wait, wait, wait.

HONORABLE SARAH DUNCAN: For instance, let's say that someone is appointed an ad litem who has particular expertise in tax law and there is related litigation in which the services of that tax lawyer are desired. Does the fact that they're being paid ad litem fees in the original litigation preclude paying them for tax advice to related litigation?

HONORABLE JANE BLAND: To the extent that it's related litigation, I would say yes. I mean, this rule -- you know, an ad litem shouldn't get payment for anything other than fees approved pursuant to this rule.

HONORABLE SARAH DUNCAN: Why would we want to

do that? I mean, if Ad Litem Joe is familiar with the facts of Lawsuit A and the parties and possible resolutions of Lawsuit A, and you've got related Litigation B and Joe's expertise in tax law will be of assistance in related Litigation B and cheaper because Joe already knows the facts in the piece of Litigation A, why would we want to force engagement of some other lawyer and going through the learning curve again?

CHAIRMAN BABCOCK: I don't think you would. The reason why I didn't read this as reaching that is because it says "Anything of value in consideration of the appointed representation," and the situation that you posited, the compensation that he's receiving would be in consideration of that other case, not in consideration of the appointed representation. But if two judges read it differently, then it's a problem. We have to fix it.

HONORABLE SARAH DUNCAN: But then why is there any other -- in the next few clauses, any payment in any other matter?

MR. YELENOSKY: Yeah. Where does the related come from? If you read it the way Sarah does, then it wouldn't extend just to related cases.

JUSTICE HECHT: Well, what it did say is what Bill was telling earlier. You can't get your $43,000 in one case; so you get it in another case, and -- but the $80,000,

whatever it is, is not in consideration for what you did in that case. It's partially in consideration for what you did in the first case that you couldn't get paid for.

MR. MUNZINGER: The trending clause is still modified by the clause that Chip points out, "in consideration of the appointed representation." So it's part-and-parcel of the same. I think it's -- I don't think there is a problem with the rule as written, because it says "in any other matter." It is still modified by "anything of value in consideration of the appointed representation."

CHAIRMAN BABCOCK: Pete had a comment.

MR. SCHENKKAN: That was my comment, the "in consideration."

CHAIRMAN BABCOCK: Oh, really.

MR. SCHENKKAN: Yeah. I agree. I think that solves this problem. We may have other problems.

CHAIRMAN BABCOCK: Is that an example of great minds thinking alike or simple minds?

(Laughter)

CHAIRMAN BABCOCK: Orsinger, and then Ralph.

MR. ORSINGER: Several things. In the second line, ordering the party to forfeit, I think we'd better say person, just so that no one construes that to be the incapacitated person, and I don't --

HONORABLE JANE BLAND: Whatever we call this person at the end, we'll use that nominative.

MR. ORSINGER: Okay. And then there's several things about the mechanism here that trouble me. the person who makes the payment is just as wrong as the person who receives the payment; and, therefore, I don't see that forfeiting the illegal payment back to the party who made the illegal payment illegally is actually -- is punishing the right person. Arce would say that you would forfeit that to the incapacitated person, and there's some logic that if two people conspire to defraud an incapacitated person with an illegal payment and they get caught, maybe we ought to let the incapacitated person receive the illegal payment.

And I don't want this to preempt or create a bar against an Arce lawsuit, and I wouldn't want this to create a double-jeopardy bar against a criminal prosecution for a bribe. No. This -- if this is in a rule of procedure, arguably, it's a fine. And if you forfeit somebody by saying, "Okay. You took a $25,000 payment you shouldn't have. Give it back," then they might have a double jeopardy bar claim against being prosecuted.

I'm not saying that should defeat this concept, but I think we should just keep it in mind.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: This is just a question. How does this -- pertaining to (d)(2). How does the process initiate? We say -- it says "after notice." Is what -- from whom? I'm just asking this question. How does this -- how do you envision this process being kicked off?

HONORABLE JANE BLAND: We put that in because, you know, there was a whole bunch of Supreme Court jurisprudence, that, before you sanction somebody, you have to have notice and a hearing. So it was just to remind people that you can't send out a sanction -- you can't sanction an ad litem without having notice of a hearing. And that could be either by a judge or by a party in the case.

MR. DUGGINS: Well, I would suggest we should -- when you look back at that, that we consider specifying how that gets initiated or who can initiate it by motion or -- just how the process gets triggered or who's got standing to trigger it. It's a little unclear -- at least to me it is.

HONORABLE JANE BLAND: Okay. And, Richard, on your question, if we styled this as a sanction, does that -- because we don't use the word "sanction," and we probably should, instead of "forfeit the compensation," is that --

MR. ORSINGER: I don't have the answer to

that question. I think we ought to ask a D.A., because this statute would apply to a commercial bribe. And we certainly wouldn't want -- I mean, you can't get out of a bribery conviction -- well, that's not true. There have been some public officials that have, but you can't just put it back and say that it wasn't a bribe, and, therefore -- that has worked in Texas jurisprudence, I'm sorry to say.

HONORABLE JANE BLAND: And with respect to your concern about that it's only the parties, I mean, one thing we -- you know, one thing -- we can't really sanction a non-party. So if it is -- you know, if you're saying the payee, if it's, for example, an insurance or financial institution that's made this kickback, we have trouble getting jurisdiction over them in the case.

MR. ORSINGER: All I'm saying is don't -- you know, don't punish the co-equal wrong-doer by giving them their illegal bribe back. Let's just give it to the person who really was injured who's the incapacitated person.

So instead of forfeiting -- I mean, I'm assuming "forfeiting the compensation" means "return it to the payor." It doesn't mean, "Give it to the District Clerk," does it?

HONORABLE JANE BLAND: That's a good question.

MR. ORSINGER: Yeah. I would say, the Arce

concept is, "If you're a fiduciary and you breach your fiduciary obligation to the beneficiary, you forfeit what you profited to the -- or some portion of what you profited to the beneficiary." So it seems to me a better punishment would be not to give the money back to the wrong-doer payor, but do take it away from both of them and give it to the incapacitated person who, after all, is the person who was victimized.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: Under your hypothetical, the person hasn't been shown to have been victimized. I'm sorry. But I'm hearing people making all kinds of accusations about ad litems that I find very upsetting, having served in that capacity. We're assuming that these people are suspect by definition, and this rule is being drafted as though there is all kinds of underhanded sculduggery going on. One, I'm not aware of it. Two, I don't think it happens. Three, if it happens in some isolated place in the state, then let the District Attorney in that area take care of it or let the existing sanctions rule take care of it, but I am so tired of hearing this committee go down the road of bashing lawyers, bashing ad litems over and over and over again in this discussion as though they're all felons when that's utterly inappropriate.

And you've just gone down the track of assuming, one, improper payment; two, that those are somehow against the best interest of the incapacitated person or minor, which has not been shown. There's been -- but we're just making a whole set of heinous assumptions here, and I'd like to have that either justified or toned down. And I certainly wouldn't want that carried forward in what ultimately comes out as a draft of this rule

MR. ORSINGER: Well, Paula, you don't even get to Paragraph (2) unless there's been a payment in violation of the rule.

MS. SWEENEY: Oh, what if you take somebody out to lunch? All of a sudden they've had something of value that they've received.

HONORABLE JANE BLAND: You can have it back.

(Laughter)

CHAIRMAN BABCOCK: Yeah. Steve and then Pete, and then Luke

MR. YELENOSKY: I have no idea whether this happens or not, but whether it does or not, it seems to me this does too little and too much, because if what happens really isn't fraudulent, in a sense, a violation of fiduciary duty, then you don't want this rule to be operating, and if what happens truly is a violation of fiduciary duty and perhaps a crime, you don't want to take

care of it with this little peashooter. So why are we addressing it at all in here?

CHAIRMAN BABCOCK: Pete, and then Luke.

MR. SCHENKKAN: Very consistent with what Steve said. I would propose that (d) read in its entirety what presently the first sentence of (d)(1) reads, stopping at "other than as provided by this rule." "A person appointed under this rule may not receive, directly or indirectly, anything of a value in consideration of the appointed representation other than as provided by this rule," period, full stop.

MS. SWEENEY: Second.

MR. SCHENKKAN: Then the civil law would apply, breaches of fiduciary duty, assuming somebody finds out about it and can find a lawyer who's willing to make that breach of fiduciary duty claim against another lawyer, and the criminal law applies if there's been bribery and you got D.A.s willing to bring a claim, and we'll test and see if you can get away with it by giving your money back.

CHAIRMAN BABCOCK: So Pete and Paula are in agreement on this one.

MR. SCHENKKAN: I know it's extraordinary.

MS. SWEENEY: Write that down.

CHAIRMAN BABCOCK: Would you note this point?

(Laughter)

MR. LOPEZ: Let's call it a day.

(Laughter)

CHAIRMAN BABCOCK: Luke.

MR. SOULES: Won't we have situations where the district court will be awarding some compensation for some of the work that's being done and a probate court awarding compensation for related work being done in the probate court? And it seems to me like if those two -- that at least those two courts should be authorized to make payments.

MS. SWEENEY: Good point.

MR. SOULES: And this says, I think, only -- you can only get what the district court awards. And if you were one of the probate court appointed guardian who's handling the litigation and that probate court appointed guardian is going to have to do some work in the probate court --

MR. YELENOSKY: But then they're being compensated in consideration of their work in the probate court, not in the --

MR. SOULES: But on this matter.

MR. YELENOSKY: Yea, but it's not in consideration of the appointment in this matter that they're getting paid in probate court. They're getting paid in

probate court in consideration of their appointment in probate court.

MR. SOULES: Well, if you say so. It's not clear to me, because the probate court has appointed a guardian in general. The guardian is over taking care of the ward's business in district court, reporting back to the probate court and going through all that tremendous paperwork that you have to deal with in probate court, and then they're going to make a fee application.

MR. YELENOSKY: Well, like Chip said, if Justice Duncan and other judges think it's problematic in the other context, it's also problematic in this context, but it gets back to whether you're being paid for something you're doing different in a different case or a different court.

CHAIRMAN BABCOCK: Which should be okay.

MR. SOULES: Well, you just have more to do because you have to do things in two different courts to satisfy two different judges and two different proceedings over the same matter.

MR. MUNZINGER: I don't see the problem arising if it says, "This rule is only triggered when the party has no next friend or a guardian within this state." If you've got a probate court-appointed guardian, the person doesn't qualify here. It's a false problem, in all due

respect, it seems to me, if the rule is only triggered when you have no guardian or next friend.

MR. YELENOSKY: You could have a guardian that's not appointed yet in probate court.

MR. SOULES: Well, if that fixes it, that's fine with me. I just want to be sure that we're not precluding, because I know a lot of these -- I know a lot of these personal injury cases require a pretty good bit of work, and bankruptcy courts, too.

MR. MUNZINGER: If you had a guardian with a conflict of interest, Richard, the trial court would appoint a guardian ad litem to serve the trial court and the minor, or whoever it is, in the litigation. The guardian who has the conflict of interest is being compensated by the probate court for other matters. It's still not a problem, if this rule says you only trigger this rule in the absence of another guardian.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: It was the conflict aspect of it that I was going to mention.

CHAIRMAN BABCOCK: Couldn't hear you.

HONORABLE SARAH DUNCAN: It was the conflict aspect of it that I was going to mention.

HON. TRACY CHRISTOPHER: Well, we incorporated this from the Jamail report, and -- I mean, I

don't think we felt that strongly about it. If the committee wants to eliminate this entire section, we'll -- all of (d).

CHAIRMAN BABCOCK: Bill, how do you feel about eliminating it, (d)?

MR. EDWARDS: (d)? I don't see that that adds anything that we need.

CHAIRMAN BABCOCK: Well, it's getting at the situation that you described earlier today. Maybe that's so isolated we don't need to worry about it.

MR. EDWARDS: Not really. I don't think this would get there.

CHAIRMAN BABCOCK: Okay. All right. Anything else, Judge Bland, on this rule that --

HONORABLE JANE BLAND: I'll just say, I think the Jamail Committee felt pretty strongly that we needed to articulate that the only kind of compensation you could get was compensation based on a reasonable hourly rate and that -- and I do not have personal awareness of this, but that there was a perception that there were certain ad litems who were getting a fee from structured settlement brokers and/or insurance companies that were captive of particular defendants and that of course -- in exchange for recommending that particular structure or placing the structure with that particular insurance company, and so I

think, you know, the reason that this Section (d) is in there is to articulate that, "Can't do that anymore under this rule." And I don't know if we need the sanctions section of it at all, but I think that's -- I think that's why Section (d) was in here.

MS. SWEENEY: We can't do that now under the Rules of Evidence.

MR. EDWARDS: What was happening out there and still does happen is that an insurance company will have its own broker -- in-house type of guy -- and you'll be told that the annuity is going to cost X dollars. There's a brokerage fee in there -- whatever percentage it is, but the deal between the broker and the insurance company is that they're only going to take half of it. So they're lying to you about the cost of the annuity. That's what the problem is.

HONORABLE JANE BLAND: And I think that was the intended purpose of Section (d) --

MR. LOW: But it does happen where --

HONORABLE JANE BLAND: -- to get at that problem.

MR. LOW: -- nonlawyers -- now, I don't know it happening in a guardian ad litem situation -- where the plaintiff's lawyer have been offered a gift certificate like $100 or a trust, and I gave it -- you know, I wouldn't

accept it. So people don't see that -- I mean, it's $100 is wrong. It would be if they give me $10,000 or what.

So I can see where -- I don't think that this is any mass thing. I don't see it accusing the lawyers. I just see it as pointing out that -- a lot of people are nonlawyers and they don't understand the duty, but maybe we don't need it in here to remind the lawyers of that. It wasn't in here when I didn't take it, so maybe nobody needs it if I understood it.

(Laughter)

MR. MEADOWS: What about just putting a period after "provided by this rule" and strike the including language.

CHAIRMAN BABCOCK: I think that's what Richard suggested.

MR. MEADOWS: All right. I'm sorry. Good suggestion.

MS. SWEENEY: I just want to make the point that what you suggest -- I mean, if the annuity carrier --

HONORABLE JANE BLAND: Well, not me --

MS. SWEENEY: The example that you gave. If the annuity carrier is paying a kickback to the ad litem, that's already unethical. So, you know, if they're not bound by the rules of ethics --

MR. MUNZINGER: It's a violation of 32.43 of

the Penal Code. It's commercial bribery. You can't pay any consideration to anybody owing a fiduciary obligation to another. You can't offer it. You can't pay it. You can't accept it.

MS. SWEENEY: So this is superfluous, I think.

CHAIRMAN BABCOCK: Steve.

MR. TIPPS: We are, as we often do, trying to fix a whole lot of problems, and it's become apparent to me that our current ad litem rule probably needs to be improved upon, and when the committee goes back, that's probably a worthwhile exercise, but it also seems to me that the primary problem that gave rise to our focus on this is the fact that in a certain number of instances every year lawyers and ad litems and judges get in cahoots and end up saddling usually some defendant with some huge out-of-line ad litem fee, and of all of the talk that we've had, I think that David Peeples' suggestion addresses that problem most directly.

And I would suggest that the committee give some consideration to sort of a direct fix and to create for an aggrieved defendant who is victimized by one of these huge fees some quick and easy sort of appeal. It may be modeled on the recusal rules and asking the presiding judge or someone to either himself or to appoint somebody to come

in and review the fee. I mean, that would be a much more direct way to deal with the primary problem. So I second Judge Peeples' suggestion of 45 minutes ago.

CHAIRMAN BABCOCK: And Judge Peeples' idea was a -- was, if somebody is objecting, then the award gets reviewed by some other judge de novo.

MR. TIPPS: Yes. As I understood it.

JUSTICE HECHT: I'll just tell you that the only consideration I recall Tommy Jacks mentioning at the Jamail meetings is that you don't want this to delay things, because -- typically -- it doesn't always happen this way, but, typically, you're pretty close to being done, and if the only thing that remains to be decided before the money is distributed and everybody goes away is that you got to wait three months for the MDL panel or somebody to decide this issue, you don't want that happening either. So whatever it is, it's got to be quick.

MR. TIPPS: But it seems to me like we're talking -- the typical situation is one in which the parties have agreed upon a settlement and the defendant is ready to pay the money, be it $25,000 or $500,000 or $2 million. And an appropriate ad litem fee is $10,000, and, yet, all of a sudden, the judge is saying, "Well, it's going to be $100,000 fee," and I would think at that point there could be some kind of procedure that would allow somebody to

come in and look at that and say, "Yeah. $100,000 is reasonable," or, "No. It's $10,000" and be done with it.

CHAIRMAN BABCOCK: Yeah. And you wouldn't do it lightly either. I mean, as a defendant you wouldn't be quick to take advantage of that. It would only be in an egregious situation where you would, because, otherwise, you're going to risk blowing the settlement that you've just worked real hard to get and you might delay it and that might cause it to blow up, too, so --

MR. LOPEZ: How do you do that?

CHAIRMAN BABCOCK: Richard and then -- well, I mean, that's why we've got the smart judges.

MR. LOPEZ: Because, I mean, I've had cases where they objected because the ad litem's fee was $175 an hour and they thought it should be $170 an hour, and they're like, "Judge, we need you to rule on this." They weren't going to recuse me or tell me to go some -- you know, it needs to be -- I mean, there needs to be a difference between the serious matter and your run-of-the-mill objection where they're trying to lower the fee if they can get it, but, if not, they can certainly live with it.

CHAIRMAN BABCOCK: Right. Richard.

MR. MUNZINGER: I have real problems with referring it off to another district judge or referring it to someone else. You've got jurisdictional problems. Who's

going to sign the final judgment? Okay. So the judge who is the trial judge says, "The fee is X," and you send it off to a master who says, "No, no. It ought to be X minus 10." The judge says, "No. It's X and it's X." Now, what have you done to the defendant who would be willing to appeal the case and let a court of appeals resolve the issue?

I still think -- I said an hour or two ago, if the defendant who is going to pay the costs is so offended by the cost, let him ask for a hearing at which the trial judge hears evidence and the guardian ad litem fee is justified by evidence. And then if the defendant wants to appeal it, let him take it to the Court of Appeals instead of having some kind of bastardized proceeding that denigrates the trial judge's authority, confuses the judgment and raises the question of, "What in the heck am I appealing?"

HON. TRACY CHRISTOPHER: Here-here. And if you want you could give it an appeal de novo and give no deference to the appeal court's finding.

MR. MUNZINGER: You could put -- exactly. Let the appellate court pass on it instead of abuse of discretion, and that brings everybody out of the woodwork. The judge has to be honest because he's got to listen to evidence. There's evidence of what the local hourly rates are. You get $600 an hour in Dallas; we get $150 in

El Paso.

CHAIRMAN BABCOCK: $700.

(Laughter)

(Simultaneous discussion)

MR. ORSINGER: As long as we're making it an appeal de novo, could we also make it a matter of law so that we can go all the way to the Supreme Court?

(Laughter)

HONORABLE SARAH DUNCAN: Interlocutory. I think it should be interlocutory.

HONORABLE TOM GRAY: Oh, let's go ahead and make it accelerated.

(Laughter)

(Simultaneous discussion)

CHAIRMAN BABCOCK: Accelerated interlocutory de novo. I love it.

(Laughter)

CHAIRMAN BABCOCK: Is everybody -- before we lose this point, is everybody on board with not wanting to have a separate appellate situation and Richard's idea of making it de novo, or are people conflicted about that?

What do you think, Judge Peeples?

HONORABLE DAVID PEEPLES: I think going to another trial court is about twenty times as fast as going

through any appellate court.

HONORABLE JAN PATTERSON: Not any trial court.

(Laughter)

MR. MUNZINGER: Nobody in San Antonio wants to offend Judge Peeples.

HONORABLE DAVID PEEPLES: That's why you've got to have somebody that's not next door to the judge who did it.

MR. MUNZINGER: You put a lot of pressure on the plaintiff and the guardian ad litem to be reasonable if they're going to delay and query a settlement for months, and you put a lot of pressure on the trial court if you say you've got to justify your ruling with sworn evidence and there's a record of it.

MR. LOW: But, see, we've got one safeguard in here that we've never had before, and that's saying it's an hourly rate. It's not having that that created this problem. So we've done a great thing and now we're working -- we've done the hour and the minute and we're working on the seconds now. I mean, that's --

(Laughter)

CHAIRMAN BABCOCK: Bill.

MR. EDWARDS: One thing is, it ought to be clear that the settlement doesn't have to wait on the fight

over the ad litem fee, and it ought to be an automatic severance and sever the party if there's a fight over it, to me.

CHAIRMAN BABCOCK: Well, what about de novo review? Does everybody think that's a good or a bad idea?

HONORABLE TOM GRAY: Anything that involves yet another appeal, I'm against.

(Laughter)

HONORABLE TOM GRAY: I mean, realistically -- now, stop and think about what you're talking about. You're talking about what is going to impede the settlement. You're talking about the fee that somebody is going to have to pay the ad litem. Are you saying everybody is going to check off on the settlement with the fee still hanging out there, yet to be determined? I mean, is that practical and in practice is that actually going to happen?

MR. LOW: It happens a lot.

MR. EDWARDS: It happens a lot of times.

MR. LOW: Right.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: Well, I think that, first of all, it would be an appeal on a final judgment, so it doesn't make more appellate work. It's just a case that's being appealed. I think you can make it so that the settlement goes forward and the appeal is the ad litem

fee.

I don't like de novo review, but I'm a trial judge, so, you know, we never like de novo review to the extent that we don't have to have it, and, you know, you have to put this in context. I mean, we make bad decisions all the time, and that's what the appellate court is for. And the only time, you know, one of our bad decisions ought to have some kind of fast track review is, if, because of our bad decision we're going to be -- continue to hear the case and keep making bad decisions.

And so this is -- in the grand scheme of things, is something that is perfectly capable of being appealed. It's at the end of the case. It's a final judgment. The appellate court is well suited to review it. So I don't think we need a separate appellate process for the dispute over an ad litem fee.

MR. SOULES: Well, except, if you don't sever it, like Bill said --

MR. YELENOSKY: How do you sever it?

HONORABLE JANE BLAND: No. I agree with that. I think --

MR. SOULES: Okay. Because you may even wind up with acceptance of benefits waiver of appeal.

HONORABLE JANE BLAND: No. I think it's similar to disputes over attorney's fees in connection with

a settlement. Generally what we do is go ahead and pay the money to the plaintiff and then, you know, what's left over, the fee, and the two lawyers who are fighting over the fee are left over to litigate their case.

CHAIRMAN BABCOCK: Justice Jennings.

HON. TERRY JENNINGS: Well, even if you have a de novo review, it's still going to end up being kind of a bifurcated de novo review, because there are going to be facts on the record, and if somebody is going to take it and inflates the fee, they're probably going to be able to come up with a way of justifying that inflated fee in the record somehow.

CHAIRMAN BABCOCK: Okay. Judge Peeples.

HONORABLE DAVID PEEPLES: This is kind of like what we have now in the family law situation where an associate judge hears something and anybody who doesn't like it, I think they have three days to file something and take it to a district court. And I think 1 out of 1,000 go to district court. But the mere knowledge that it can go there has a sobering effect on the initial decisionmaker, and I think that a quick hearing by somebody removed from the friendly relationship between the judge and the ad litem would have a sobering effect on the first judge in a lot of cases. I mean, $100,000 awards --

MR. SOULES: What about the regional judge?

HONORABLE TERRY JENNINGS: But it's a check and balance, is what it is.

HONORABLE JANE BLAND: But we already have an appellate court for that.

HONORABLE DAVID PEEPLES: Well, if I set something reasonable, I don't mind if somebody else looks at it. This is only the situation in which somebody who's going to pay it thinks it's too much. That's not going to happen very often.

MR. SOULES: Well, I mean, if we use the regional judges, there's a lot -- we've got several judges and they're fairly close by.

HONORABLE DAVID PEEPLES: You would want to have somebody some way to keep it -- you don't want the next door neighbor, you know, who's just going to say, "Well, you know, you may be reviewing my fees next time." I don't know. We do it in other contexts, and I think it would work.

MR. LOPEZ: How is that so different than just going to the Court of Appeals right now?

HONORABLE DAVID PEEPLES: Well, I tell you, one way, the Court of Appeals, you're not going to have the record. To just have it reviewed de novo you just walk down, you know, across the hall or wherever you're going to go and just present the same five minutes of testimony, and

the judge either says, "Gosh. That's outrageous, I'm going to lower it," or "That's in the ballpark," and it's affirmed.

MR. ORSINGER: If all you're doing is walking down a hallway, you have to walk to another judicial district so that you don't have the same electorate -- or electing the same kind of judge.

HONORABLE DAVID PEEPLES: I think there are some areas where you'd need to do that, that's true.

CHAIRMAN BABCOCK: Texarkana, the courthouse, you can go to different state.

(Laughter)

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: Should we write in a provision for the inadequate ad litem fee as well?

CHAIRMAN BABCOCK: De novo review of that.

MS. SWEENEY: It sure seems to be a one-way street to me.

HONORABLE JANE BLAND: I think right now there's a hearing about what the fee is, or reasonable or necessary, and it doesn't contemplate that only -- it says "unless all parties agree." So, presumably, if the ad litem disagrees, the ad litem has that avenue to appeal.

MR. MUNZINGER: The outcry of underpaid

plaintiff's lawyers has overwhelmed us.

MS. SWEENEY: We're talking about ad litems, not plaintiff's lawyers.

HONORABLE TRACY CHRISTOPHER: Could we have a vote on appellate court versus another trial court?

CHAIRMAN BABCOCK: The Peeples' proposal.

HONORABLE TRACY CHRISTOPHER: Would that be possible, so we don't have to draft --

CHAIRMAN BABCOCK: Yeah. I think that's a good idea, because I don't have a good sense of where the room is on this.

MR. SOULES: I just don't know which other trial court it would be. That's my question.

CHAIRMAN BABCOCK: Judge Peeples, do you want to state your proposal again, with whatever modifications you choose to make to it?

HONORABLE DAVID PEEPLES: Well, okay. When there's been an ad litem fee set and somebody thinks it's unreasonable, that person would have the right to take it to a different trial court who would have to decide if some distant body picks -- you know, the Court of Criminal Appeals has designated, by statute, a wiretap judge in every part of the state. The high court has said, "This is a trusted judge that the police go to to get a wiretap." In other words, you might have to have some preapproved judges.

I don't know. And as I've said, I don't think to have the buddy of the trial court -- it would work that way. That would be better than nothing, but, probably, you'd have to have some elevated, you know, person that's going to hear one of these a year maybe, that you just go -- and it might happen the same day. You might walk out of a trial court where you got the $100,00 fee and go somewhere else or get on the telephone and have it heard by another judge, and it would be instant. You wouldn't have to have a record. I don't think there needs to be a record. You just present the same testimony, which is a matter of minutes, and then this outrageous fee -- or outrageously low fee is reviewed, in the one out of the hundred cases or fewer that it happens.

MR. SOULES: Yeah, but de novo hearing, not on the record -- not on the first record.

HONORABLE DAVID PEEPLES: It's not a review of the original record. It's a representation of the same thing to a different decisionmaker who, presumably, is not buddies with the ad litem.

CHAIRMAN BABCOCK: It's sort of like recusal, is what you're talking about.

HONORABLE DAVID PEEPLES: It's analogous to that.

HONORABLE TERRY JENNINGS: Couldn't it be

like the administrative judge or --

HONORABLE DAVID PEEPLES: Could be. Could be.

HONORABLE LEVI BENTON: Yeah, but this -- we didn't resolve what -- someone else's comment about what if it's my award you disagree with it and I say, "I'm not going to sign this judgment. I'll just transfer the case to Peeples and if he thinks that's the right fee" --

HONORABLE DAVID PEEPLES: It gets done, doesn't it?

HONORABLE LEVI BENTON: What if I don't want to transfer the case and what if I won't sign the judgment?

MR. MUNZINGER: That's the problem that Judge Peeples suggested, you've got the trial judge to have a final judgment. The judgment has to be signed disposing of all issues and all parties by the trial judge. You've now brought in a foreigner, stranger into the process, apparently giving him the authority -- or her the authority to make a final decision on a very small part of the case. The solution is to sever that issue out and let it go forward, but to have some kind of a stranger come in and tell the trial court, "You've made a mistake. I think you screwed up the jurisprudence on final judgment" --

CHAIRMAN BABCOCK: So you'd be against this. Right?

MR. LOPEZ: I think under Chapter 74, you can do it. I mean, any district judge in Dallas can sign my judgment.

CHAIRMAN BABCOCK: Okay. One more comment and then we'll vote on it.

Judge Gray.

HONORABLE TOM GRAY: I was just going to first make sure that everybody, and particularly the record, knew that I was jesting a while ago when I was talking about "against any other appellate issue" --

(Laughter)

CHAIRMAN BABCOCK: We're going to blow that quote up big time.

HONORABLE TOM GRAY: I understand. That's why I'm going to have one to blow up in response.

I do want to revisit one comment that Buddy made on the -- if we limit this to reasonable hourly rate for the necessary hours actually spent, I think that we have focused the problem and eliminated that margin that we're so concerned about.

The appellate courts get that issue all the time on a review -- on a record, and we can deal with that. That's SOP. Apparently, that would be the only issue in this appeal, because apparently everything else has been decided. And I, frankly, didn't realize that there would be

that many settlements dependent upon just a single issue of the attorney's fees that the defendants were willing to pay high or low, but this is going to be what resolves the whole case and this is the only issue to be decided.

I understand the mechanical problems of David's approach and Richard's concern over it, and if the case is really -- still will get settled with this issue hanging over them, then the appellate route is certainly an alternative.

CHAIRMAN BABCOCK: Okay. Everybody -- well, Judge Bland.

HONORABLE JANE BLAND: If he's going to take back what he said, I'm taking back what I said about us making bad decisions because --

(Laughter)

HONORABLE JANE BLAND: I shouldn't have said that.

MR. YELENOSKY: When you said "all the time," you meant never.

(Laughter)

(Simultaneous discussion)

MR. MEADOWS: You meant bad like good.

(Laughter)

HONORABLE JANE BLAND: Exactly.

CHAIRMAN BABCOCK: That Judge Bland, she is

bad.

(Laughter)

MR. MEADOWS: I would like to say, if I could quickly, that I agree. I think that once we redefine and limit the work and we tie the compensation to hours worked at a reasonable fee, we're not going to have this kind of problem. I think we're addressing a problem for an old -- for an outdated hopefully soon --

HONORABLE TOM GRAY: I'm not even sure you have to define the work in the rule if you limit what is paid to hour -- a reasonably hour rate for necessary hours actually spent performing services.

MR. SOULES: And we have a severance.

CHAIRMAN BABCOCK: Okay. Here's an incentive to get this vote done, as soon as we take it, we'll take our afternoon break. How about that?

MR. SCHENKKAN: Let's vote. Hold the questions.

CHAIRMAN BABCOCK: In favor of Judge Peeples' proposal, raise your hand.

(Show of hands)

MR. TIPPS: I'm going to vote for it if Peeples' does.

(Laughter)

CHAIRMAN BABCOCK: We're sucking up the

Peeples' vote here.

Okay. Everybody against.

(Show of hands)

HONORABLE LEVI BENTON: I didn't vote against him, but I didn't vote for him either.

CHAIRMAN BABCOCK: Okay. By a vote of 18 to 4, it fails. So we won't do that, but we will take a break.

(Break: 3:45 p.m. to 4:08 p.m.)

CHAIRMAN BABCOCK: Okay. We're on the record. All frivolous commentary will cease.

MR. LOW: The evidence committee has worked long and hard, and as a result, we present to you a work today which I'm sure will merit no criticism.

(Laughter)

MR. LOW: So sit back --

CHAIRMAN BABCOCK: Relax.

(Laughter)

MR. LOW: -- drink your coffee and realize that --

(Laughter)

MR. LOW: Here we go.

MR. SOULES: So moved.

MR. LOW: Amen.

The first thing I'd like to talk about is Rule 103. The federal rules -- we, I think, briefly spoke

about this once before, and it is a sentence that was added to the Federal Rule 103 that said once the court makes a definitive ruling on the record admitting or excluding evidence either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. And it's not affected -- it doesn't effect the motions in limine, because those usually just say, you know, approach the Bench. So I think it is a good thing to -- the federals thought it was good. Your hardworking committee thought it was good and I'm sure you will, too. End of sentence.

HONORABLE JANE BLAND: I'm ready to vote.

MR. LOW: All right.

(Laughter)

MR. LOW: We got -- we got a bid right there. What -- Luke seconds?

(Laughter)

MR. SOULES: I second.

MR. LOW: All right. Here we go.

CHAIRMAN BABCOCK: Wait a second.

(Laughter)

CHAIRMAN BABCOCK: I'm ready to vote. I just want to know what we're voting on.

MR. LOW: That's all right. Which I add that sentence.

CHAIRMAN BABCOCK: Add the federal sentence?

MR. LOW: Yeah.

MR. BOYD: The chart you sent out says the proposal is not to add the sentence.

MR. LOW: No. Our committee met -- well, you got the first chart.

(Laughter)

MR. LOW: The committee, we had -- we went back and talked about it and we agreed and put -- to clarify and to add the sentence -- we talked about it before, and there was some question and it was sent back. And your hardworking committee understood what you wanted and now we're giving it to you.

CHAIRMAN BABCOCK: Any discussion about adding this sentence to Rule 103?

MR. BOYD: I do, Chip. Sorry. The state rule under, Subsection (a)(1) includes a sentence that the federal rule does not include that is similar to but not exactly the same as the language you're pulling out of the federal rule, and I wonder if the recommendation is to delete that sentence or have them both in.

MR. LOW: Tell me what sentence on 103 you're talking about.

MR. BOYD: 103(a)(1), when the court hears objections to offered evidence out of the presence of the

jury and rules such evidence be admitted, such objection shall be deemed applied such as when it is admitted before the jury without the necessity of repeating those objections.

MR. LOW: Okay. Now --

MR. BOYD: That's not in the federal rule.

MR. LOW: We did not even -- that wasn't one of the things that was given to us to consider. We can leave it in if you think it -- or take it out. We just wanted to make it clear -- the federals have made it clear, and maybe we need to take that out, but --

CHAIRMAN BABCOCK: That's talking about something different.

MR. LOW: We didn't consider that. That wasn't even one of the things that was referred to us, but certainly, if you think it's inconsistent or repetitive, we could take it out.

MR. EDWARDS: It's neither.

CHAIRMAN BABCOCK: It's neither inconsistent nor repetitive.

MR. LOW: The last sentence in 103(a)(1), objections.

MR. EDWARDS: Without that motions in limine, you have to stand up and make the objection when the evidence comes in. This deals with, primarily, motions in

limine, the one that's already in there. The one that you're talking about is already the law of Texas in cases. It's not written in the rule, but one I recall, the Fourth Court case in about 1962, Flores vs. Barlow.

(Laughter)

CHAIRMAN BABCOCK: Let's see. 1962, I was 13.

(Laughter)

CHAIRMAN BABCOCK: Yelenosky was 4.

(Laughter)

MR. LOW: That was the year before I went on this committee.

(Laughter)

CHAIRMAN BABCOCK: All right. Jeff, any further comments?

HON. TRACY CHRISTOPHER: I just had a question. A ruling on a motion in limine, is that going to fall here?

MR. LOW: No, because it's not a defense of the ruling. The ruling in motion in limine says you can't go into something without first approaching the Bench so you can bring it up. And that was discussed with the federal -- there's a long discussion about that.

CHAIRMAN BABCOCK: Okay. Any other comments about this Rule 103?

Justice Duncan.

HONORABLE SARAH DUNCAN: So, Buddy, we're talking about running objections, not motions in limine. Is that correct?

MR. LOW: Right. We're talking -- yes.

CHAIRMAN BABCOCK: Any other comments?

MR. TIPPS: Well, Chip, I mean, I'm not sure that's exactly right, because we are talking about the ability of the trial judge to make a definitive ruling concerning the admissibility of evidence before trial, but it would not be -- it would be different from the grant of a motion in limine.

MR. EDWARDS: It could be an overruling of a motion in limine.

MR. TIPPS: Well, it could be -- I mean, it could be a ruling that, "I understand what your evidence is going to be and my ruling is that that evidence will not -- is not admissible in this case."

MR. EDWARDS: I know. That's when they grant it. But if they overrule it, they're saying, "It is admissible." The overruling of a motion in limine is overruling of an objection to the evidence, in my mind.

(Simultaneous responses)

MR. EDWARDS: It is not?

JUSTICE HECHT: It just says you --

MR. SOULES: That you can offer it.

JUSTICE HECHT: You can offer it without approaching the Bench.

MR. EDWARDS: Well, it ought to be that you don't have to make an objection. I thought that's what this was about, in part.

MR. YELENOSKY: It's changed since 1962.

(Laughter)

(Simultaneous discussion)

CHAIRMAN BABCOCK: All right, kids. Settle down.

Nina.

MS. CORTELL: I would understand this not to apply to limine rulings, but it could be a source of confusion. So I would suggest that we consider a comment that it does not include limine rulings.

MR. MUNZINGER: It does not what?

MS. CORTELL: Include limine rulings.

MR. LOW: But that's why it's not definitive --

MS. CORTELL: I agree with you, but I'm just saying it might be a source of confusion.

MR. LOW: All right. Well, your committee will certainly do what --

(Laughter)

MR. SOULES: A ruling on -- include a comment that a ruling on a traditional motion in limine is not a definitive ruling.

MR. LOW: Yeah, but you can have an --

MR. LOPEZ: It depends on the traditional ruling. I mean, if the judge --

(Simultaneous discussion)

THE REPORTER: I can only take one --

CHAIRMAN BABCOCK: Hey, guys, guys, guys. One at a time or she'll never get it.

Carlos was speaking.

MR. LOPEZ: What if the judge inadvertently or purposefully goes farther than what -- it's a limine hearing. It's on the record. And he says, "That evidence ain't coming in." That's a pretty definitive ruling, isn't it?

JUSTICE HECHT: That's not a limine ruling.

MR. LOPEZ: Okay. As long as everybody agrees that's not a limine ruling.

CHAIRMAN BABCOCK: Okay. Richard Munzinger and then Judge Bland.

MR. MUNZINGER: I just was curious why you believe that the second sentence of current Texas Rule 103 is not redundant of the new sentence being proposed in this rule --

MR. BOYD: Me, too.

MR. MUNZINGER: -- because I would think that they are redundant and that leaving the second sentence of 103(a)(1) in the Texas rule would prompt the practitioner to wonder why you'd have to say the same thing twice and whether there is a difference that's contemplated. It may be creating some confusion to the rule. I think they are redundant.

MR. BOYD: Can I add to that?

CHAIRMAN BABCOCK: Yeah, Jeff.

MR. BOYD: As I read it, and still read it, even after you-all said they weren't redundant, what the Texas rule sentence does, is, it provides the protection that you're talking about but only in the case where the ruling admits the evidence. What the federal rule does, is, it provides that same protection, i.e., you don't have to repeat the objection regardless of whether the ruling admitted or excluded the evidence. That's how I read it. I may be reading that wrong.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: I think that's a fair reading of it, but also I have fought -- I have always thought that that sentence that is in the rule was directed at a quirky practice that seems to be part of Texas culture, which -- and I never did go back to look to see where it came from,

that if you don't make the objection in front of the jury, it's not any good.

So if you -- you've sent the jury -- the jury is taking a break. You're taking up the next witness in the courtroom. The judge says, "Well, I'm not going to let" -- you know, "I'm not going to let that in. I'm not going to let that in," or whatever, and handles objections. And then when I was on the Bench and even when I was in practice, lawyers would get up and say, "Well, judge do I need to make that" -- "I need to make that objection when the jury comes back in the box," and, "No, you don't." I mean, as long as the objection is made and ruled on somewhere, the jury doesn't have to know about it. Maybe you want them to know about or maybe they don't, but they don't have to to preserve error.

Whereas, the sentence in the federal rule is to -- is broader than this, but it now helps with our expert witness and Daubert questions where you get a ruling before trial, that, "Yes. I am going to let this expert testify," or, "No. I'm not." And then the parties, to some extent, need to plan how they're going to present the trial in the light of that ruling, and not just a motion in limine that -- the judge says, "Well, I may change my mind after I hear five days of testimony." Well, the judge may still change the ruling into the trial of the case, but lawyers

need some way of knowing, when there's a ruling that they're all depending upon for the planning of the trial, that this is going to be the way it is and this is not just an approach to Bench ruling.

MR. LOW: It was McConnell where they held that, you know, on a motion in limine, that then you had to make it again at trial, and that has created a lot of confusion, and, in McConnell, they didn't make it again. They said, "Well, that's not sufficient." This is supposed -- and there may be some conflict in the way the rule is written, but this is supposed to make it clearer or fairer, that, you know, you make your objection and he makes a definite ruling, not that you have to approach the Bench. And nothing in here prevents you from saying -- from approaching the Bench on something to say, "Judge, this has changed now. They've opened the door to this. They've opened the door" -- it doesn't prevent that, but it allows you to rely on that and not have to get up and do that or object in front of the jury or say, "Judge, would you send the jury out? I need to" -- you know, it's for the flow of the trial.

CHAIRMAN BABCOCK: Okay. Any other comments about this?

HONORABLE JANE BLAND: I was just going to say that Leigh Rosenthal's, hers begun -- in federal court,

the practice is to ask the trial judge, "Is this a definitive ruling?"

(Laughter)

MR. LOW: If the judge tells me I can or I can't --

HONORABLE JANE BLAND: The judge makes a ruling at pretrial, because pretrial is when the confusion might occur, because often, in pretrial, you know, the objection is there's not enough foundation or something like that that can be cleared up during trial. So to say it's, you know, pretrial to say one thing to make a ruling, you shouldn't be able to then complain about it on appeal the error of the ruling by using evidence that's presented at trial that wasn't presented at pretrial.

So in federal court, they ask the judge -- I mean, that's what she says they do, because that alerts the judge that, you know, they're planning to rely on this ruling for the duration of the trial.

MR. WATSON: Well, I don't know about Chip, but I always just ask them if they've learned the error of their ways.

(Laughter)

MR. LOW: We even had one case that we tried where -- it was in federal court -- lasted like three months. It would have lasted longer than that if we hadn't

done it this way -- where we would make tenders of documents or evidence and so forth with one group of lawyers in magistrate, and they'd make rulings before we got there. So when we got there, there were no objections. They were already recorded in another hearing. There were no objections, hardly, during that trial.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I'm confused -- I'm sorry -- about what the proposal is. The proposal as I read it is that we're going to add the sentence -- the sentence beginning with "Once the court makes" as a separate paragraph following (1) and (2) as it is in the federal rule, because in the federal rule, that is the sentence that applies to both (1) and (2).

If you'll look at it, it says -- the federal rule says after (a) -- (a) ends with an "and," and then one talks about objections to the admission of evidence and then one talks about rulings that exclude evidence -- (2) talks about rulings that exclude evidence. And then the sentence that we're talking about, "Once the court makes a definitive ruling admitting or excluding evidence." So it applies to both of them.

Now, I don't know that that's the way the Texas rule would work, especially if we kept the second sentence in (1.) It's going to look -- I mean, again,

what's the purpose of the second sentence in (1).

MR. LOW: No. It's at the end of the second sentence, offer of proof, and the case ruling (1) excluding the evidence, sub and so forth, once the court has made a definitive ruling, so forth, excluding the evidence. It goes at the end of (2).

MR. GILSTRAP: Okay. Well, is it going to say "Once the court makes the definitive ruling admitting or excluding evidence," or is it just going to say "excluding evidence"?

CHAIRMAN BABCOCK: Admitting or excluding.

MR. GILSTRAP: The federal rule clearly talks about (1) and (2).

MR. LOW: The way -- we've copied the federal rule. We put it after (2) instead of (1) because it would apply to -- go ahead.

MR. TIPPS: Well, I think we should copy the federal rule, totally, because I agree with Jeff and Richard upon rereading this that the inclusion of the "Once the court makes a definitive ruling" sentence makes the current second sentence of 103(a)(1) superfluous.

MR. GILSTRAP: It also is confusing, because the second sentence of (1) talks about a ruling and the new sentence talks about a definitive ruling.

MR. TIPPS: I don't think we need the "When

the court hears objections" any longer.

MR. LOW: I'm fine with that. You and I are the only two on our committee here.

MR. GILSTRAP: And I guess, Chip, again, if we're going to make it totally congruent to the federal rule, (1) will be -- "or" will come at the end of (1). It will be semicolon "or," like it is in the federal rule. I mean, we're talking about going to complete federal rule language, which I think we probably ought to do.

MR. LOW: In other words -- see, they added that sentence at the end of (2) in the federal rule. That's where it's added. Federal Rule (1) doesn't have everything -- it does. It applies to both (1) and (2). And as Jeff pointed out, (1) is not worded federal exactly like (1) is state rule, and we've spoken about it earlier and some felt that the last sentence in (1) added something else and was not inconsistent. I haven't really thought about it in that light, so could be right.

Do you want to go with the straight federal rule?

JUSTICE HECHT: Well, you could and add a comment that just says, "We think the new language covers it and old language doesn't add anything."

MR. LOW: And we want to comment that by taking out that sentence that -- that the new sentence

covers --

CHAIRMAN BABCOCK: I sort of disagree with people and say that that second sentence in the Texas Rule (a)(1) is redundant, because it does deal with something that the new language does not deal with, and that's whether you've got to do in the presence of the jury. And Justice Hecht is right. There used -- at least in Dallas, there used to be a lot of people that thought that you had to make that objection in front of the jury or else it didn't count, and if you go and take this out now, you know, you may suggest to people that now we're back to the old way of doing things.

MR. BOYD: You know, you're called to trial on a Monday morning. The judge says, "We're going to spend this afternoon doing pretrials. Have you-all conferred over exhibits?" "Yes. We've confirmed. We've got four exhibits we object to. We need you to rule on them." So you spend that afternoon -- before the jury panel even comes in Tuesday morning, you spend that afternoon and the judge rules some in and some out.

CHAIRMAN BABCOCK: Right.

MR. BOYD: Which -- if you include both pieces of these rules, which one applies. As I read it, they both do. And that's the sense in which it's redundant. They both say, "in the case in which the judge admits the

evidence." They both say, "I don't have to repeat the objection once the jury comes in and there's a trial."

CHAIRMAN BABCOCK: What's in 103 (a)(1) now is in the situation where you have your pretrial and the judge says, "Okay. You guys are in dispute over four exhibits. I'm going to admit two of them. I'm going to exclude two of them." When -- you say, "Judge, note our objection." Then when it comes time, those two that are admitted are admitted, and you don't have to stand up and object again.

MR. BOYD: That's the exact same thing -- the new language from the federal rules says.

CHAIRMAN BABCOCK: Except that the new language also talks -- doesn't address whether you've got to do it in front of the jury or not, and the federal language is also dealing with, not just admitting, but also excluding and you don't have to --

MR. BOYD: Right. It's broader than but encompasses -- the new language from the federal rule is broader than but encompasses what the old -- this language currently in (a)(1) already says.

CHAIRMAN BABCOCK: There are a couple of ways we can do it. You can take that language out and make a comment and say, "We're not intending to change anything about doing it in the presence of the jury." You don't have

to do that, and that's one way to handle it.

MR. YELENOSKY: You could have a clause in front "whether or not the ruling is made in front of the jury."

MR. GILSTRAP: Yeah. Just add that.

MR. EDWARDS: That's what I was going to suggest with regards to the "Once the court makes a definitive ruling."

MR. GILSTRAP: "At or before trial in the presence of or outside the presence of the jury" --

MR. TIPPS: "Whether or not in the presence of the jury."

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: Where that comes from is a Supreme Court case, and it's "something bus lines," and I can't remember the rest of it, and I think all you need is a comment saying this rule intends to overrule that.

The other comment I have is, I don't think we want to adopt (d), since we don't really have plain error.

MR. BOYD: We're just adopting the federal (a).

HONORABLE SARAH DUNCAN: Just (a)?

MR. BOYD: We're changing -- right. We're replacing state (a) with federal (a) with additional

language, "whether or not in the presence of the jury."

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I just wanted to make sure that whoever the scribbler is they picked up the point that was made down the table here, that Section (1) in the federal rule does not end with a period after the word "context." It ends with a semicolon and "or," and that the sentence being added comes as a separate paragraph under Subsection (2). It's different -- to make it clear -- that the newly added paragraph applies to all of Section (a).

CHAIRMAN BABCOCK: I believe on this side of the table, we got that.

(Laughter)

CHAIRMAN BABCOCK: The right wing has -- or the left wing, depending on your perspective.

(Laughter)

Yes. Stephen.

MR. TIPPS: And Buddy tells me that the committee's new recommendation is to include in the Texas rule the semicolon "or" that we just talked about; to delete the "when the court hears objections" sentence in (a)(1); and to modify the "once the court makes a definitive ruling" sentence from the federal rule by adding after the words "either at or before trial," comma, these words: "whether or not in the presence of the jury," comma.

CHAIRMAN BABCOCK: All right. Everybody in favor of that, raise your hand.

(Show of hands)

CHAIRMAN BABCOCK: Anybody against?

(No response)

CHAIRMAN BABCOCK: 25 to nothing, the Chair not voting.

MR. EDWARDS: Would that be a Paragraph 3 or would it just be part --

MR. LOW: It would be -- add "Once the court makes a definitive ruling." It would just be added to the federal sentence. It would be not exactly the federal sentence.

MR. EDWARDS: Would it be a Subparagraph 3?

MR. LOW: No. It would go after (2) as it does now.

MR. GILSTRAP: Just like the federal rule.

MR. TIPPS: The final sentence of 103(a).

MR. LOW: It will be like the federal rule, except it will have "whether in the presence of the jury or not."

CHAIRMAN BABCOCK: Okay. We got that, Bill.

MR. EDWARDS: Semicolon "or."

CHAIRMAN BABCOCK: Okay. What else do we got?

HONORABLE TOM GRAY: Chip?

CHAIRMAN BABCOCK: Sir?

HONORABLE TOM GRAY: Question -- and I'm trying --

MR. LOW: I didn't move fast enough.

(Laughter)

HONORABLE TOM GRAY: -- but in the appellate rules, 33.1, we've got the concept of an implied ruling with regard to all types of complaints, including erroneous admissions on the admission or exclusion of evidence, and could it be argued that now we are back to having to require a ruling in the record, no implicit rulings on the admission or exclusion of evidence, and do we need a comment to the evidentiary -- this change we've just voted on, that it doesn't affect implied rulings on the admission of evidence otherwise -- or something of that nature -- if we intend to preserve that.

CHAIRMAN BABCOCK: Richard Orsinger -- I mean, Munzinger.

MR. MUNZINGER: How can you do that if the rule that you just adopted requires a "definitive ruling"? Definitive ruling, it seems to me, by definition, preclude implied rulings.

HONORABLE TOM GRAY: Well, and even further than that, Richard, because it's definitive on the record,

but what I'm saying is that if there's -- like I say, I was trying to think of how it would impact on implied. A piece of evidence is either the -- the most likely situation is there's an objection made. There's no definitive ruling, but it comes into the presence of the jury.

Is that -- I mean, it's in the record, then. I mean, it's -- in the sense that it's talked about, it's discussed, and I was just trying to think of where that implied concept was left in the context of evidence.

MR. MUNZINGER: I think that's the whole point of the inclusion of the word "definitive" in the federal rule and in our rule. You can't send back somebody by coming up with an objection that you didn't make in trial if there has not been a definitive ruling by the trial court at some stage of the proceedings.

So if somebody offers some evidence and you don't say anything about it and three days into trial the evidence is now in front of the jury, you aren't covered by new Rule 103; there was no definitive ruling on the admissibility of the evidence. That would be my point about your concern under the implied evidence ruling, and that would be the way I would argue it.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: By "implied ruling," are you talking about the phrase in 33.1(a)(1)(A) which says that

they've got to be specific unless the specific grounds were apparent from the context?

HONORABLE SARAH DUNCAN: Keep going.

HONORABLE TOM GRAY: Under (a)(1) -- no (a)(2)(a), the trial court ruled on the request, objection or motion either expressly or implied implicitly.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I don't think they're incompatible. All this rule is saying is that once you have a definitive ruling, you don't have to keep repeating your objection to preserve error. It does not mean that you can't have an implicit ruling. There's nothing that says that you must object -- that's the first part of the rule. And then it says, "Once you have a definitive ruling, you don't have to re-urge your objection," but it does not make unavailable an argument of error based upon an implicit ruling under 33.1, I don't think.

MR. BOYD: I agree.

MR. LOW: All right. One thing, we can either put that language in, comma, the language, comma, or just in parentheses, which doesn't --

CHAIRMAN BABCOCK: Frank Garner would want commas, wouldn't he? Frank Garner would want commas.

MR. LOW: All right. Comma it will be. And

we don't need any comments. It's pretty obvious what we're doing.

Okay. The next thing is -- another thing that's been unanimously approved by your committee --

(Laughter)

MR. LOW: -- and the State Bar Committee, including judges, professors and a lot of people, and that is --

CHAIRMAN BABCOCK: And every other jurisdiction does it this way. Right?

(Laughter)

MR. LOW: And even Louisiana.

(Laughter)

MR. SCHENKKAN: Up to that point, we were with you.

(Laughter)

MR. LOW: Well, I thought it would wake you up. We'll exclude Louisiana.

All right. It will be a new Rule 904, and it's -- did you get the attachments on 18.001, changes about affidavits? Basically, what it is and what brought it about -- now when you're proving up your medical expenses, so forth, you give an affidavit, and if the other side does not object, then, you know, you can offer it, but if they object, you can't.

The State Bar Committee felt that you should be required to do more than that. You should file and be required to file a counter affidavit stating what you object to or why. And then, that event, you'd have to call your doctor.

The only problem we had with it was that it is that way -- the way we have it in our rule is the way it is in the Civil Remedies Code, Section 18.001, but the government code, Section 22.004, gives rulemaking authority to the Supreme Court. And if the Legislature doesn't like that, then, you know, they change it. If they don't change it, it's a rule.

And most everybody on our -- well, everybody on our committee, including Scott, it was unanimous, as well as the State Bar Committee wanted this. And I was the only one that kind of objected, because I didn't know how the Legislature -- I'm pretty sensitive to what the Legislature thinks -- but nobody thought it would be offensive to them, and we agreed to do that. And you'll see the proposed new rule, 904, and there are not at lot of changes. I hope you have it, because -- that's basically the effect of it. Nothing has changed other than you have to file a counter affidavit.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I just wanted -- could you

stated the effect of the rule. I offer an affidavit that meets the requirements of the rule within the time limit prescribed within the rule.

MR. LOW: Right.

MR. MUNZINGER: My adversary files a counter affidavit. What happens?

MR. LOW: No, no. Used to, your adversary just had to say, "I object to that." Now he has to file a counter affidavit stating what he objects to and why, and then you've got to prove it just like you did before. You got to -- if he does that. It changes nothing other than, you can't just object. You need to come in and -- because people, apparently, were just objecting when they really -- just to require somebody to go to the trouble of bringing, you know, somebody when they really had no basis, and if they have to file some affidavit stating -- they would be discouraged from doing so.

MR. SOULES: Same as in a deposition.

MR. LOW: Yeah. And they convinced me it was good.

MR. MUNZINGER: What section of the rule -- Buddy says if the counter affidavit is filed, then you have to prove it. Where is it? What I'm looking at has the Exhibit sticker F on it, and I just was curious -- I'd like to see the section.

MR. LOW: Because it says "An affidavit that a person charges" so forth, "reasonable place of service provided necessary sufficient evidence to support findings, affidavit must," so forth. "And the party offering the affidavit must file the affidavit if party intended not to" -- it says, "The counter affidavit must" --

MR. YELENOSKY: It says "A party may not offer."

MR. LOW: "May not offer," yeah.

MR. YELENOSKY: "May not offer evidence unless" --

MR. MUNZINGER: Which section is that?

MR. LOW: Let me show you.

MR. MUNZINGER: (e). No. I have it. But what that says is, "I may not controvert." I'm looking for the section that says, "If controverted, you have to prove it."

MR. LOW: Well, I mean, if it -- that's just the way it's been before, that if they objected, then you had to prove it. It wasn't -- I don't know that it was written in there.

MR. DUGGINS: Isn't it in (g) down at the bottom? This says, "You submit the affidavit."

MR. ORSINGER: No. It's in (b). (b) says, "Unless a counter affidavit is filed." So if a counter

affidavit is filed, (b) doesn't apply and you can't walk the affidavit in.

MR. LOW: That's right. Yeah.

MR. LOPEZ: (g) says they both go to the jury.

HONORABLE JANE BLAND: That's going to be deleted, though.

MR. LOW: No. The only thing that's going to be scratched through is (b), where you scratch through "unless a controverting affidavit is filed as provided in this section." Then we'll strike through down at (f) and say, "The counter affidavit must," and then you'll strike through "give reasonable notice," and so forth. And it says, "Counter affidavit must be made by a person with knowledge," and so forth, and you have to basically state the --

MR. TIPPS: I'm not sure we should strike through the "unless" language. Don't we still need that?

MR. LOW: I didn't read it that we did. It just said --

MR. TIPPS: I mean, that -- it's the unless language that states the consequence.

MR. MUNZINGER: But Subsection (g) says all these affidavits are admitted, both sets. So you're now trying a fact question to the jury on affidavits without the

benefit of cross-examination of the witness on competing affidavits.

HONORABLE LEVI BENTON: Yeah, but they can always depose those people.

MR. MUNZINGER: Well, the way the rule is set up, if I'm a proponent of the first affidavit, I may do so within 30 days before the day on which evidence is first presented at trial. And then my adversary to offer evidence has got 30 days to file the certificate. I don't know -- I'm not real keen on trying fact issues by affidavit.

I had a case once with a Frenchman, and he was marveling at how we spend all the time that we did on discovery issues and fact issues. He was overwhelmed by it. He said, "In France, we do it by affidavit." And then he said, "But you Americans get to the truth."

(Laughter)

MR. MUNZINGER: That's what trials are for, is to find truth. I question the wisdom of allowing any issue to be tried to a jury on the basis of affidavits without the right to cross-examine. I think it's fundamentally wrong.

MR. LOW: There's an (e) struck out. I misstated there. Where it says, (e) "A party intending" -- it says, "A party may not offer evidence to controvert a claim reflected unless the party files a counter affidavit."

HONORABLE JANE BLAND: And that's the section that gives me a little bit of cause for concern, because Subsection (b) says that the affidavit itself may not be enough to require such a finding, and I agree with Richard, that we like to, you know -- to have a joining of the issues. And so I don't think a party should be required to file a counter affidavit in order to controvert the claim that these medical bills were not reasonable, you know, because the impact was so slight, or whatever reason, and that the medical treatment was excessive.

It seems to me like the theory behind this is to prove up the medical bills and the medical records, and so let somebody file an affidavit and prove up the medical bills and the medical records and let it be admitted. And then let somebody file a counter affidavit, if they want, and let that counter affidavit be admitted. But you shouldn't preclude a party from attacking in court through cross-examination or by argument that the records themselves -- you know, whatever is on the face of the records, from questioning the credibility of the affidavit or the substantial -- or that the records meet -- you know, meet what they're intended to meet and offer them. And just let the parties -- let it be the threshold for admissibility, but not have it be that somebody can't controvert what's in those affidavits in court.

CHAIRMAN BABCOCK: Judge Sullivan and then Bill.

HONORABLE KENT SULLIVAN: I think this is a fairly big deal for small personal injury cases, and I think there's a fair amount of confusion about it.

I agree with Jane. The purpose of this rule, as I've always understood it, was to avoid having to subpoena an otherwise busy medical doctor to come down and wait around the courthouse in order to say magic words in order to get either, you know, records into evidence or to prove up medical expenses that otherwise really aren't in controversy.

There is some confusion, I think, over to what extent causation is covered by this, because I see people trying to -- filing counter affidavits saying, "Well, the medical expenses are, in effect, reasonable and necessary relative to the condition, but I don't concede that the condition was caused by the accident that's the subject of the lawsuit," or this, that and the other, i.e., you know, he -- I think -- "I have proof he fell in his backyard. It wasn't the traffic accident that caused it," or, you know, that sort of thing, and I think that the -- I think the rule is sufficiently unclear as to what we're trying to do that it really does need some clarity. I think Jane is exactly right, though, the whole idea is threshold

admissibility, in my view.

CHAIRMAN BABCOCK: Bill.

MR. EDWARDS: What this is -- it's a policy decision, but if you have 25 or 30 medical bills of $50 or $100 and $150 and you have to prove up every one of them, the cost of proving up each one, you're going to have to do it by written questions or you're going to have to do it by deposition, and by the time you're through paying the doctor for his time, the court reporter for the deposition, you're going to end up spending more money to prove up the bill than the bill is worth, and that's what this is about. It's to get out of the way -- you know, in federal court, if you don't sit down in your pretrial order and agree that the expenses in one of these things is reasonable and necessary, somebody is going to jail, probably.

(Laughter)

MR. EDWARDS: I've never gone to trial in federal court where we had a fight over the reasonableness and necessity of medical expenses. You get a fight over whether the accident caused the condition, but it has nothing to do with whether or not the expenses were reasonable and necessary in connection with treatment condition.

CHAIRMAN BABCOCK: Carlos and then Bob and then Buddy.

MR. LOPEZ: When I started county court, there probably wasn't any single day that first year that I didn't have this issue come up, and, you know, the clumsiness of the rule is -- I always just attributed it to, "Well, the Legislature passed it, and so there it is."

The issue with what the Judge was saying about controverting -- "may not offer evidence to controvert the claim" was an open issue in my mind. I always ruled -- it says you can't offer evidence to controvert the claim. It doesn't say you can't argue in closing argument or cross-examination that it's not causally related or that it's not even reasonable, for that matter.

The open question I always had in my mind was, "Why should you be able to argue something in closing argument that there's no evidence on?" But nobody ever asked that question. And as the trial judge, I said, well, I guess I'll cross that bridge when I get there. I never got there in seven years, but that was always the issue.

I mean, you know, should the defense be able to argue that these bills aren't reasonable when they didn't file a counter affidavit? I mean, that's still an open question in my mind that maybe ought to be answered by this one way or the other.

CHAIRMAN BABCOCK: Bob.

MR. PEMBERTON: Yeah. I was asking for

clarification. I mean, reading Paragraph (b), it seemed like some -- that the defense could attack the reasonableness and necessity of the charges. It's all (b) says. And I think Buddy added some language at the end of this paragraph.

If you have an affidavit proving this stuff up, no controverting affidavit, you have some evidence for reasonableness and necessity, and it is not conclusive and it does not require a finding. It seems like the defendant could come in here --

MR. LOW: It would be sufficient to support a finding.

MR. PEMBERTON: Yeah. Some evidence.

MR. LOW: And I can't argue the question about whether we ought to have affidavits or not. That's been in the law a long time. The Legislature passed this act the way it is, and the only thing that we or the people that recommended this to us are trying to change is that you can't offer -- your counter affidavit, is going to be sufficient to prove. You can offer it. And if they -- before all they had to do was object and then you couldn't offer it. Now, you can offer it and if they -- unless they have a counter affidavit and so forth stating, you know, why reasons, so forth, their attack can't be admitted into evidence.

Now the way it reads, both affidavits can be submitted. It's just a question of what it takes for you -- when they just plain objected, there wasn't even enough to make a finding. You couldn't offer it. And now you can in a counter affidavit. So very little has been changed.

MR. BOYD: Can I clarify -- ask for clarification? 18.001, if I pull out Civ.Prac&Rem right now, does 18.001 require a counter affidavit or an objection?

MR. LOW: No. The 18.001 requires only an objection. 18.001 is -- you have a copy of it. 18.001 is what's been copied and modified. That's not --

MR. BOYD: So when I look at (f), for example, or (e) in the copy you've provided, it talks about a counter affidavit, and that language isn't bold or underlined, so I'm assuming it's --

MR. LOW: That has been there. "The counter affidavit must," and then you see what's outlined and what's been added.

MR. BOYD: So the law currently does require a counter affidavit, not just an objection?

MR. LOW: It requires an objection that -- now, and if they don't object, then you can -- it's sufficient to support a fact finding of reasonableness and

necessary.

CHAIRMAN BABCOCK: Luke, did you have something?

MR. SOULES: I just want to try to understand how this works.

If the plaintiff makes an affidavit, it goes into evidence. If the defendant makes an affidavit -- counter affidavit, it goes into evidence. And then either side can put on any other proof they want to put on during the trial.

MR. LOW: There's nothing in here preventing that. I don't read one thing in this rule --

MR. SOULES: It's wide open after that to do whatever they want to in attacking the affidavits, but both affidavits are going to get in.

Now, if the defendant --

MR. LOW: That's the way it reads.

MR. SOULES: -- does not file a counter affidavit, it cannot counter the proof of the plaintiff.

MR. LOW: But the counter affidavit of a defendant can't just be an objection any longer. It's got to be what they object to and why.

CHAIRMAN BABCOCK: I'm not sure that this -- that that's right, what you just said, Buddy, under the current 18.001, because the affidavit only gets in under (c)

and (d) if it's properly filed --

MR. LOW: Right.

CHAIRMAN BABCOCK: And the way the rule reads now, it has the language "unless a controverting affidavit is filed."

MR. LOW: But see, they've added down here at (f) specify -- set forth the factual basis for --

MR. BOYD: That's the change.

MR. LOW: That's the change, specifying the factual basis. You now have to be more specific. That was the idea rather than just filing an affidavit and objecting. You've got to specify, you know --

CHAIRMAN BABCOCK: But the point I'm raising -- and maybe I'm misreading it -- but under the old rule, it looks like, whatever your controverting affidavit said, whether it's just an objection or whether now it says specific things, under the old rule, the language said, "unless a controverting affidavit is filed as provided by this section." And if a controverting affidavit was filed, then there was -- then you couldn't use it as evidence.

(Simultaneous discussion)

MR. YELENOSKY: It negated the sufficiency of the evidence.

MR. LOW: It wouldn't be -- I mean, if it did

that, then it wouldn't be what -- the original affidavit wouldn't be sufficient to support a finding of fact.

MR. PEMBERTON: But why would you submit it to jury in that case? Why would you go and submit the affidavits to the jury in that case? Did you do that under the old practice?

HONORABLE JANE BLAND: No.

MR. LOPEZ: It's the difference between having to bring your doctor or not. That was the --

MR. BOYD: No.

MR. LOPEZ: -- big controversy. Believe me, I lived it every day.

MR. LOW: Most people would go ahead, and then what would happen -- what would happen is, they would take the doctor's deposition and go through all that.

MR. PEMBERTON: The question I'm raising is, if you get the effect of the affidavit, why are you submitting it to the jury?

MR. YELENOSKY: You're not. Not in this new rule.

MR. PEMBERTON: I thought you were in (g). Aren't you?

MR. EDWARDS: Only if there's a controverting affidavit.

MR. LOPEZ: Because that's the only evidence

of reasonable and necessary.

MR. EDWARDS: If that's the only evidence reasonable and necessary, there's no issue to go. If there's an issue, then it would go to the jury.

MR. LOPEZ: The jury is still going to ask the question, "Are they reasonable and necessary?" If there's no evidence in the record for the jury in support -- under the old rule, the question -- at least in Dallas -- the majority of the judges said, "Affidavit, proper affidavit, proper counter affidavit, they knock each other out, got to bring a doctor." And there were some minority of them that said, "No. It's the battle of the affidavits." And, you know, that was the minority, you know, view. That's what it was.

This provision, right or wrong, makes it clear that that's --

(Simultaneous discussion)

MR. PEMBERTON: And is the battle of the affidavits --

CHAIRMAN BABCOCK: The two Richards -- the good looking Richard first.

(Laughter)

CHAIRMAN BABCOCK: I just wanted to see who was going to talk.

MR. MUNZINGER: Could we vote on that?

MR. ORSINGER: My recollection of the operation of this was that, if you filed a controverting affidavit, it denuded the first affidavit of its weight because it was not properly filed, and, under (e), you used to say you couldn't controvert a claim unless you filed a counter affidavit, and I think that meant you couldn't stand up and argue to the jury it wasn't reasonable or necessary.

This change says, "A party may not offer evidence to controvert," which allows you to controvert it without offering evidence by just arguing that the burden of proof is on the plaintiff. So I think this really is a substantive change, but I'd like to step back for just a second and ask: If there's no controversy, we shouldn't make the plaintiff bring 15 doctors down -- or even just have their one expert try to vouch for all of these other doctors.

So if somebody is going to have an objection, they ought to not just make a lawyer objection, but they ought to have an expert who says, "I'm going to get up and testify to the contrary," and, therefore, we ought to have real witnesses in the courtroom and not just trial of affidavits.

And I guess my next or last point is, I guess this is new, Buddy, but you can't challenge -- the

suggestion, you can't challenge an affidavit signed by the custodian of the records that they have no sufficient expertise to authenticate these matters into evidence, and I don't like that. I think that if the sponsoring witness who signs the affidavit that proves up reasonableness and necessity is not qualified to testify to that opinion, you should be able to make that objection, get it ruled on and make it stop.

(Simultaneous discussion)

CHAIRMAN BABCOCK: Wait a minute. Wait a minute. Ugly Richard.

(Laughter)

MR. MUNZINGER: I'm confused by (e), because (e) doesn't seem to make sense to me, "A party intended" --

MR. TIPPS: No. That word is gone.

MR. LOW: "A party may not offer evidence."

MR. MUNZINGER: Okay.

MR. LOW: Here, let my give you a clearer version. I think you're looking at --

MR. ORSINGER: It used to say, "A party intending to controvert must first file a counter affidavit." Now it says, "A party may not offer evidence to controvert" --

MR. MUNZINGER: "A party may not offer evidence to controvert a claim."

CHAIRMAN BABCOCK: Okay. Judge Christopher has got a point -- salient.

HON. TRACY CHRISTOPHER: Okay. I have several points.

CHAIRMAN BABCOCK: Ooh.

HON. TRACY CHRISTOPHER: Okay. First of all, there has been a lot of case law construing 18.001 -- okay -- and we are making substantial changes here to that case law by these changes. These are not just cosmetic changes.

All right. There's a big difference between a chiropractor bill being reasonable, as in, "That's what every chiropractor charges for that manipulation," and being necessary because of the car wreck and -- or being caused by the car wreck. So this may not ever -- offer evidence to controvert is a substantial change from the case law that interprets 18.001, and there is also case law that allows you to argue that the counter affidavit was made by a person with insufficient knowledge to object to it and strike it.

So I just don't see the point in making these changes when we have a rule and we have case law that's interpreting it.

CHAIRMAN BABCOCK: Steve.

MR. TIPPS: My impression was that this

was -- this change was recommended because defendants were making the process more expensive by filing vague, form affidavits and were thereby able to impose additional burdens on the plaintiffs, and my question --

HON. TRACY CHRISTOPHER: Case law says you can strike those.

MR. TIPPS: -- to the trial judges is: Is that true?

HON. TRACY CHRISTOPHER: It used to be until we had that case that says it's got to be made by a person that really knows what they're talking about.

MR. LOPEZ: You're talking about the counter affidavits?

HON. TRACY CHRISTOPHER: Yes. And now no one pays any attention to the counter affidavits.

MR. LOPEZ: We're a little late getting --

HON. TRACY CHRISTOPHER: No one files them anymore.

MR. LOPEZ: I agree with everything the Judge said, we're late getting the fix, because the case law kind of beat us. Except -- and I'm off the bench now so maybe I don't know, but except with regard to (g). There still was, up until recently, an open question about, if you have a properly filed affidavit and you have a properly filed or properly authenticated counter affidavit signed by the right

person with the right knowledge, what happened? Was it -- did they knock each other out and you had to bring live witnesses or was it the battle of the affidavits and it went to the jury? And whether the plaintiff had to bring some other evidence of reasonable and necessary other than that affidavit. In other words, did the counter affidavit just knock out the affidavit as if it didn't exist or not? And that was an open question up until I read (d) which seems to, for right or wrong -- and Richard disagrees with it and I don't have an opinion on it, but it seem to answer the question.

CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE KENT SULLIVAN: I wonder if we wouldn't improve the situation by making it clear, you know, reasonable -- like Tracy outlined, "reasonable charge for the service performed; necessary, relative to the condition presented by the patient," because I see a lot of confusion that people sort of, you know, want to argue about that. I had somebody in a motion hearing the other day where there was some argumentation about that.

And then I wonder if the rule wouldn't be better if it just said, "At that point, it's in," and then somebody -- because these are all -- these are small cases, and then make clear what the significance of (b) is, because I think that the intent there is that it can be discussed,

attacked, argued about. There is no finding required, but the finding is allowed. The threshold evidentiary showing was made without causing the doctor to come down and prove it up.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: It just -- it appears to me that under Subsection (c), the chiropractor's accountant can prove necessity, but under Subsection (f), if you're going to contest necessity, your expert has to be a chiropractor or doctor, the way this thing is written.

HON. TRACY CHRISTOPHER: Right. And that's the way the case law is.

MR. MUNZINGER: I don't work in this area, but that doesn't seem to be right either. I guess that's what the Legislature wants but --

HON. TRACY CHRISTOPHER: That has been the case interpretation, that the controverting person can't be just another accountant. It has to be a doctor.

MR. MUNZINGER: But here's what I see, the plaintiff calls by affidavit Jane Brown, the office manager of Dr. Chiropractor, and Ms. Brown says, "Here's the chiropractor's bill for $15,000, all 14 treatments. Here are the charges. These are reasonable and necessary for the treatment of Patient X," and that affidavit goes into evidence.

Bookkeeper Brown is not a chiropractor, has no medical or chiropractic training whatsoever. All she knows is, this is what the doctor told her to say and this is what her charges are and that her bookkeeping records reflect this person was there. That comes into evidence and raises the presumption that the treatment was reasonable and necessary and caused by the accident in question.

HONORABLE KENT SULLIVAN: No. Not the latter.

(Simultaneous responses)

MR. MUNZINGER: Why?

HONORABLE KENT SULLIVAN: Because it's not the rule.

MR. LOPEZ: It's reasonable and necessary services for medical condition, not causation.

MR. MUNZINGER: Yes, but it doesn't say it in the rule. I guess if that's what the cases say, then I don't have a problem. I don't work in this area, but it troubled me.

HONORABLE KENT SULLIVAN: That was my point, we ought to clarify it.

CHAIRMAN BABCOCK: Okay. Pete.

MR. SCHENKKAN: I think the rule is intended to address one area of what Justice Hecht referred to at maybe our last meeting about how the litigation system is

pricing itself out of the dispute resolution market here. And this is intended to prevent that from happening, where the defendant can bring in someone who is equally unqualified to say that the services are not reasonable and necessary; and by doing that, force the plaintiff to bring a doctor to the hearing.

All the rule does is say: If the defendant wants to have a dispute that requires a doctor to testify -- or chiropractor to testify that the services were reasonable to treat the condition and necessary to treat the condition, then the defendant has to put in an affidavit by that person who's qualified to do that, and, thus, flip the burden back on the plaintiff to say, "All right. If we're really going to fight about it, I'm going to bring in somebody who's qualified." It seems to be perfectly reasonable.

This is a cheap way to get the situation to where it either goes to the jury with two competing affidavits, one of them by somebody, maybe, who's not qualified to say that and one by somebody who is, in which case, the plaintiff has to take the substantial chance that he's going to lose that issue if he doesn't bring the doctor, or the plaintiff says, "All right. I'm bringing the doctor," and then the defendant has to do the same thing and bring the doctor.

It's going to produce the effect, I would

assume, in the great majority of these cases that the -- either one affidavit goes in from the plaintiff and there's no controverting affidavit, because, in fact, the charges are not really disputed, only the causation of the accident or the injury, or, two, both of them bring some real witnesses. And I think this is a good change. I'm in favor of it.

CHAIRMAN BABCOCK: Okay. Judge Bland.

HONORABLE JANE BLAND: This Subsection (e) that says, "A party may not offer evidence to controvert a claim" is going to be very difficult in a car wreck case, because often the defense lawyer doesn't file a controverting affidavit. The plaintiff's affidavit admits to the reasonableness and necessity of the charges, and then the defense lawyer cross-examines the plaintiff on the stand and says, "Okay. You saw a chiropractor for the three weeks after the accident. And then you went for a month with no medical treatment, but then you met with a lawyer. And after you met with the lawyer, all of a sudden you started going through" -- I mean, this is a very typical scenario in a car wreck case -- "And you met with a lawyer. Then you started getting chiropractic treatments again, and lo and behold, you got $9,000 worth of chiropractic treatments more than a year after this soft tissue, low impact, no damage to your vehicle car wreck."

And, you know, under the old system, I've had people object to that and say, "Judge, you know, he's contesting the necessity of the medical and he can't because I have an affidavit." But if this is here, he's going to say, "Judge, he can't offer that evidence through the plaintiff because he didn't file a counter affidavit as to the necessity" -- I mean, "as to the fact that the chiropractic treatment was not necessary," but the defendant doesn't have the burden of proof in the case, so the defendant can, I think, legitimately question the credibility of that evidence that has been put in by affidavit by cross-examining the plaintiff or whomever else is called as a witness in the case and shouldn't be precluded from doing that simply because they didn't file a counter affidavit.

The only thing that a counter affidavit should be required in the case is in a case where they want to strike the admissibility of the medical bills and the medical records, you know, at the outset and not allow them to be admitted, but they certainly ought to be able to attack, as they would be able to in any other case where they don't have the burden of proof to attack the legitimacy of those expenses through other evidence in the case.

I wouldn't let them do it through

non-evidence in the case, but through evidence in the case, I don't think that they should be precluded from doing that. I think the plaintiffs ought to be able to admit their records, but I don't think that the purpose of this was to preclude any challenge to the credibility of those -- of the statements that were made in the affidavit.

CHAIRMAN BABCOCK: Okay. Last comment, girls, before we break.

MR. LOPEZ: I don't completely disagree -- I mean, I agree, but I disagree -- I think part of the purpose of the rule was not to say they couldn't do it. It was to say they couldn't do it unless they gave 14 days' notice, so that the plaintiff knew ahead of time whether that was going to happen or not.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: Well, I think that's right, because they shouldn't be able to strike the affidavit or keep that testimony out, but this change to the rule doesn't talk about controverting the claim, i.e., the affidavit or the admissibility. This is saying, "You can't offer evidence." And that's going to really constrain, you know, any defense of the case --

HON. TRACY CHRISTOPHER: It's going to require defendants to hire doctors, to file affidavits, and that's a big change.

MR. LOPEZ: Obviously, the rule -- I'm not sure it's a great rule, but that's always been the rule of thought.

MS. SWEENEY: No.

CHAIRMAN BABCOCK: All right. I lied. Last comment. Paula.

(Laughter)

MS. SWEENEY: There's a big difference between offering evidence and cross-examining someone.

HON. TRACY CHRISTOPHER: It's evidence.

HONORABLE JANE BLAND: Well, it's evidence. It's testimony from the witness on the witness stand. And I wouldn't bring it up except that I've had objections along those lines before, and I thought, under the old rule, you know, there was room for cross-examination, you know, basically as to the totality of the credibility of the evidence and the burden, you know --

MS. SWEENEY: I mean, what is the sense of the litigators and the trial judges about that? If you're cross-examining somebody, are you offering evidence?

MR. BOYD: Yeah.

MS. SWEENEY: I don't think so.

MR. MARTIN: I would vote no, but why don't we just put in the rule that cross-examining the person is not offering evidence.

MS. SWEENEY: No, because I -- I mean, I view that as two different things.

CHAIRMAN BABCOCK: Bill.

MR. EDWARDS: Okay. The question is whether you've got a dispute or not. If there's a dispute about the necessity, then they go out and they get an affidavit and you know where the fight is. If there's no dispute, it ought to be gone. It ought to be out of the case.

MR. LOPEZ: There's always a dispute. There's always a defense.

HONORABLE JANE BLAND: In your cases, I'm sure that's true, but in some of these small cases, that is where -- that is where the rubber hits the road. They fight about the necessity of the treatment.

HON. TRACY CHRISTOPHER: "The MRI was unnecessary. The six months of physical therapy was unnecessary."

CHAIRMAN BABCOCK: Justice Hecht, closing remark, because I'm going to sleep on this rule, I'll tell you that.

JUSTICE HECHT: I forgot to tell you something earlier, and that is that at some point in the process, I think we indicated that there might need to be comments to the rules that we've already promulgated, but we just -- under the pressure of getting them out, we didn't

have time to write all those comments.

I now think that it will almost certainly be necessary to have comments to Rule 167, just because we have a new relationship with a statute and we need to make sure that everybody knows what that relationship is, but we're not going -- there's not going to be another meeting between now and December 31st. So what we will do is that, along about Thanksgiving, when we've had time to draft some of these comments, we'll send them to everybody, and then you can send us back some views on them, with the idea that that will go in with the rules that will take effect in January.

CHAIRMAN BABCOCK: We're in --

MS. SWEENEY: Is the Court going to copy us with the written commentary that it's receiving on all of these other rules?

I mean, in the past, we've kind of gotten copies, but --

JUSTICE HECHT: Well, we're happy to do that. There's a lot of it with respect to 8(a), and we don't have a budget for it. You're certainly welcome to see it, and we can make it available somewhere, but I'll have to talk with Chris, just from a budgetary point of view, because we can't copy and send it out.

MS. SWEENEY: Is it scannable, Chris?

MR. GRIESEL: Yes, and the answer to your question is yes.

MS. SWEENEY: That's great.

JUSTICE HECHT: And we can probably make a PST file of the e-mails or something and send that -- that's an Outlook file or a Lotus file.

(Simultaneous discussion)

CHAIRMAN BABCOCK: Yeah. We can, maybe, put it on the Web site, Paula -- the SCAC Web site.

MS. SWEENEY: Yeah, just some place where we can go without having to --

JUSTICE HECHT: And then Chris told me to tell you that Pete's son's season premiere --

(Simultaneous discussion)

JUSTICE HECHT: -- is next week.

(Laughter)

(Simultaneous discussion)

MR. SCHENKKAN: Wednesday night.

JUSTICE HECHT: And Nina Cortell's daughter has an album out.

(Laughter)

(Simultaneous discussion)

MR. ORSINGER: What's the Court got for tomorrow?

CHAIRMAN BABCOCK: Nine o'clock. Just

picking up on the rest of the agenda, which is finishing evidence, and then we'll go to 76(a) and then Rule 202, prefiling.

(A recess was taken at 5:11 p.m., after which the meeting continued as reflected in the next volume)

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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

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I, Patricia Gonzalez, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on the 24th day of October, 2003, and the same were thereafter reduced to computer transcription by me. I further certify that the costs for my services in the matter are $2,342.50 charged to Charles L. Babcock.

Given under my hand and seal of office on this the 11th day of November, 2003.

ANNA RENKEN & ASSOCIATES
Registration Firm No. 299
610 West Lynn
Austin, Texas 78703
(512) 323-0626

Patricia Gonzalez

PATRICIA GONZALEZ, CSR
Certification 6367
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