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HEARING OF THE SUPREME COURT

ADVISORY COMMITTEE

(MORNING SESSION)

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Taken before Anna L. Renken, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 16th day of January, 2004, between the hours of 9:10 a.m. and 12:52 o'clock p.m. at the Texas Association of Broadcasters, 502 E. 11th Street, Suite 200, Austin, Texas 78701.

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I N D E X

JUSTICE NATHAN HECHT: Let's get started. Okay. We're on the record. Chip is in Dallas. His plane was canceled this morning; and he will be here before lunch, hopefully before long. And we'll have to start without him; but I think we can make some progress. And then we'll try to assess about mid day whether we think we're going to finish today or have to meet tomorrow. So we'll try to figure that out by lunchtime.

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Let me report on a few things. First, as you know, Governor Perry appointed one of the members of this committee, Chief Justice Brister to our Court in November. And so we have a full complement now. And six of our justices are from Houston these days. Somebody called us the "Third Houston Court of Appeals."

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(Laughter.)

JUSTICE NATHAN HECHT: So we're outgunned. Three of our members of the Court are on the ballot. Justice Smith has opposition in the primary, Justice Brister has opposition in the general, and Justice O'Neil drew no opponent at all. So it should be -- and we'll be doing some of their work this year.

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Another one of the members of this committee,

Justice Tom Gray, was appointed Chief Justice of the Tenth Court of Appeals in Waco. And when I asked Tom to serve on the committee he expressed some reservation about having to drive to Austin all the time; but now he's going to be here for chief's meetings and budget hearings and we'll be seeing a lot of Tom.

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In December Governor Perry appointed Judge Bland Justice of the First Court of Appeals in Houston and appointed Bob Pemberton Justice of the Third Court of Appeals here in Austin. So you see that membership on this committee is a brief step away from glory.

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(Laughter.)

JUSTICE NATHAN HECHT: I think Steve Yelenosky should have no trouble in his race for district judge. Luke Soules moved to a new and improved firm, I understand. I saw him the other night. Pete Schenkkan's son continues to star on the OC. And Chris' eleven-year old daughter reports that there are already seven websites devoted to him. So he's a star.

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Nina Cortell's daughter got very positive reviews in the Fort Worth Weekly this week calling her, and this is a quote, "The Jenexer whose contemplative, moonstruck music portrays an old soul

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with lots of unfinished business to keep her awake at night."

(Laughter.)

JUSTICE NATHAN HECHT: I'm not sure what that means; but that's great.

On rules we -- the comment period ended for the August and October orders. We did not get significant comments on Rule of Civil Procedure 166 and Rules of Judicial Administration 11 and 13, so we have not made any changes in those.

The MDL panel has had its first hearing and rendered a decision. Stephen Tipps was one of the lawyers in the case, and I think Carlos Lopez' firm was involved in it. So it is functioning; and we hope after the smoke clears from that hearing that we can get reports from the panel members and any of the participants regarding how the procedures worked and whether we need any changes.

There were no significant comments to Appellate Rule 24; but we did make a technical correction that Professor Carlson pointed out, a wrong reference, cross reference. And so we fixed that; and we don't look to make any other changes in that rule.

And then in Evidence Rule 407(a) we got a couple of comments objecting that it had to be done;

but of course the legislature required that change, so nothing else, I don't think, to do on it.

Then on the October 9th order we have gotten a number of comments on Rule 167, although not as many as you might think. And most of them are complaining that there is such a thing rather than it should be fixed in some particular, so I think there are no reactions to those comments.

On the class action Rule 42 we can talk about what remaining issues we have there in a minute; but on the changes there were no significant -- no significant comments. And then on Rule 8a of the Civil Rules the State Bar asked the Court if they could study the problem of referral fees and study it in a broader context including advertising and some other issues; and the Court met with the leadership of the Bar, and they seem very determined to make a comprehensive study of the issue. So given that we issued an order about Christmastime pulling that rule down and explaining sort of the history of it and the reasons for it and the arguments against it and kind of trying to summarize the comments that we got on that rule. And that order is here? It's available?

MR. GRIESEL: It's on its way.

JUSTICE NATHAN HECHT: It's on its way.

If you haven't seen it, it is on the Court's website; and but we'll try to have copies of it. It has a lot of appendixes and sort of bibliographic matters, so it's pretty thick.

09:17 And speaking of the website, we -- some of you have complained that it's difficult to get things on our website and difficult to find things. And we apologize for that; but it's not our fault. The legislature fired our tech guy in the last

09:18 appropriations process and we're lucky to hang on to our legal staff. In fact if Scott's appointment hadn't been delayed as long as it was and we hadn't had some other turnover in the office, I'm not sure we'd be -- make ends meet. But please bear with us,

09:18 because the legal staff is trying to keep the website up and make it usable for you; but it's not their first job, and so you'll just have to bear with us until the legislature sees fit to send us some more money.

09:18 We also approved, the Court also approved a very large set of changes to the Texas Rules of Disciplinary Procedure that were required by the State Bar Sunset Act. And this is the new business of which I am aware. The first thing is that articles by

09:19 Pam Baron and Bill Dorsaneo have suggested that there

is still a problem with Appellate Rule 19.1 regards whether the filing of a motion for rehearing en banc in the Court of Appeals extends or affects the time for filing a petition for review to the Supreme Court. And we blame Justice Duncan for raising this issue in the first place. And we thought we had it fixed last time; but maybe it's not quite fixed. So we need -- the appellate committee probably will be asked to take a look at that.

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Justice Wainwright and the Court Reporters Certification Board have asked us to resolve an issue that they think is a conflict in the rules regarding a duty to take certain documents, whether reporters have a duty to take certain documents. So we'll refer that, ask Chip to refer that to the appropriate committee.

Then we have several House Bill 4 issues that are still out there. One is how do Rules 226(a) and 292 of the Civil Rules work now that some verdicts must be unanimous? What changes do we need to make in those rules which prescribe the certain instructions that are to be given the jury with respect to the changes in the statute in certain kinds of actions? So the pattern jury charge is working on this too; and Judge Sullivan and Tommy Jacks have raised it, and we

probably should take a look at it as well, and probably sooner rather than later, because it will need an immediate answer.

Another issue is how and when to change Civil Rule 194.2 which is the disclosure rule. This is also required by House Bill 4 which directs that the rule be changed quote, "as soon as practicable," end quote to include disclosures of responsible third parties, which is a new, sort of a new idea that is added in House Bill 4. So we probably need to take a look at that and maybe have an order in the next month or so making, if no other changes, making that change since there is a statutory directive.

Then we just need to review the legislative changes in medical liability and medical malpractice to see if there are any other inconsistencies which we have not -- we started on that and made some progress on it; but we haven't finished it, and we probably need some subcommittee help on that.

And I think the minutes of the most recent State Bar Evidence Committee are here somewhere in the back and the Court Rules Committee also; and we're going to try to coordinate better with them and keep up with their work which is very useful and very helpful to us. So and we're going to also try to

communicate with the State Bar sections and particularly those two committees each time we're about to meet so that they are kept up on what our agenda is and what issues we've got.

09:23 So that's the report from the Court. Any questions, comments? Okay. Well, for the latecomers, Chip is on his way; but his plane in Dallas was canceled. He should be here well before lunch; but we're going to soldier on without him. And we'll try 09:23 to assess at lunchtime whether we will need to meet tomorrow.

So I think the first item on the agenda is lingering class action issues; and in Richard's absence, Richard claims to be teaching CLE in 09:24 New Orleans today, so we'll hear from Frank.

MR. GILSTRAP: Thank you, Justice Hecht. I want to just sit here for a moment and kind of help orient us on these issues and review briefly what we've done with regard to Rule 42, the class action 09:24 rule, what we did in the last half of 2003.

This was, the changes in Rule 42 were prompted by House Bill 4; and in House Bill 4 the legislature added Chapter 26 to the Civil Practices & Remedies Code, and this required the use of the Lodestar method 09:24 to calculate attorney's fees as opposed to the

percentage of recovery, required that attorneys be paid in coupons to the extent that the class members are paid in coupons, and most importantly it directed the Supreme Court to adopt rules implementing these changes. And those rules, that resulted in subdivision (i) of the new Rule 42. And we've got a handout here on your desk that have I believe all of the recent changes in the Rules of Civil Procedure. It might help to go through and number those pages, because Rule 42 is fairly long and I'm going to have to skip around some.

But that wasn't, the changes in attorney's fees were certainly not the only changes that were on the table or that were adopted. There were two other factors at work that drove us to recommend a substantial revision of Rule 42. The second was the revision of Federal Rule 23, subdivision (c) through (h) which deal with certification, notice and appointment of class counsel. Those are on pages two through seven of your handout. Generally that was fairly easily, fairly easy to do. The Texas rules in this area have always followed federal lead. On December 1st of this last year an amendment to those sections in the Federal Rule 23 was adopted and we tracked a lot of those.

The third item was the Jamail committee report. Now the Jamail committee report had a lot different parts; but the part dealing with class action recommended a couple of significant changes, and these changes I think the committee concluded required further deliberation. We simply had so much on our plate and we had a December 31st deadline imposed by the legislature that we felt it was best to defer consideration of these, of two additional issues, these issues being opt out versus opt in and the question of inchoate claims. We felt it was best to defer these until later. And we had a clear understanding we would come back to these issues, and now that time has come.

I want to talk about opt in and opt out. It's a fairly simple issue to understand; but it takes a little bit of orientation in the rule to see where the changes have to be made, and I want to briefly run through, run through those considerations. We start out with the fact that Rule 42(a) sets forth four requirements that all class actions must use the requirements of numerosity, commonality, typicality, fair and adequate representation of the class. That's on page one of your handout. Then on pages two and three is 42(b); and this sets forth four requirements,

but only one of them has to be met for the class to be certified. And there's a very important distinction in these requirements. One, two and three can be lumped together and with regard to the fact that
09:28 they're not controversial. In fact, we eliminated number three in the rule revision. One was the consideration of the separate suit would lead to inconsistent results. Two was a suit for declaratory judgment or injunctive relief against a common
09:28 opponent. Three was a claim involving specific property.

And so and that was eliminated. And then four, the former four, which is now 4(b)(3) was the controversial one; and that is the one that has
09:28 generated all of the controversy and most of the litigation involving class actions. And this is the requirement that allows a certification if there is a common issue of law and fact. The Supreme Court of Texas has handed down several important decisions
09:29 interpreting this in the last year; and these were codified in the rule in part (c)(1)(d) on page three.

What we're going to talk about today though is the notice provisions; and these are in (c)(2) on part four -- excuse me --on the page four. And if you'll
09:29 look at page four, you'll look at the top, you have

2(a) that is (c)(2)(a). And that talks about classes certified under 42(b)(1) or (2), the noncontroversial portion. And there it simply says the Court may direct appropriate notice to the class. (c)(2)(b) which covers most of the rest of the page has to do with certification under 42(b)(3) which is the old 42(b)(4); and this is the one that involves common issues of fact or law.

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Now look down in 2(b) Roman V, which is the second indented paragraph at the bottom. This says the notice must clearly state and in plain and easily understood language that the Court will exclude from the class any member who requests exclusion. And if you'll look over on in part three, there is another reference to exclusion. It says the judgment in a (b)(3) action shall specify and describe those to whom notice provided in (c)(2) was directed and who have not requested exclusion.

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The point of this all is this: That when you send notice to class members under (b)(3), you have to tell them this: "You're in the class unless you request to be excluded. You're in unless you affirmatively opt out."

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The Jamail committee report, which is another handout, would change that. And I'm not going to go

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over the specific language. Well, I guess I will. Look at paragraph two on the short handout that has Rule 42, Class Action at the top.

MR. WATSON: Is that the Jamail committee report?

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MR. GILSTRAP: That's the Jamail committee report. And if you'll look, and about seven lines from the bottom it starts reading like this: "In all class actions maintained under (b)(4)," which is now (b)(3), "this notice shall advise each member of the class A, the nature of the suit; B, that the Court will include him in the class only if he so requests by a specified date; C, that the judgment will include and bind all members who do request inclusion; and (d), any member who does not request inclusion may, if he desires, enter an appearance through his counsel."

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The Jamail committee report would switch over to an opt in system. You're not in the class unless you request to be opted in. The subcommittee viewed this as, and I think correctly, as a significant change. I believe the consensus on the subcommittee -- and this is not a subcommittee recommendation. I'm just summarizing the debate -- was that in general people who receive class action

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notices will in many cases do absolutely nothing.

We've all had the experience where we made an unfortunate purchase of stock back in the solid years of stock when stocks were good, and we now have gotten a notice that somehow there was some shenanigan going on by the company and a class action suit has been filed. And it's verbose, long, dense, hard to read, and almost everyone tries to read it once, and then from then on they just throw them aside knowing that they will be in the class unless they opt out and knowing that they are probably not going to opt out because that purchase of stock simply cannot justify your own lawsuit against the company.

The Jamail committee report would do, would reverse that procedure. When you get the notice unless you sit down and take the time to fill out whatever form is provided and send it in, you are not a member of the class.

Now I think the comment was made and I think this is a valid comment, if we switch to an opt in system, the notices are going to change. Right now lawyers draw these and they don't want you to opt out so they make it hard to read knowing that you won't opt out probably because you won't do anything. If they're drawn by lawyers who want you to opt in,

they're going to be a whole lot easier to read and the experience may not be quite the same. That was one of the comments that was made; but I think in general we all came to the conclusion that no one knew what would happen.

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There is as far as I know there is no empirical data on this. As far as I know, and I think this was the case back when we had our subcommittee deliberations, no state has adopted this procedure. There was however a proposal before the federal rules committee I believe to adopt this procedure, to adopt an opt in procedure, and it wasn't adopted. Justice Hecht serves on that committee and probably can bring us up to speed a lot better than I can on that.

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So one of the things we concluded was we don't have any empirical data. We don't know what is going to happen. We had some suggestions to try to cure that problem short of doing a study. There was a suggestion made that we would get a law professor on board that was well versed in class action issues. That never quite happened; but I think that's still a good suggestion if the subcommittee is required to take further action.

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Ultimately, and I'll warn you about this, this is an issue, especially without any empirical data to

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support you're reasoning, that kind of cuts to your basic view of class actions. A lot of people view class actions as a nuisance, you know, reputable businesses are hounded by these things and they serve no good purpose. Other people view them as a useful tool that gets redress for a lot of little people that couldn't otherwise afford to sue a big company. It's a fundamental distinction, and you all may come down on one side or the other; but I think that lies underneath this issue, and hopefully we can rise above some of those issues and make the best decision when we make the decision. That's really all I've got.

I'll talk about inchoate claims later; but I presume we're going to talk about class action first -- excuse me -- opt in/opt out first.

JUSTICE NATHAN HECHT: All right. Any discussion? There is no proposal at this point?

MR. GILSTRAP: Well, the Jamail committee proposal is on the table. And Justice Hecht, let me say this: The subcommittee did not sit down and draw something, because frankly the question is simple. Do we opt in or do we opt out? And we can draw the rule easily once we're told what to draw; but we couldn't make the decision, and we felt we needed the benefit and the Court needed the benefit of the

entire committee.

JUSTICE NATHAN HECHT: Buddy Low.

MR. LOW: Let me ask you a question. Did you discuss? The first class action I handled I defended a company; and we ended up settling on the basis that a certain, if a certain percentage, over a certain percentage opted out, they wouldn't settle, because the company wanted do know how many people are out there still with claims. That's what we wanted to know. Did you discuss that? I don't know how that would work with the Jamail idea, because you've got people out there; and you don't always know just how many there are. But this way you know when the defendant is settling you know what the defendant is settling. They're going to have just a certain percentage out there.

MR. GILSTRAP: No, we did not discuss any type of number. Are you talking about some kind of cutoff number that --

MR. LOW: Yes. Like for instance --

MR. GILSTRAP: -- so many would have to opt in before the class can be certified?

MR. LOW: This was -- well, I won't go into detail. But we wanted to know, we wanted to buy our peace; but we didn't want a lot of people out

there we didn't know about. So by opting out we agreed, the settlement agreement was that "If more than X opt out, there is no settlement."

MR. GILSTRAP: We didn't discuss that; but we did discuss something that is very close to that, and that's this: We were a little perplexed by the all or nothing quality of the debate. If it's opt in, it's one thing. If it's opt out, it's another. We believe -- I think there was discussion on the subcommittee that there might be room for some discretion on the part of the judge in this area whereby perhaps he would have the discretion to impose an opt out regime in certain cases; and that was a way I think to try to find some mid point in between the two that would not on the one hand, if you are of that view, just totally destroy class action, because nobody is going to opt in or few people are going to opt in in most cases. But we did discuss, we felt around and struggled to find some type of compromise, but didn't come up with one. I think the compromise might be there though.

JUSTICE NATHAN HECHT: Anybody else? Jeff Boyd.

MR. BOYD: The point that Buddy's question makes is that one of the characteristics of a

class action is not just that it allows people who otherwise couldn't get to court to get there, but that it also allows defendants to buy peace. And that's both one of the, depending who you ask, one of the things people like about class action. It's also one of the things other people criticize about class actions.

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I'm trying to recall. It's not in the rule. But does anyone know? Is there case law or other authority that authorizes the Court on a motion of the parties particularly in a settlement context to structure the class action as an opt in only or subclasses are opt in, other sub classes are opt out? It just seems like several years ago I did one that way that involved opt in only; and I'm assuming I had some authority to do that.

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(Laughter.)

MR. BOYD: But the rule doesn't say it has to be one or the other, does it? I mean, you have that provision in there about giving notice that they can opt out. But I like the idea of allowing -- I'm not sure I would like the idea, with all respect to our judges here, of allowing the judge sue sponte to decide "No, this is only going forward as opt in." But I kind of like the idea of allowing the judge on a

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motion of one or all parties to consider the approving an opt in only. I don't -- for different reasons I think am not comfortable with the idea of getting rid of any authority that would allow an opt out only class as we've grown -- as we've been doing.

JUSTICE NATHAN HECHT: David Gaultney.

HONORABLE DAVID GAULTNEY: Just to respond a little bit, I think there ought to be the option for the trial judge on his own or her own to have an opt in, because you're really dealing with the rights of absent class members. You're not -- we're trying to protect the due process rights of people who are not in court, so I think for that reason I might want to consider at least having the judge have that option.

JUSTICE NATHAN HECHT: Justice Bland.

JUSTICE JANE BLAND: What criteria would you use to make a determination between an opt in or an opt out case if you were the trial judge?

MR. GILSTRAP: Well, I think that's the question. And Judge Gaultney points out that it might be a good idea to have, give the judge the power to do that. But, you know, what standard is he going to use? I think that's -- I don't know the answer to that. We didn't come up with that on the

subcommittee. But if we're going to use, give the judge power to do that, it seems to me there has got to be some standards, because this is such a crucial decision. If the judge stands up and says, you know, "I'm going to require everybody to opt in" and has discretion to do that, that can kill the class action. Make no mistake about it. There are plenty of class actions that simply will not survive that type of a ruling. And that type of ruling may be appropriate; but I don't know that we ought to give the judge unfettered discretion. But again, how do we fetter it?

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JUSTICE NATHAN HECHT: Buddy Low.

MR. LOW: We basically started class action based on a federal rule. And maybe one or two sentences were different; but we followed. And now we're tending to follow their rule on fees and so forth. Wouldn't this be getting a long way away from the federal rule, the opt in?

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MR. GILSTRAP: Well, it certainly would be a step away from the federal rules. We've done that in certain other areas; but this would be a significant step.

MR. LOW: I'm not saying that we should be married to the federal rule. I'm not saying that;

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but I'm just saying shouldn't we be cautious when we deviate from something that has been going on for some time?

MR. GILSTRAP: Maybe Justice Hecht could give us a little background on the history of this in the federal rules.

JUSTICE NATHAN HECHT: The committee proposed back in the early '90s before Judge Higginbotham was Chair to give the judge discretion without standards as I recall to decide whether a class should be opt in or opt out. And that got -- in the structure of things the federal rules process has a much longer structure than we have. And it got to either the standing committee or the judicial conference, which is the next step above that, and there was just reluctance I think to make that big a change without more of a sense of urgency from the Bar. But that was 15 years ago.

The whole undertaking had been prompted by the American Bar Association and the Bar of the City of New York and others. So it's not, it's not as if it's dead forever. It's kind of where are we now in the scheme of things? Because some of these litigation problems get worse and then they get better; and so right now there is no appetite on the federal

committee to revisit these issues. I think they have done as much as they're going to do for the time being.

MR. GILSTRAP: Justice Hecht, can you tell us? Or maybe you don't know. But is there, do you sense any appetite on the part of legislature in Texas to revisit this issue?

JUSTICE NATHAN HECHT: Well, I did on the part of Governor Ratliff; but he's gone. So I don't know. It keeps changing over there. So right this second, no. But I wouldn't necessarily know. Skip Watson.

MR. WATSON: Judge, just from listening, two or three comments from the aspect of the federal statute such as the FLSA and discrimination, by statute opt out, not rules, but are statutory opt outs. These are just personal observations; but to me this works. From what I've seen it works.

First, on the issue of drafting the notice order for opt out -- excuse me -- opt in, --

PROFESSOR DORSANEO: "Opt in" you mean.

MR. WATSON: -- for opt in the judge drafts that notice, and that's just a given. Both sides submit notices. There are usually hearings over it. It's the wording whether it's urging people to

get into or merely advising them to get into, it's very much like a jury charge. It sounds and feels like a jury charge. And people are frankly reserving error in that conference. And it goes all the way into how many languages it goes out in and even who is going to be drafting those languages because of what is lost in translation.

But the bottom line is the judge drafts the order. The forms, there can be formal orders that you can put in there. I have never seen them. Every one I've ever seen a judge draft is different; but every one gets the job done. There are parts in them I don't like, and there are parts I like; but that's life. That solves that problem.

Second, advantages and disadvantages to plaintiffs or defendants for opt in: The advantages to the plaintiff are to me the first case is not going to be res judicata on the whole class, period. The first case is a trial run for everyone. It usually, the plaintiffs will want it to be as big as possible to have the maximum possible settlement potential. The defendants will want it to be as small as possible for that very reason. But the truth of the matter is that it's usually small, and in the end that's not necessarily bad.

If it goes south, the plaintiffs who stayed out can watch, correct the mistakes that were made by the lawyers in the first case; and it's almost a free trial shot. If you're smart, you sit back and you watch and you see how they did it, because these things once they start being filed they become sort of a cause of action de jure, and lawyers gravitate to that area. Plaintiffs can pick and choose between the lawyers that are competing for their business; and that's not bad. It's not necessarily the best lawyers that file the first one, although sometimes it is. But they can see who is making mistakes, who is really working the case and pick the lawyers that have the best chance preferably after one has gone up and people have adjusted.

If it settles, if the first case settles, at least the plaintiffs have a floor. It's almost certain that their case will not settle for less than that floor. That just seems to be the way it works.

To me the disadvantage to the plaintiff in opt in is if they do opt in or in one of the first cases, what Frank talked about, if it doesn't get big enough, either the clients and/or the lawyers lose faith and want to bail, that could be a problem. Frankly however if you think about it, if the thing is

not going anywhere, they probably want to bail and not make that first bad precedent that is going to be res judicata as to them and potentially poison the case law that is coming down for everyone else. And that might be good for judicial efficiency rather than having to stay in a situation where you've had to opt out of the case and you didn't and you're locked in and it's going to grind on and on and that precedent is going to be made regardless.

09:51 Frankly if I've, in those cases that I've had where I thought from the early factual analysis and the early legal analysis, and that's where they're won, when I felt like that I had a winning case from the defendant's standpoint in federal court I always 09:52 file an early motion for summary judgment which prevents a voluntary motion to dismiss in federal court. It cannot be granted if I have a Rule 56 motion on file. And so I hold them and at least get that initial res judicata finding as to those people 09:52 which then sets the precedent. That's to me the big downside for the plaintiff.

Advantages to the defendant, because it's usually smaller, you can go all out to beat it. You can go all out to beat it on the law to establish 09:52 non res judicata, but precedent in that area,

particularly if it's a new area. If you're vulnerable, then you go all out to settle it and to establish as low a possible settlement floor because you know they're coming after that. Once you settle one and pay money the disadvantage to the defendant is you will have multiple seriatim suits in many jurisdictions and on the same issues. And they, as I said before, they know what the settlement floor is from that.

09:53 In reality I think it aids judicial efficiency. If a good judge is handling it that knows what they are doing, they see how it's going to work. They're ready for the orders. They're up on the law. They get the notice out. We see how many are opting into the case. They know that there are going to be other suits coming. They carefully manage the case. It requires what the Civil Justice Reform Act of 1990 called "early, hands-on management by the judge," not just by staff, but by the judge. And getting that early hands-on management particularly in looking at the threshold issue that always comes up of commonality, typicality or the appropriateness of these representatives and then and narrowing the class down to the people who are really affected by this and helping define what that class is simplifies not only

that case, but every case to follow. But it does spawn multiple cases unless it just goes away at the beginning either through a voluntary motion to dismiss that is not opposed or a summary judgment granted to the defendant. That ends them. It just stops them. There is nothing there.

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JUSTICE NATHAN HECHT: Skip, are these -- this is required by statute?

MR. WATSON: Yes, sir.

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JUSTICE NATHAN HECHT: And are there separate procedures -- I'm just not familiar with this -- that are prescribed?

MR. WATSON: No, there are not, judge. It's I'm familiar only with the Fair Labor Standards Act; but the Disabilities Act also follows exactly the same trend. The statute just says that a person may bring an action for unpaid overtime wages or failure to pay minimum wage on behalf of himself and other workers similarly situated. That person then brings that action for himself and, quote, "others similarly situated," attempts to define in a well pleaded complaint who or by category what those other workers are, you know, other production line, slaughter workers in defendant's plants in Iowa, Nebraska, Kansas, et cetera, and Texas.

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The Court then receives a separate request to issue notice. That's where the war is. And you go in and say okay. Let's say they're saying that they need to arrive 15 minutes early at work to clean up their work station from the previous shift and that that's work. It benefits the employer. They're not being paid for it. That kicks them into overtime. Therefore we have an FLSA action. You go through. And say they're saying for themselves and everyone else similarly situated; but these plaintiffs hold four positions out of 688 job descriptions. And so this is not really everyone in the plant, all 2000 people. It's in fact 40 people that are a part of this class that these people are similarly situated to under these circumstances.

So you go from there and in a logical progression define the class, discovery is done just for the point of identifying who the class is. Notice is then sent to those people that they have the opportunity to opt in. The Court drafts the notice, decides what languages it's in, what it says and says how it's sent out. Usually it's posted and, you know, they say where to post it in the plant. But then it also has to be mailed to every current worker; and because the FLSA will go back potentially three years

the employer has to supply a disk with mailing addresses, last known mailing address of every employee in those categories for the last three years.

So they're not written rules; but once a judge has been through it it's very clear how it works and it's just it is smooth.

JUSTICE NATHAN HECHT: Alistair Dawson.

MR. DAWSON: When I first thought about this issue a year or so ago when we first got this proposed rule my immediate reaction was "Yes, go to an opt in system because if the absent class member can't be bothered to send in a form, you know, we shouldn't allow them to be a litigant. And as I thought through it over the last year I've come full circle; and I'm of the view, pretty strongly held view, that the opt out system works better than the opt in system would work. A part of that is that in order to get the class certified under the standards that exist in our state today the trial judge and then, well, the trial judge initially has to determine that the class is in the best interest of the absent class members. The rights of absent class members are in many instances, if not all instances, adjudicated, if you will, or at least there is argument about that at the trial court level. If this is not a good class for

absent class members, you can rest assured the defendants will be making that argument, and the trial court is the guardian for the absent class members. And then those issues are largely vetted on appeal. And so by the time you get to a notice issue you had not just a trial court, but at least one, perhaps two appellate courts review the case and determine whether at least in part the rights of absent class members are adequately protected under that class.

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With that background it seems to me we all know that a very small percentage of people -- think of notice as sort of a equivalent of a coupon. Very few people turn in coupons. I don't know what the studies are. My guess is it's less than 10 percent of people actually affirmatively take the time to send in coupons. My guess would be, if it's a good analogy, that that's what you're going to see in an opt in class. The percent of people that turn in their notice or turn in their claim is going to be somewhat analogous to the percent who use coupons. And it seems to me then in that situation you have had the determination that this is good for absent class members, and yet there is a whole body of people who don't get to participate or who elect or don't participate in the process. I'm not sure that's a

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good thing.

Secondly, from the defendant's standpoint it seems to me if you've gone through all that process and it's been determined that yes, this class is an
10:00 appropriate class, well, then you do want to eliminate as many claims as you can. And I know that the law on res judicata there is some debate about that and different courts have said different things; but at least it gives the defendants an argument that they
10:01 with respect to the people that did not opt out of the class that those claims, at least those vetted at the trial court have been, are barred by res judicata.

And then I think to follow up on Skip's point, that if you change to an opt in system, then it seems
10:01 to me you don't have that res judicata argument. It would seem to me that people who elect not to opt in they are not bound by the judgment of the trial court, which then is going to lead to multiple claims. You're going to have multiple class actions. You'll
10:01 have one. Notice will go out, and then there will be people that will pursue their own claims individually or as a class, and you will have multiple litigation, which I don't think is a good thing as far as judicial economy and for the litigants themselves.

10:02 All in all looking at it on balance I say yes,

I can make the philosophical argument of why you ought not to let somebody participate if they can't be bothered to send in the form; but I think the current system works better than the opt in system would.

10:02 JUSTICE NATHAN HECHT: Buddy Low.

MR. LOW: I agree. I have experience where they'd get people to opt out. The opt out is not the answer to everything. But and then they'd have a class for an opt out class.

10:02 And if the defendant wins his major case, I just don't think he should be, the lawyers over here say "Well, let's improve on that and go again." I mean, you just shouldn't have multiple litigation. The defendant shouldn't have to defend this one and

10:03 that one. The same thing where if the defendant gets stuck, it might be a judicial estoppel; but the defendant needs some protection too.

JUSTICE NATHAN HECHT: Judge Gray.

JUSTICE TOM GRAY: I won't reiterate

10:03 what I said at the last meeting about my personal view; but I don't think that this is just about whether you like or dislike class actions. There is another level at which and at least needs to be considered, and it's on the individual liberties

10:03 aspect of it. And I don't mean to make this a

political discussion by any stretch of the imagination. But it's what is the proper role of government in our society? What we're talking about is whether or not you choose to require someone to be involved in a -- or they are involved in it unless they take some affirmative action to the contrary versus their choice to become involved in the process.

I know that there is benefits to individual litigants of both. And one of the things that was -- that I was most concerned about that did hit a chord with me was what about the situation which class actions can currently deal with where an individual maximum damage is less than a dollar, but there's 100 million of them? And the defendant knows they're doing it, they know they're damaging these individuals; but it's not economically viable for any of them to sue.

And we have an office in our state government, in our federal government that is designed to deal with that, and it's called the Attorney General's Office. And they can deal with that in one sense and even secure benefits for private individuals.

And what I'm concerned about is we're approaching it much as it's either all opt in or all opt out or maybe some combination; but we're all

looking at the class action as the only option one way or the other. There are other things that we at least need to put into the mix, I feel like, that are appropriate which would be something in the nature of like a private attorney general, a method by which those marginally damaged individuals, I say "marginally damaged," meaning minimally damaged individuals may not be represented by the Attorney General, but could actually get an attorney or an attorney could pursue it on their behalf, but it would have to be like preapproved by a committee of, maybe by the Attorney General himself.

And I know that's partly legislative and beyond the scope of what we as a committee can do; but I am reluctant to not kick out another idea that may cause us to broaden our perspective on what the problem is and how we can address it or at least encourage other people to address it before they react. And because frankly I am concerned that if the pendulum swings on the legislative front, that it will swing far in the other direction from where it is now and sweep under it some things that don't necessarily need to be because we didn't give it full venting or airing here.

So that's just an idea that I kick out that it's broader than just a class action whether you are

for them or against them. There are other issues here about individual liberties of whether an individual should be compelled to take action or not because of actions of the government or acting through the power of the government in these rules. So, you know, I just pitch that out for consideration.

JUSTICE NATHAN HECHT: Bill Dorsaneo.

PROFESSOR DORSANEO: To me the key question seems to be whether the potential class member whether you're going one way or the other would understand the potential res judicata effect of the judgment (b)(3) case on his or her rights. Under the current rule the notice must clearly state the binding effect of the class judgment on class members under Rule 42(c)(3) here, but I'm not sure that's not (b).

And I'm not all together clear, you know, how informative the notices are. I'll bet they're not very informative other than saying "you're bound" without saying what that exactly means. That strikes me as a particularly bad thing if we would have a broad res judicata rule and would zero out somebody's claims that are part of the same cause of action under a normal claim preclusion principle, but might not be thought to be so by the person receiving the notice, assuming they read the thing to begin with.

So my first thought is the notices ought to be better. I know the notices at the federal level that are proposed and that Molly Hatchell and I put in my own chapter are a lot better than the notices we had before, a lot more easier to understand, and they look a lot more like they would motivate somebody to read them because they provide useful information. But I don't recall how detailed they are on this particular point. I doubt that I would really consider them adequate.

But then again if you assume that nobody reads these things or a lot of people don't read them at all, then it's particularly disturbing to me that somebody could be barred beyond any expectation that a reasonable person not trained in the law would anticipate, and that would lead me toward wanting people to have to opt in despite the fact that might, you know, that might torpedo this device, which is the matter to consider, you know, on the other hand.

I suppose before 1978 we didn't really have common question classes in this jurisdiction, so we have really limited experience on the whole issue. So I'm -- I haven't decided yet; but it does seem to me to be the res judicata impact that worries me the most with respect to people who read the notices and with

respect to people who don't read the notices.

JUSTICE NATHAN HECHT: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I agree with the professor. I started off by agreeing with Alistair. I think as a general proposition you need to have an opt out or class actions would be really not very useful at all. However I think a trial judge needs to have discretion to have opt in because of the reasons that I've expressed. It takes a lawyer to read some of these notices, and most of the recipients are not lawyers. Even a lawyer reading it may not find out exactly how you're being bound by it; and it's the binding effect of some of these lawsuits I think that concerns me.

You know, facetiously, but how much process is due depends on what is at stake. If you're dealing with a 10 cent coupon or something of that nature, maybe a trial judge would say "Well, opt out is what should be used here." But if you're dealing with a contractual provision that has to do with whether or not you get health benefits when you're 65, maybe that's appropriate for an opt in provision rather than binding everybody who doesn't turn in their notice or turn in their request.

So I guess where I come down is, and at least

right now after I'm thinking, is I think generally we need an opt out, but I think a trial judge needs to have discretion to do an opt in.

JUSTICE NATHAN HECHT: Alex Albright.

10:12 PROFESSOR ALBRIGHT: I just have a question. On issues like that isn't the answer, like Alistair said, where that then is not an appropriate class to be served on under the current rule?

HONORABLE DAVID GAULTNEY: Maybe. But I 10:13 think we've all seen classes certified that they're going to do exactly that. And --

PROFESSOR ALBRIGHT: But, you know, we're now, we now have courts, appellate courts looking a lot more closely at certification orders 10:13 than they did before, and there are a lot fewer classes certified; and I think the parameters for those in the appropriate class have become more clear.

So is the answer -- I see this as do we want a class action process or do we want just mass joinder? 10:13 And it seems to me I think we ought to be honest about that and say we -- if we're going to have to go to a whole opt in class action rule, we're not going to have class actions. It's going to be mass joinder. And the way Skip was describing in his situation was a 10:14 mass joinder situation. And I think the class action

does have places where it's very useful; and I think the answer is really that there are certain classes that are not appropriately certified and others are instead of just throwing away the whole process.

10:14 And I am concerned with giving trial judges unfettered discretion to say "Well, this is going to be an opt in class instead of an opt out class" without any kind of parameters. How are we going to? I don't know how you can draw any parameters.

10:14 JUSTICE NATHAN HECHT: Carl Hamilton.

MR. HAMILTON: I sort of agree with what Bill and David said. I think the key element is how much money is involved and what is the value of the right involved. And I've gotten these things in the

10:14 mail; and I have spent maybe 30 to 45 minutes looking through there, maybe an hour before I find someplace that says that if I'm successful in this, I'll get $2.37 back. Well, I throw it in the garbage. But if it says you're going to get two million dollars, then

10:15 I might think twice about whether I want to throw it in the garbage or whether I want to get my own lawyer.

So I think the notice ought to somehow tell the class member "Here is what is involved" very clearly so that the member, the potential member is going to

10:15 know whether they want to opt in or opt out, what they

want to do. And if you give them the proper notice, then I'm not sure that it matters whether you have an opt in or opt out provision, because then they're going to know what they're doing.

10:15 JUSTICE NATHAN HECHT: Buddy Low.

MR. LOW: But one of the things in Skip's situation, you have a company that has so many employees. They have the social security number, they have addresses and things like that. In the class
10:16 actions that we see that's not true. You put it in a newspaper, you put, you know, different things. So that's a little bit different situation where they work in than this.

Now for whatever it's worth I just point out
10:16 that difference, because in most class actions you don't have that. The person doesn't get a letter or get something written to them. He reads about it in the newspaper, sees it on the internet, you know, there is publication. I mean, some you don't have all
10:16 the addresses. You don't know who all bought the toaster.

JUSTICE NATHAN HECHT: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, one
10:16 thing I don't think people have mentioned is the idea

of how discovery would happen if it was opt in or opt out too, because if you were going to give the judge some discretion to decide whether it was opt in or opt out, I would like to know a little bit about the liability in the case before I made that kind of decision.

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Generally in class action the only discovery that gets done at the beginning is just the class certification issues, and that's all people do. There is not really any real liability discovery done. Liability experts don't get designated until the whole class has been determined, goes up to the appellate court and comes back down before they start doing, you know, discovery on the merits. So, you know, I think that's something we have to consider, because I as a judge would want to know. And this ties into the notice provision too. If you're not really sure what the ultimate damages are going to be at the end of the day, you know, not something like a dollar per record or 20 cents per computer screen or whatever it is, that would really change how things are done.

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JUSTICE NATHAN HECHT: Well, what do we want Frank's subcommittee to do? Anything?

MR. LOW: We have three options. You know, one, the other or, you know, the third where the

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judge has the option of going the other way.

JUSTICE NATHAN HECHT: Well, I don't sense a lot of enthusiasm for going all the way to opt in for everything. Is that fair? So is there, is it, would it be helpful to ask who is in favor of exploring further what Frank has referred to and others as middle ground, some opt in mechanism in certain instances which we haven't defined? We don't know should it be the trial judge's discretion, should there been a motion? But I don't think we're far enough along to think about that very clearly. But is there -- would it be helpful to know who is in favor of doing that?

MR. DAWSON: Can I ask a question?

JUSTICE NATHAN HECHT: Yes. Alistair Dawson.

MR. DAWSON: If you gave it to the trial judge's discretion, is either party really going to ask for that? I mean, realistically the plaintiffs want as many members of the class as possible so that they can, say, you know, in the old days, justify your fee. Maybe that's different under Lodestar. It seems to me they're going to want as many people in the class as possible and the defendants are going to want as many people in the class. So I'm not sure if you

leave it to the trial judge's discretion, unless they do it sue esponte, which I can't imagine, I don't see that you've accomplished very much, frankly. Maybe I'm missing something.

10:20 JUSTICE NATHAN HECHT: Justice Gray.

JUSTICE TOM GRAY: I think the answer to that will be that there will be the defendant that thinks that the class action is just completely bad, should never have been brought that will move for it and endeavor to knock it out knowing that if it's an opt in class it's going to die and so there will be some defendants that utilize the option.

I would make the pitch for using the, going ahead with the draft for maybe a different reason in that at least we will have some substantive thought into it when we get one of those late November calls from the 79th Legislature that says "We're going to take this up as House Bill 2."

(Laughter.)

10:20 JUSTICE TOM GRAY: We'll already have some substantive thought dedicated to it.

JUSTICE NATHAN HECHT: Jeff Boyd.

MR. BOYD: Maybe I can give an example of why opt in I think in some circumstances is

10:21 important. In the case I was talking about earlier, I

was sitting here trying to remember it, it was basically a suit against an insurance company where the plaintiff class had purchased mobile homes and had financed those mobile homes and as part of that financing were required to get insurance to secure the collateral to cover the cost of the mobile home. And the allegation was that the insurance company misrepresented by omission, did not tell them, that they only had to insure the home, but instead had a basic all comprehensive policy that included liability at the home, outdwellings and other kinds of coverage. So that was the nature of the allegation. And the insurance company who I represented -- that was one of the allegations in the case -- basically stepped up and said "Look, if anybody is paying for insurance that they didn't want, we'll completely reimburse them retroactively for all premiums they've paid, but they're going to have to give up their coverage to do that." So the decision was made that it would be a settlement of an opt in nature where anybody who wanted to opt in to this class could be a member of the class, receive the benefits of the settlement, that is, the retroactive return of premiums, but they had to give up something for that, which was the coverage, which a lot of them didn't want to give up.

And as I recall, this was several years ago; but as I recall the problem with, I mean, we talked about we'll just do an opt out only, but make the nature of the settlement that the defendant will provide them with the option of doing that rather than we'll just give them the refund. The nature of the benefit is the provision of an option of canceling retroactively. The problem was if you did that, then even if they did not exercise that option, they were barred from any claims related to that.

So as I'm sitting here remembering that it seemed to me that's a circumstance where not just simply because whether or not you go with opt in or opt out it is going to affect the total number of people who get the benefit in the bar; but actually there is a cost to the plaintiffs beyond just the bar, but in fact giving up something valuable that is the coverage that was under the policy.

So maybe I'll have other anecdotal examples. That's the one I'm thinking of where opt in really is the right way to go and you can do in a way. And of course their notice by publication was inadequate. We had to pull out all our records and send a notice that was approved by the Court to every single insured and so on.

But so I do think considering under what circumstances opt in should be I don't think we ought to outlaw opt in. I certainly don't think we ought to outlaw opt out; but I also don't think we ought to outlaw opt in.

JUSTICE NATHAN HECHT: Steve Yelenosky.

MR. YELENOSKY: I agree with Jeff. I think in listening to this that there are appropriate times for an opt in; and I sort of reached that conclusion by thinking about Justice Gray's point people's freedom. And freedom is based on you initially have to have some knowledge. And I think the question here is what knowledge do people have, what knowledge can people be given and what is the default if people have no knowledge or they have imperfect knowledge? And so I think there are some instances in which the default should be opt out and others in which it should be opt in as in the example he gave; but I don't think we can really talk about people making a choice when they have no idea that there is a potential claim, for instance. And in the opt out instance we're talking about as lawyers reading these notices and not even being clear on what they are, so certainly the nonlawyer is going to have trouble with that. And you have to assume that if

there is a notice, that it's going to be difficult to understand no matter how well it's written and that people are not going to have full knowledge. And then of course there is the transaction cost issue, is it worth it for them? And in some instances assuming that people don't have full knowledge, as in Jeff's case, it would be inappropriate to place them into the class, and I think the default there should be an opt in; but I think both options have to be available.

JUSTICE NATHAN HECHT: Richard Munzinger.

MR. MUNZINGER: I just wondered, Judge, if you could state, remind me what it was that prompted the Jamail committee to be formed and issue its report.

JUSTICE NATHAN HECHT: Well, it's kind of a long history; but several things came together to prompt it being formed. One was then Governor Ratliff's request that some work be done on an offer of judgment rule. Mr. Jamail and others were concerned about ad litem fees and referral fees; and then there had been some other concern expressed about class action, the class action generally and what might happen in the last legislative session. This was two years ago. And so it was sort of an amalgam

of those issues that they looked at and made a report on.

MR. MUNZINGER: Historically then there has been no outcry from the Bar or the general population or anyone else that would be the genesis for an opt in rule?

JUSTICE NATHAN HECHT: Not that I know of in Texas; but outside of Texas it has kind of gone back and forth. I mean, the ABA litigation section wanted it looked at 15 years ago. As I said earlier, several significant Bar associations like the Association of the Bar of the City of New York. But you know, there is study done, and then it kind of subsides and kind of comes back up; but I don't know of any right at this second. David Peeples.

HONORABLE DAVID PEEPLES: I kind of like the opt in middle ground. Does anybody know is there any other area in human affairs where we have opt out? For example, we don't let magazine people send a notice saying you're going to start getting *Newsweek* unless you write me back and say no, and I can't send out a political endorsement letter that say's "You're going to be on my" --

(Laughter.)

JUSTICE NATHAN HECHT: That's a good

idea.

HONORABLE DAVID PEEPLES: -- unless you opt out.

MR. YELENOSKY: But *Newsweek* can start sending you magazines and not charging and that hasn't impinged on your freedom in any way. How is my freedom impinged upon if they tell me you might get $10 at the end of this suit? I mean, I don't have to do anything.

MR. BOYD: Well, but it is -- I'm sorry.

JUSTICE NATHAN HECHT: Go ahead.

MR. BOYD: It is because you're hit with a res judicata bar as to your claims that gave rise to the $10 settlement. Now it may be a total -- it may be worth $1 and you're getting $10, so it's turning out good; but you are paying something in the form of the bar.

HONORABLE DAVID PEEPLES: I think to join a lawsuit is a serious matter; and I kind of like the idea that you've got to say "I want to join" instead of allowing someone else to say "You have joined unless you say no." And I'm sensitive to the res judicata concerns that have been expressed here; and so maybe the thing to do is just say opt in, but if the parties agree, they can send an opt out

notice. Would that help on the res judicata settlement?

MR. WATSON: Say that again, David.

HONORABLE DAVID PEEPLES: Well, have the general rule be opt in; but if everybody involved says "We want an opt out notice," allow them to do it. Now that would sweep in people that didn't consciously do it; but that would help you protect and have a settlement that would give you some closure. Although it seems to me if opt in is the rule, there just won't be a whole lot of these big class actions on small matters. I mean, I think that's pretty much what Frank said.

JUSTICE NATHAN HECHT: Anne McNamara.

MS. MCNAMARA: Just to go back to Steve's point, I think a lot of people really don't want to litigate some of these cases; and I see like at American you have people sending back the vouchers or writing letters saying they were outraged that they were included in the class. They don't read the notice. You know, they don't opt out. They don't do anything; but when they finally get the results of the litigation there is some group that doesn't want to be part of that. And so it's not them trying to hold out and litigate it differently or better. It's just they

want nothing to do with it.

JUSTICE NATHAN HECHT: Okay. Shall we get a sense of the group who wants Richard and Frank to do some more work on a proposal that would at least let opt in be an option under Rule 42 and those that pretty well think that that's not going to work and it's a waste of time to work on it any further? Those seem to be the two positions. Who wants the subcommittee to come back with a proposal or do some more work on it? And who doesn't? 17 to 11 to do some more work, Frank.

MR. GILSTRAP: All right.

MR. TIPPS: Frank not voting.

(Laughter.)

MR. GILSTRAP: I didn't think I should vote on that. And this, as you've probably sensed by now, it's not an easy area; and we did want to have the benefit of the full committee's thoughts on this; and you've given it to us and some of this is going to be very helpful.

Let's go on to the other issue. The other issue has to do with inchoate claims; and you need to look at this document here that says "Rule 42, Class Action" at the top. It is about a three-page document that was handed out just a few minutes ago. This is

the other prong of the Jamail committee proposal regarding class actions; and I think it will be helpful to look at the language of this rule. First of all, this rule does not define inchoate claims; but you're just going to have to go along with some kind of general feeling for what that means.

Here is what it says: First of all, the first sentence, "A class action" -- "In a class action," they left out "In." "In a class action for personal injuries, death, products liability or property damage involving mass tort or disaster litigation," that's what that covers -- then skip down to the second sentence -- "injuries or claims are considered wholly inchoate where there has been no discernible or detectible manifestation of injury or damage using admissible expert evidence." And then finally, it says "Inchoate claims excluded from class certification shall by Court order be protected against the running of applicable statute of limitations."

So basically what this says is that -- and excuse me. I didn't finish the top part. It has two parts. First of all, if it's an inchoate claim, it may not be certified as a class or sub class, but limitations doesn't run. So that's the proposal.

When I first read this I thought they were talking about almost all personal injury claims and I was thinking about things like asbestos exposure where the person has been exposed to asbestos, but there has been no manifestation of the injury; and that's what I think a lot of members of the subcommittee thought we were talking about. But there is another problem here; and that is what I call the unmanifested defect problem, and that has to do with products liability. And if you read, you can read this to where it simply talks about products liability; and any products liability claim can be the subject of this inchoate claim rule.

And there is quite a lot of important litigation now involving unmanifested defect. I know that Bill Dorsaneo and Alistair Dawson are involved heavily in this. Perhaps some of you people are too. But we're talking about computer, for example, a defect in a computer that hasn't caused anybody any problem, but can cause a huge problem. It can cause your data to be lost. I'm probably not saying that very well; but that's the type of claim we're talking about. And maybe Bill or Alistair could help us with that particular aspect of the claim.

So we're really talking about two things, the

unmanifested injury and the unmanifested defect. And the question is should we impose a rule that will, one, say they can't be certified and, two, say that limitations doesn't run?

10:35 JUSTICE NATHAN HECHT: Bill Dorsaneo.

PROFESSOR DORSANEO: The problem that I have starting to work from this paragraph is that I am unclear what it's meant to be, the scope of it in terms of types of cases; and I think we have to work 10:35 through it to try to figure out what it possibly was meant to mean. Normally we have somebody who can tell us what he or she had in mind; but I don't guess that's true here. Right?

JUSTICE NATHAN HECHT: Mr. Jamail is not 10:35 here.

PROFESSOR DORSANEO: We start out by talking about "In a class action for personal injuries, death," -- I can understand that -- "products liability" there is a huge ambiguity there, 10:36 because products liability encompasses negligence claims, product liability claims, breach of warranty claims under Article 2, Chapter 2, if you like. So I'm just unclear about what kinds of claims are covered. Now I'm not exactly sure why you wouldn't 10:36 cover all of the claims that are within the general

language of products liability and maybe that's clear enough. And it says "or property damage"; and of course aside from the fact that we're mixing the liability theory there in the middle with types of harm in the same sentence, which is problematic, I'm not sure what it means by "property damage." Does it mean damage to other property, or does it mean damage to the product itself or both? If it means damage to the product itself as well as damage to other property, you're talking about a much larger range of cases and probably the more important cases, probably the more important cases numerically and economically in terms of class certification.

"Mass tort," I don't know whether mass tort means a big explosion, a plane crash or a bunch of torts, mass tort or disaster litigation. So I can't really get started on this, because I don't know what we're talking about for sure. And it makes a difference. "Wholly inchoate claims," that language, "when there has been no discernible or detectable manifestation," and then it says "of injury or damage." I want to know what "of injury or damage" means. What does that mean? What do you mean by "injury or damage"? Do you mean only some additional injury or damage, or does that cover economic loss

claims with respect to some sort of assertion of diminished product value?

What is this about? It seems to be about some of the cases that I have read and that I've been working on; but I'm not all together clear that it is. And I think we need to start there.

JUSTICE NATHAN HECHT: Frank Gilstrap.

MR. GILSTRAP: In terms of the injury, unmanifested injury problem, I think I can tell you a little bit about what it is about. There I think the problem has been raised, this problem has been raised: When you have a large group of people that have potentially suffered some sort of personal injury sometimes there is only so many -- so much in the way of funds to compensate these people.

I think Richard's favorite example involves the agent orange case where there was a certain fund set up and once that money was gone it was going to be gone. And if you follow this procedure and you say that certain claims are wholly inchoate because there has been no discernible or detectable manifestation, there is going to be a large number of people that by the time their injury is discernible or detectable the limitations may not have run, but there is no money left. That's what I understand about the problem in

that area.

I don't understand the problem with regard to the unmanifested product defect at all. And maybe you guys could tell us what that is.

10:39 PROFESSOR DORSANEO: Well, to me in those kinds of cases the big problem is that somebody acuses a product of having a design flaw characterized as a defect even though with respect as to the class representatives the thing has not malfunctioned in
10:40 normal use. And if you can make a class action out of that on the basis of all the products that have been sold to anyone, then you've to me kind of perverted the beneficial use of class action litigation, because you've made it too easy for somebody to have standing
10:40 to represent a large group of people who really the representative at least really doesn't have anything where there is any discernible manifestation of injury.

The assertion is usually made that, "Well,
10:40 there's diminished product value" -- that's the usual assertion -- "because this thing isn't right." A lot of courts across the country including some of our own courts, not all of them, at least one of our own courts has said that there has got to be some sort of
10:41 a manifestation before you get started, some sort of a

malfunction in normal use before you get started, some sort of a problem other than a theoretical or hypothetical problem, conjectural problem.

There are arguments on both sides of this obviously; but I'm not ashamed to say that I don't think those cases are good candidates for class action litigation.

JUSTICE NATHAN HECHT: Richard Munzinger.

MR. MUNZINGER: I think Bill may have hit it on the head. Under current case law it seems to me "inchoate claim" is an oxymoron. You have got law set up. The current common law says in terms of limitations that a cause of action arises when someone has a legal right which has been violated which is measurable in damages. I'm paraphrasing the cases. But if we're talking about a person who may be injured in the future, we're not talking about a person who has a claim. So now we're sitting here trying to adopt rules it seems to me that protect against the eventuality that someone may have a claim either by way of being injured or by way of having a product design defect or otherwise.

And I was persuaded. I was moved by Richard Orsinger talking about the agent orange situation.

And yes, there is that possibility that there is a class of persons who may be hurt or injured sometime in the future and there is a limited class of funds; but I don't know the law, that we are capable or the 10:42 Courts are capable of writing laws and protecting against all of these eventualities. I think the basic problem here is that you are talking about an oxymoron. And I don't know how you can write a rule around protecting something that doesn't exist.

10:43 JUSTICE NATHAN HECHT: Frank Gilstrap.

MR. GILSTRAP: Well, let's talk about a couple of possible cases. I understand that we may not be very enthusiastic to make a computer manufacturer send out, you know, replace all these 10:43 hard disks that may some day fail and cause me to lose all my e-mail. What about making a manufacturer replace a wiring defect in your car that may sometimes cause the car to burn you up? Nobody has been injured. Are we going to wait until people are burned 10:43 up before we can have him included in the class?

MR. MUNZINGER: Well, you now have a situation where the national whatever it is, the National Transportation Safety Board or what have you, they issue you a warning and the cars are withdrawn. 10:43 At the same time if I were a trial judge and I were

sensitive to the fact that I'm taking money away from someone whose money it is, that it's General Motors and General Motors shareholders' money, and I'm a trial judge and I then say "Take money away from Mr. and Mrs. Smith in El Paso, Texas because your car might burn somebody in 10 years." Wait a second. I don't think that's right; and I think the current law the way it's set up says people who have been injured may seek redress in the courts. And what you are now attempting to do is to say "People who may be injured may seek redress in the courts and the courts may be required to force free citizens in free countries to set aside money and do these things because someone may be injured in the future."

There isn't a product made in the world that may not fail be it because it is inartfully designed or because it is inartfully assembled. There isn't a product in the world that is not subject to that problem. What you're trying to do is make heaven on earth, and you can't.

JUSTICE NATHAN HECHT: Mike Hatchell first.

MR. HATCHELL: I have worked with Bill over a year; and as of this week we are still struggling to put --

COMMITTEE MEMBERS: We can't hear you, Mike.

MR. HATCHELL: Bill and I have worked on a case for a year. We still --

10:45 MS. CORTELL: Two years.

MR. GILSTRAP: Two years.

MR. HATCHELL: -- are struggling to, or two years, I guess, struggling to define what an inchoate claim is.

10:45 In the situation that you bring up, Frank, where are we going to wait until somebody dies, well, okay, the way these things usually play out is you don't send the cars back in and get them fixed. You send them money. You send them a coupon. Most of the 10:45 time they go buy lottery tickets.

And then what happens when somebody does get in a situation where they're seriously injured and the defendant comes in. "I'm sorry. It's res judicata." So then that gets us into the whole res judicata. The 10:45 other thing, the problem with the inchoate claim is the same fact scenario is either inchoate or manifest depending on how you name your cause of action. You can call it a negligence case. You can call it a products case. If nothing has ever happened to the 10:45 product, maybe that's an inchoate claim. If you call

it a warranty claim in which all the rights are fixed on the sale and you bought a bad product, maybe you don't have an inchoate claim. It's just a quagmire that I don't think that we can get into and solve in this area.

MR. LOW: I helped represent Firestone; and I'll guarantee you I wanted my Firestone tires replaced before I had a wreck, I'll guarantee you. And I don't know how many people here wouldn't. I mean, so I had, nobody was killed or anything; but I sure didn't want to sit around and wait.

JUSTICE NATHAN HECHT: Alex Albright.

PROFESSOR ALBRIGHT: I'm just confused. We presented this problem of somebody might be killed. But what does this rule do about that? It doesn't say -- it says it will not be part of the class. So these people won't get the coupon. Right? All it does is say that they, their statute -- I guess it identifies a bunch of people who are not in the class whose statute of limitations will run, so I don't understand how it solves anything.

MR. GILSTRAP: Well, the statute of limitations is a trade off. If the claim is inchoate, it can't be certified.

PROFESSOR ALBRIGHT: Right, because they

don't have a claim.

HONORABLE CARLOS LOPEZ: That's the problem. They don't.

PROFESSOR ALBRIGHT: If there is a problem, and I'm not convinced there is a problem, I don't see that this -- I don't understand what this solves.

JUSTICE NATHAN HECHT: Justice Duncan.

HONORABLE SARAH B. DUNCAN: I don't have a pending case. I don't have any interest in this one way or the other personally. But to use what Alex said, suppose you've got -- the one class action case I did work on was a Remington case. You've got a gun that has a defect in the trigger mechanism. That gun is of less value, so the plaintiffs say, than it would be if the trigger mechanism were correctly designed and manufactured. That is an injury right now. That defect could cause horrendous personal injury or death later on down the road.

I think what this rule is trying to do is say, whatever Bill Dorsaneo may think of diminution in value as appropriate for class action, you can go forward with that diminution in value class action; but that personal injury or death claim that hasn't accrued won't be governed, will not be included --

PROFESSOR ALBRIGHT: So it's more of a --

HONORABLE SARAH B. DUNCAN: -- in a class action --

10:48 PROFESSOR ALBRIGHT: It's a res judicata rule.

MR. BOYD: Or barred.

HONORABLE SARAH B. DUNCAN: -- or barred. And most importantly it won't be barred.

COURT REPORTER: Speak one at a time.

PROFESSOR ALBRIGHT: It's really a res judicata rule.

HONORABLE SARAH B. DUNCAN: As I see it the big concern I had with the Remington case was

10:48 res judicata. I mean, there is no reason on earth that somebody who bought a defective gun but has not yet suffered personal injury or death as a result of that defect should be barred by a class action addressed to the diminution in value claim.

10:49 PROFESSOR ALBRIGHT: It gives you your $5 for diminution in value.

HONORABLE SARAH B. DUNCAN: Yes, whatever it is, a new gun or --

PROFESSOR ALBRIGHT: If that is the

10:49 problem it seeks to solve, I don't see that this rule

solves that.

HONORABLE SARAH B. DUNCAN: Yes. This is not a good -- sorry.

JUSTICE NATHAN HECHT: Carlos Lopez.

10:49 HONORABLE CARLOS LOPEZ: Well, at a minimum res judicata will affect -- whether or not limitations has run will also determine whether you consider staying for part of that claim. So in a sense I don't see them as completely different. I 10:49 mean, I think at a minimum the problem was that a claim that is good enough -- that if it's not good enough to be brought, but good enough to start the statute of limitations ticking. And in some instances like asbestos and second injury the opposite case 10:49 actually came out, and the majority I thought in that opinion exercised, you know, sort of the common sense of "You can't really -- you can't do that to people. You can't tell them their claim is not good enough to bring, but it's good enough to start limitations on."

10:50 I'm not sure if this addresses that. It should in some form or fashion; but it's not totally different from the res judicata effect as well. That's even more. That's even obviously greater, but at a minimum that limitation issue as well.

JUSTICE NATHAN HECHT: Judge

Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I think the problem is that there is certain case law that says you can't define the class in terms of damages. And so, for example, even though we don't have personal injury class actions, but assuming if we did, you couldn't have a class of everyone who had asbestosis who worked at this plant from X day to X day. You could only define a class, everyone who worked at the plant from these time periods who was exposed to the asbestos. You're not allowed to define a class in terms of damages. And in the commercial context, you know, you'll get the computer that may or may not have caused any damage to anybody; but because our law says you can't define the class, you know, people who have suffered damages. And so perhaps that's what this paragraph is trying to fix; but it's really more our case law and how we define a class.

JUSTICE NATHAN HECHT: What is the solution, Bill?

MR. LOW: I think if these two people can't understand what it means, (indicating to Professor Dorsaneo and Mr. Hatchell) --

(Laughter.)

MR. LOW: -- I'd just start from

scratch.

PROFESSOR DORSANEO: I'll just say one other thing. In a lot of these cases there is no assertion of diminished product value, difference in value; and that's what makes the claims really look specious.

HONORABLE SARAH B. DUNCAN: And that's a whole different ball of wax for me.

JUSTICE NATHAN HECHT: Well, Frank.

10:52 MR. GILSTRAP: Justice Hecht, I really -- it may be that this proposal is just premature. It's just the law simply has not developed enough that, one, we know what we're doing, and two, know what we can do. It may be that this is an issue that simply has to mature a little before we can address it in the form of a rule. I agree with Buddy. If Bill and Mike don't understand it, how can we understand it?

JUSTICE NATHAN HECHT: Bill.

10:52 PROFESSOR DORSANEO: I think without regard to talking about this specific aspect of it or putting it in this exact context that the rule ought to have something in it about standing of class representatives, because that's an important matter, and the rule is silent on it. And we do have case law

on that. How far along the drafting could go in order to provide satisfactory guidance to the bench and Bar I'm not sure; but it could be considerably better than silence.

10:53 MR. GILSTRAP: Could you give us some examples or help us? I mean, I generally understand what you are talking about; but I don't really have a specific idea.

PROFESSOR DORSANEO: Well, just the 10:53 idea. Okay. You have from the Supreme Court several cases that make it clear that Texas law is that the class representative needs to have standing and that it's not enough that somebody in the class might have sustained the kind of level of injury that would give 10:53 that person standing if he or she wanted to bring a claim. We've got case law in the *Grizel* case saying that that problem, that the class representative hasn't suffered a legal injury, however we define that, can't be fixed by amending things to add a new 10:54 class representative. We have the idea that in order to have standing there needs to be an injury, a legal injury.

Our standing cases are in a multitude of areas; but saying whether it has to be an actual injury or a 10:54 threatened injury or an imminent injury, I mean, that

needs to be worked out. To me in a damage case there ought to have been an actual injury defined in some way. I think the injury could be an economic loss and not just a personal injury or damage to other property; but it's very confusing at the moment, and I think we could make some headway. Now we might not be able to completely solve all of these cases, and there are a whole big bunches of them; but I would recommend that the larger committee suggest to the subcommittee that some drafting on the standing issue of a class representative should be done to see what it looks like.

JUSTICE NATHAN HECHT: All right. Shall we see what the sense of the large committee is? Yes, Jeff Boyd.

MR. BOYD: Can I ask a question of Professor Dorsaneo? How does the typicality requirement and the case law that already equate the requiring of standing to typicality not cover that already?

PROFESSOR DORSANEO: Well, I think it does cover it already; but I think the class action calculous keeps doubling back on itself all the time, and it covers it in an arcane, confusing way. I mean, almost all of the requirements, you can talk about

almost every problem that comes up in a class action case in any of these pigeon holes. You can talk about it as a commonality problem, a predominance problem, typicality problem, a class definition problem or over and over again in all these different contexts.

10:56

To me the best place to focus on whether this is the kind of case or one of the best places to focus on whether this is the kind of case that should be certified as a class action or not is by reference to the standing of the class representative. And it also helps with this issue that is talked about a lot, you're not really supposed to get to the merits. Well, if you're talking about whether the class represented has sustained a legal injury, in some sense you're getting into the merits, the merits of the issue as to whether there has at least been an allegation of a legally cognizable claim. Maybe it would go beyond that. Maybe you'd get back beyond injury.

10:56

10:57

10:57

In warranty cases the difference between the injury is the loss of bargain, so you have to focus on the bargain, what the bargain is. So I guess my answer is the rule would be better. Although you can make the same arguments under the rule as it were.

10:57

JUSTICE NATHAN HECHT: Nina Cortell.

MS. CORTELL: That may have answered it, Bill; but I'm trying to determine what the problem is we're trying to get at. Is it that we want to make sure there has been a legally sustainable injury? Is it that we want to make sure that this class of persons, that their interests are protected in the mix of litigation?

PROFESSOR DORSANEO: I think that's why we have the requirement that the representative have certain characteristics that provides protection to everyone.

JUSTICE NATHAN HECHT: Mike Hatchell.

MR. HATCHELL: I think that's, Nina, what we were addressing, yes. I think as well what we're really saying is that there needs to be more merit consideration in the certification process. The typicality things, Jeff, and the other things you're talking about presuppose standing.

The typical example I use, which is actually imperfect, is why should we allow to go forward a perfect class action allegation for somebody who wants a class for negligent infliction of emotional distress? Not legally cognizable in Texas. But technically speaking and the way the rule is drafted they could do that to get that certified. Ultimately

it would be thrown out.

Why should we have to go through that? I think Bill is exactly correct. That needs to be front loaded into the consideration and the rule. And the only way you can do it is through standing; and that's at least that is why everybody is trying to do it now.

My wife has worked with Bill in redoing the class action chapter of the Litigation Guide. It's now much more a national trend to have greater merits consideration in the certification process.

JUSTICE NATHAN HECHT: Yes, to some extent the no merits consideration is just a slogan, something that you have to look behind. I mean, you are right on the one hand that the judge ought not to be able to look at the class and say "Well, I don't think a jury is going to rule in your favor, so I'm not going to certify the class." But on the other hand if you can't get there, why are we going through all the trouble? Carlos Lopez.

HONORABLE CARLOS LOW: Doesn't the *Bernal* case I thought make that fairly clear that you don't certify now and worry about it later?

JUSTICE NATHAN HECHT: Well, you know, there is still out there --

HONORABLE CARLOS LOPEZ: I'm not sure

people are following it.

JUSTICE NATHAN HECHT: How far can you look, how far is the Court supposed to look at the merits of the case in the certification process? And clearly it seems to me it's very difficult for the certification process to be complicated by a judge saying "Well, I've tried a lot of cases, and I just don't think the jury is going to rule in your favor" when you have a legal claim and you've got facts to support it and the judge is just making his own judgment call. But on the other hand, there are clearer cases than that. Skip and then Sarah.

MR. WATSON: Judge, forgive my lack of knowledge in this area. But has the Court -- is this definition of inchoate claim coming from anything the Court has done? Has the Court recognized a form of an inchoate claim as being a legally cognizable claim?

JUSTICE NATHAN HECHT: Well, I don't -- nothing comes to mind. We have written on the subject in the area of limitations; but I don't know this is derived from that. Sarah, Judge Duncan.

HONORABLE SARAH B. DUNCAN: Help me understand. Like how does standing get to negligent infliction of emotional distress?

MR. HATCHELL: If you don't have a cause

of action legally, how do you have standing to represent a class?

HONORABLE SARAH B. DUNCAN: But I thought standing was more to, went more to has this person been personally aggrieved by whatever the problem is, that --

MR. HATCHELL: It's both.

HONORABLE SARAH B. DUNCAN: -- it's the conduct underlying the negligent infliction. I'm not disagreeing. I'm agreeing with what Bill and Mike have been talking about. I just don't see it coming under the rubric of standing.

PROFESSOR DORSANEO: The word "standing" is kind of a recent addition to our state jurisprudence. We really borrow it from the federal system; and if you check into our case law analysis, what we're really talking about is whether the claimant has a justiciable interest which relates to the injury, but also relates to whether there is a legally cognizable claim. When you start thinking about whether somebody has sustained an injury you start thinking about whether it's a legally cognizable injury; and that takes you back under state jurisprudence, not just Texas, the common law thing, the notion is whether they have a legally viable

claim.

Now the federal standing notions and even our standing notions that have to do with the idea of whether an individual who is a member of the public can bring a claim even though he or she is not, has not suffered any special injury, I mean, that complicates the analysis, all right, and maybe isn't even really helpful. Okay. But the standing notion of whether a class representative has standing it focuses more on whether that person has a claim, has the kind of status that would authorize them not only to bring a claim in his or her own right, but in behalf of all kinds of similarly situated people.

You don't have to look long to get pretty certain that standing and the existence or not of a justiciable interest under Texas law are the same concept.

JUSTICE NATHAN HECHT: Jeff.

MR. BOYD: But standing is different. In a class action there is not ever an issue. At least in theory under the law there shouldn't be an issue whether the class representative has standing to represent the class. They have to have standing as a matter of justiciability for their own claim; and then if it's typical and common issues and all the other

things apply, then they can be qualified as a class representative, but it's not a standing issue.

And I guess what I'm confused about this on is you can't get to the merits of their, of the representative's claim in order to decide whether to certify the class; but you can get to jurisdiction of the Court before you look at certification. In fact the Court first has to decide it has jurisdiction before it can go to certification. And standing is a jurisdictional issue.

So, you know, if I'm defending a class action where the plaintiff doesn't have a claim either because it's not cognizable, it's negligent infliction of emotional distress or because they personally haven't sustained an injury, then I file a plea to the jurisdiction, and I can get that heard before class certification is considered, because the Court has to hear it. And in fact I think House Bill 4 has a provision about pleas and abatement also now have to be heard before you get to class certification if it's a matter that should be abated to allow a state agency to adjudicate through the administrative process.

So I think there are methods that protect that already, or in fact I guess also the legislation on asbestos reform would address the inchoate, the plural

registry legislation that has been submitted and I guess will come back again.

PROFESSOR DORSANEO: I think you're proving my point that it would be good to have something in the rule that talks about where it is you talk about this problem and how you address it. I mean, you're a very able guy thinking about all the different ways it could come up and the context and what kind of procedural device you would use in order to predicate the argument. I don't know about the rest of the people.

JUSTICE NATHAN HECHT: Carlos Lopez.

HONORABLE CARLOS LOPEZ: That is exactly what happened in one big, heavily litigated I should say, class action that I had. They brought it, the defendant brought it as a plea to jurisdiction/plea and abatement on the justiciability issue. And the big argument, I ruled on it very quick. The big argument was at what point should I make that ruling, how early on in the process should I make that ruling. I said it's jurisdictional, so probably the sooner the better; but there wasn't -- you know, there is case law. If you want to codify that some way, I think that certainly wouldn't be harmful.

JUSTICE NATHAN HECHT: We need to take a

break; but about all we can do is give the subcommittee some guidance. And my sense of it is that time has passed by or we've passed by the report that we have in front of us. Certainly as it applies to personal injury damages it does seem that they are much less of a problem in the class context. But should -- there seems to be some idea that the subcommittee should work along the lines of what Bill and Mike have suggested. So would it be helpful to see who wants more work done on that or not? And I don't -- should that be augmented? Is there anything else we should include in that? Who wants the subcommittee to continue to work along the lines that Bill and Mike have suggested? 16. Who doesn't? Three. Okay. Frank, is that helpful?

MS. SWEENEY: I counted four at least. Sorry.

JUSTICE NATHAN HECHT: Four. Sorry.

MR. GILSTRAP: It's been very enlightening.

(Laughter.)

JUSTICE NATHAN HECHT: Let's take a break and come back to ad litems.

(Recess 11:08 to 11:21.)

CHAIRMAN BABCOCK: Everybody ready to

go? Hey, Buddy, time to start. Well, sorry I wasn't here for the morning session; but it's great to be here now. And we're going to go to ad litems; and Bobby Meadows and now Justice Bland are going to talk about it. Who wants to speak first? Your highness?

JUSTICE JANE BLAND: Bobby and Tracy have left the room; but I think Bobby is going to take the lead today.

PROFESSOR DORSANEO: Mr. Chairman, could I say one more thing about the class action rule?

CHAIRMAN BABCOCK: Certainly.

PROFESSOR DORSANEO: When Molly Hatchell and I were working through the Rule revision 13 we noticed the little words "after hearing" were taken out of the sentence that talks about certification. When we changed it to "at an early practicable time" or whatever wording was involved the language didn't have added back into it a requirement that there be a certification hearing. Probably there needs to be a certification hearing from a due process standpoint. I think everybody would contemplate a certification hearing, not some sort of certification order; but it doesn't say that anymore. And I would recommend to the subcommittee that we take a look at that to see whether we ought to put back in there a hearing

requirement which seems to have disappeared without due consideration.

CHAIRMAN BABCOCK: Frank, you've got that down?

11:23 MR. GILSTRAP: I do. I know what he's talking about.

CHAIRMAN BABCOCK: Any comment on that? Okay. We'll go to ad litems. And Bobby, Justice Bland said that you're the speaker today.

11:23 MR. MEADOWS: Well, we can probably do it together. Tracy and I and John on the telephone -- and there's a new draft. I don't know if everyone has it on the table over here. And it was posted yesterday I believe; but you'll want that. It's two

11:24 pages.

MS. SWEENEY: Would you describe what it looks like?

MR. MEADOWS: Rule 173, Ad Litem Representation.

11:24 MS. SWEENEY: Thank you.

MR. MEADOWS: Got it? And frankly, I don't want to get Jane or Tracy to do this if they don't want to. As I said, we met yesterday and worked off of the draft that came out of the last meeting;

11:24 and there are just, you know, there are certain things

about it that perhaps I'm going to rely on Jane for since she was at at least one of these meetings and I was not. But if everyone has the draft, why don't we just pick it up. And Jane, I really would ask you to just if you would just kick it off.

HONORABLE JANE BLAND: Okay.

MR. MEADOWS: And some of the things that are perhaps more controversial, then we can bear down on them.

HONORABLE JANE BLAND: Okay. We tried to review the comments that we received the last couple of meetings and incorporate those into the draft; and I think one comment that was well taken is that we needed to be specific about which lawsuits this rule would apply to and which lawsuits it would not so that there would be no concern about overlapping, particularly in the Family Code.

And so Tracy drafted 173.1; and basically that sets forth expressly what we had implied in the earlier draft, that is that this applies to civil lawsuits for damages or declaratory relief except that the Family Code governs the parent/child relationship, the Probate Code governs probate proceedings and the Texas Parental Notification Rules would govern parental notification lawsuits. And so that was one

suggestion that came from the committee in our earlier meetings that we have incorporated.

PROFESSOR DORSANEO: Why wouldn't you say "damages, equitable or declaratory relief"? That would kind of cover it.

11:26

JUSTICE JANE BLAND: Okay.

PROFESSOR DORSANEO: Because "equitable" is a bigger thing than "declaratory."

MR. MEADOWS: I think that's fine.

11:26

HONORABLE JANE BLAND: Any other comments on 173.1?

MR. GILSTRAP: Why do you need any limitation, limiting language in, after this rule applies? "This rule applies to civil lawsuits except"...

11:27

HONORABLE JANE BLAND: You know, I guess on the off chance there would be some other sort of civil lawsuit involving minors that wouldn't be governed by this rule. But you're right. I can't think of one.

11:27

PROFESSOR DORSANEO: Well, juvenile delinquencies are civil lawsuits.

MR. LOW: They're considered civil.

JUSTICE JANE BLAND: That's an example then.

11:27

MR. LOW: But are there others besides these three that have their own specific statutory provisions? In other words, wouldn't it be that it applies to all except those that have their particular statutory applications? I mean, I don't know that these are the only three. Maybe they are; but maybe there are some other statutory provisions that provide for guardian ad litem. If we know these are the only three, maybe then --

11:28 MS. SWEENEY: Doesn't the parental notification? Never mind. You've got that.

HONORABLE TRACY CHRISTOPHER: I actually did a Lexus search on ad litems to pull up all the statutes that dealt with ad litems; and Family Code and Probate Code were the two major ones. The term "ad litem" appears in the Health & Safety Code, Government Code, Human Resources Code, Occupational Code, Education Code and the Tax Code; but none of those instances were a specific type of lawsuit or issue I thought that would have to be excepted out. They just reference an ad litem at some point in all of those other provisions. So I felt like we covered the main ones with the exceptions.

MR. LOW: I'm not saying that we haven't. I just wondered.

HONORABLE TRACY CHRISTOPHER: Well, I'll give you my list if you want to look at them all.

MR. LOW: No, no. I'll take your word for it.

11:29 JUSTICE JANE BLAND: Well, we can leave the language as it is; and that way in the event that something does come up that's not included in these, on record that it's civil lawsuits for damages, equitable or declaratory relief.

11:29 CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I would make it just two sentences: "Declaratory relief. This rule does not apply to the following cases:" Because I don't really think those one, two -- the A, B, Cs are

11:29 civil lawsuits for damages equitable or declaratory relief. You kind of get it coming and going. It works fine.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Well, you can

11:29 have damage claims in family law cases and in probate cases.

CHAIRMAN BABCOCK: Jane, is there a proposal that you think works, or do you want to leave it as it is?

11:30 HONORABLE JANE BLAND: I'm guided by the

committee on it. I think "except" it shorter; but --

PROFESSOR DORSANEO: Not much.

JUSTICE JANE BLAND: -- not much.

PROFESSOR DORSANEO: And slightly less accurate.

JUSTICE JANE BLAND: Slightly less accurate. How about "This rule does not apply"? Does anybody have problems with that change?

CHAIRMAN BABCOCK: Okay. Hearing no dissent.

HONORABLE JANE BLAND: Okay. That means we have to change the verbs.

HONORABLE DAVID PEEPLES: I liked "except" better myself.

MR. MEADOWS: It looks like we need to vote on it.

PROFESSOR DORSANEO: Leave "except." I don't care.

HONORABLE JANE BLAND: Mr. Dorsaneo says he'll exceed to the slight inaccuracy.

MR. MEADOWS: You'll accept "except."

CHAIRMAN BABCOCK: Okay. So it stays as it is. Any other changes in 173.1? Do you want to go on to the next section?

HONORABLE JANE BLAND: Okay. 173.2 we

revised to address the concern raised in our meetings about the differences between a guardian ad litem and an attorney ad litem to clarify that a guardian ad litem is appointed in subparagraph (c) when the defendant has made and offer to settle the minor's claim and there appears to be a conflict of interest between the next friend for the minor and the minor. And an attorney ad litem in subparagraph (d) is appointed to represent a defendant or defendants served by publication where the defendant has not answered.

We also included language in subparagraph (e) that we do not recommend as a subcommittee that would address the issue that was brought up about the situation, the situations that people have had come up where they have represented an ad litem and the trial judge converts the role of the ad litem in the case to one of actual legal counsel in the case where the ad litem begins to represent the minor in the trial and participate in the trial. And so that one is split out. And these definitions or when appointments are made dovetails with our new 173.3 which sets out the duties; and the subsection (a) of 173.3 curtails, or I should not say "curtails," but defines the role of an ad litem to be simply one of evaluating the

fairness of the settlement for the minor and not one of legally representing the minor. And that was because we definitely got the comments back that there was a concern that whatever the role of the ad litem is in the lawsuit it ought to be defined in the rule; and if we were going to restrict the ability of the ad litem to participate in legal proceedings and represent the minor, then they should not have an attorney-client relationship with the minor.

11:34 And so I think we could probably go ahead and talk about 173.2, subsections (b) and (c). I don't think there was any -- there wasn't any problem with requiring it to be made by written order. I think everybody agreed with that. So but (b) and (c), that talks about the subcommittee's suggested language about when a guardian ad litem ought to be appointed.

CHAIRMAN BABCOCK: Paula Sweeney has got a comment. Is it about (a) or about (b) and (c)?

MS. SWEENEY: (c). If you read the language, what I'm concerned with (c) is that you said that it dovetails with 173.3 defining the duties which is at settlement stage; but you've got 173.2(c) starting with "when the defendant has made an offer to settle." And I think that that triggers way to early. You have got "The court must appoint when the

defendant has made an offer." The hold on the conflict thing for a second. And that could be, you know, a year and a half before settlement is finally agreed on. I mean, your first offer of $18,000 isn't going to settle the case. And a year and a half later you get to a million and half and you settle the case, and you're going to be trailing an ad litem along all this them.

HONORABLE JANE BLAND: Would "may appoint" work better?

MS. SWEENEY: Well, there are two components to it, because what you're really talking about is I guess "may appoint as early as" what? Somebody makes a motion to trigger it? Somebody is going to have to bring it to the Court's attention; and you don't want to start running up the tab especially in this offer of settlement Rule 8a context that we have just had hoisted on us. So, you know, now --

CHAIRMAN BABCOCK: Not to editorialize.

MS. SWEENEY: It happened. But now we've got 8a. We're going to have offer of judgment. We're going to have cost shifting. And if you start running up ad litem fees when the defendant makes their first offer, that's just one more item that

becomes a, you know, toy to be played with to create leverage where we don't intend to.

JUSTICE JANE BLAND: What would you suggest that we incorporate?

11:36 MS. SWEENEY: I would say "One may appoint a guardian ad litem, you know, at any time when there appears to be a conflict; but must appoint prior to approval of a settlement" somewhere. And that's not particularly carefully drafted; but those

11:37 are the concepts.

JUSTICE JANE BLAND: I see what you're saying. Trigger the appointment closer in time in connection with the approval of the settlement rather than the defendant's offer of settlement.

11:37 MS. SWEENEY: Correct. Yes. So that if there is, you know, if there is a reason why somebody needs to make a motion early in a case because there is something going on where you need an ad litem, that would be a circumstance where "the Court may"; but you

11:37 wouldn't get to "must" until you actually had a settlement you're talking about proving up. So that is component one of the comments on (c).

And component two is we still have this where there appears to be a conflict of interest; and I

11:37 really hate that we're drafting a rule that has an

implicit finding of conflict. If we could says appears to be a conflict or potential conflict of interest, that just is so much more appropriate, because the Court is really not saying even there appears to be a conflict. They're saying "Maybe there is. Maybe there is not. I don't know. I need an ad litem to tell me there could be." But it is an appearance or a potential conflict. And that matters to those of us who represent. We don't like to have a finding that our clients have a conflict of interest between each other and therefore so do we, so you don't want a rule that is triggered on there being an appearance of conflict.

JUSTICE NATHAN HECHT: Wouldn't you be afraid that the judge would appoint one in essentially every case if it's that lax?

MS. SWEENEY: Well, they do. If there is a minor settlement, they are going to appoint one in every case. So --

JUSTICE JANE BLAND: Not if the next friend is not getting the settlement proceeds.

MS. SWEENEY: Well, no. They still do because they want you to -- you've got to come in and prove that to them. If there is a kiddo involved or an incapacitated person, you're going to have an

ad litem at least to the point of coming in and saying, the ad litem says "You don't need me. There is no conflict." But the judge is going to, at least in my experience, is going to at least take that step, and most of the time the defense is going to ask for it.

And all I'm saying is, which is fine, all I'm saying is let's just not have the appointment predicated on the finding of an apparent conflict rather than an apparent or potential conflict.

CHAIRMAN BABCOCK: Judge Christopher had her hand up.

HONORABLE TRACY CHRISTOPHER: Well, I disagree with Paula that we should wait until the settlement is in the can before we appoint an ad litem, especially in light of our new offer of settlement rule.

CHAIRMAN BABCOCK: That's not 8a. It's 167. You said "8a."

MS. SWEENEY: Oh, yes. Just another rule I don't like.

HONORABLE TRACY CHRISTOPHER: It seems to me that an ad litem should be involved in an offer of settlement when we're talking about fee shifting and should review that on a minor's behalf.

MS. SWEENEY: Well, the way I'm envisioning it, judge, it would be "may" at that stage. The judge "may appoint" as early as the first offer; but don't get to "must" until you have a settlement and a prove-up, because I don't think in every case where there is a minor you want an ad litem tagging along for a year's worth of negotiations.

HONORABLE TRACY CHRISTOPHER: But since we've narrowly defined their role, I wouldn't think it would be a problem; but I would think you would want one when there was an offer of settlement made. Sometimes we'll get to a trial and an ad litem has never been requested because the offer has never been sufficient for the plaintiff's attorney to want to accept it; but I still appoint an ad litem at that point because if an offer is going to be made to the minor, I want someone besides the plaintiff's attorney to look at it and see whether the minor should accept even in the light of the parents' disagreement with it and the attorneys' disagreement with it.

CHAIRMAN BABCOCK: Buddy Low.

MR. LOW: Generally that's not the way it works. The defendant doesn't just say "I'll settle with your minor." They make an overall settlement offer. The guardian ad litem doesn't determine

whether that overall settlement offer is reasonable or not because he doesn't take place or take part in the depositions and all that.

So the conflict arises when there is a pile of money from a settlement and you're dividing that pile of money. That's where the conflict arises. Not whether they make an offer and you're the guardian and you say "Well, yes. You ought to take that. You ought to." Because it doesn't work that way. They offer one pot of money for everybody generally. I mean, I'm not saying that's every case; but that's generally the way it is.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I think one of the problems we're trying to cure is the unnecessary appointment of guardian ad litems and that conflict ought to be present before the appointment of one, which means there has to be a pot of money to be shared by the next friend and the minor. Until that occurs you don't need a guardian.

HONORABLE JANE BLAND: Well, it is written conjunctively so that it requires the defendant to have made an offer and the appearance of a conflict. So maybe that takes care of your concern, Paula, that this would be too early on in the time,

because I don't think the conflict would arise unless you're splitting it.

MS. SWEENEY: That would be --

CHAIRMAN BABCOCK: Justice Hecht.

11:42 MS. SWEENEY: I'm sorry. That would be in any joint offer.

JUSTICE NATHAN HECHT: It is also true the Court must not appoint a guardian ad litem without there being a potential conflict, whatever the trigger 11:42 would be?

MS. SWEENEY: I think so. I think --

JUSTICE NATHAN HECHT: This says "must." Part of the concern is also "must not do it otherwise."

11:42 MS. SWEENEY: Yes.

JUSTICE JANE BLAND: Okay.

MR. LOW: Jane, let me ask you --

CHAIRMAN BABCOCK: Alex had her hand up first, Buddy.

11:42 PROFESSOR ALBRIGHT: I just had a question. Where is the duty of the Court to approve minor settlements? Does the Court have to approve every minor settlement, or is it just what people do?

(Professor Dorsaneo entering conference 11:43 room door.)

MR. YELENOSKY: Don't let him in.

MR. LOW: You've got to stay out.

CHAIRMAN BABCOCK: There is a message there, Bill.

(Laughter.)

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: I think there are as many ways of handling it as there are counties in Texas and maybe more than that. And in Harris County I think it's the impression of a majority of the judges that ad litems need not be appointed unless a conflict arises and that is not even in a situation to say we have no conflict. But if the parties come in and say "Judge, the minor is getting all the proceeds of the settlement. The next friend is not getting any of the settlement," I don't appoint. I didn't appoint an ad litem.

PROFESSOR ALBRIGHT: I guess my question is --

HONORABLE JANE BLAND: And I think that's probably the majority of us. What do you think, Tracy?

HONORABLE TRACY CHRISTOPHER: Well, you've got expenses and attorney's fees, and so people worry about it. And sometimes they'll have already

settled with the parents and then they just file a lawsuit for the minor, so it looks like it's just for the minor; but in fact the parents have gotten money.

JUSTICE JANE BLAND: Well, yes. I mean, you ask those questions and you still have a minor settlement hearing.

PROFESSOR ALBRIGHT: My question is does there have to be a minor settlement hearing every time you settle with a minor?

MS. SWEENEY: I think as a practical matter the defense is always going to want one so that they have finality. And also if you're going to do a 142 Trust or you're going to put the money in the registry of the court, you have to have a court order to do that, so you're going to have to have some way get to the judge.

HONORABLE TRACY CHRISTOPHER: If you don't have a Court approval, it's not binding.

PROFESSOR ALBRIGHT: For the minor. That was my question.

CHAIRMAN BABCOCK: John Martin.

PROFESSOR ALBRIGHT: Is that in a statute?

HONORABLE TRACY CHRISTOPHER: Case law.

MR. MARTIN: In general I agree with

you, Paula. But there is a situation where the mother and father are divorced and one parent is killed and the other parent brings a wrongful death case and has no interest, no financial stake in the case at all. They're strictly bringing it on behalf of the child. And I've seen a lot of those cases settle without an ad litem.

MS. SWEENEY: And no prove-up?

MR. MARTIN: Right.

MS. SWEENEY: No court proceeding of any kind?

MR. MARTIN: Yes.

MS. SWEENEY: What do you do with the money?

MR. MARTIN: You go in usually with a structure.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Rule 173 dealt with lunatics, idiots and non competents. The rule that you drafted only deals with minors. Was there a reason for that?

HONORABLE JANE BLAND: The reason for that is -- and we had a letter that I guess Mike Wood had sent to this committee back in 1997 on some of these issues. And I think Carl -- was it you, Carl, that sent this to me? Thank you very much for doing

that. And he pointed out that we don't use "idiot, lunatic and non-compos mentis" anymore to describe incapacitated persons. Now we use "incapacitated person," and that it was the feeling of the subcommittee that this rule was intended to be used in cases where minors who have a next friend to represent their interests. But if the person is an incapacitated person, i.e. they need a guardian, then they ought to be over in probate court.

11:46 MR. LOW: Okay. But if we change this rule, I mean, and I'm not talking about the terminology; but if we change the rule so that "incapacitated person" was included in this rule and we include him, what are the judges going to use as a guideline for rules on the incapacitated person, how much an incapacitated person can sue or should be able to sue through a guardian ad litem and not necessarily have to go through the probate court every time?

JUSTICE JANE BLAND: And I think that's where there is a disagreement I think among people on the committee from our earlier meetings. There is a feeling among some of us, and I think this is the subcommittee view, but you-all can speak to it, that if the person is incapacitated, you know, an incapacitated adult, that a probate guardian ought to

be appointed. Because the difference is with a minor, of course the incapacity is relieved when they turn 18. And there is, you know, in our law and case law the view that parents can make the best decisions on behalf of their minor children; but if it is an adult, an incapacitated adult who is going to be needing financial management of their assets and there is no potential or the potential for return to full capacity is low, then that ought to be handled by a true guardian appointed by the probate court with the responsibilities that are enumerated in the Probate Code for that kind of a guardian and whether that guardian be a spouse or a parent, but that there are more significant responsibilities that are associated with that sort of a guardianship than merely reviewing a settlement and saying that the settlement proceeds and the way that they're divided and the way that the attorney takes their fees out of the settlement is a fair way, because you're talking about future financial needs and care and that kind of thing.

MR. LOW: But you can also go through Probate Court if you're a minor.

HONORABLE JANE BLAND: Right.

MR. LOW: You can do that too. So I'm just saying that there are going to be incompetent

people and there are going to be lawyers that are representing them and there is no rule; and we need to tell them someplace that if you're incapacitated and incompetent, you need to go to probate court. When we amend this rule and it's just deleted, they will have questions.

HONORABLE JANE BLAND: Well, under 173.1(b) we say that "the Probate Code governs the appointment of ad litems for an incapacitated person and for unknown heirs."

MR. LOW: It's not really an ad litem though.

CHAIRMAN BABCOCK: Stephen has got his hand up and then Paula.

MR. YELENOSKY: Well, the probate court as I understand it is where you're going from a guardianship limited or full. There is a gradation there; but incapacity is not black and white, either/or. There are degrees of incapacity; and it can also be temporary just as being a minor is.

JUSTICE JANE BLAND: That's right.

MR. YELENOSKY: And in fact the attorney's Rules of Professional Responsibility require us to consider degrees of capacity when representing a client. So it's entirely possible that

you could have a person who does not need any sort of guardianship from the probate court yet has a claim or is defending a claim in court and may need something other than just an attorney who represents their interest, and may not have a need after the settlement because maybe it doesn't involve money. Maybe it is withdrawal of care or something. So it isn't true in my mind that you want to force people to go to probate court if it's an adult with an incapacity that doesn't necessitate a full guardianship.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: That's exactly true. There are an awful lot of folks. Well, not an awful lot. There are a category of folks that are represented by next friends that may or may not strictly meet the definition of probate incapacity and that may or may not choose to seek that out and want to file in district court, and that's a choice that's available that this rule apparently abrogates.

HONORABLE JANE BLAND: But you still bring your suit in district court. You open your guardianship over in the probate; but the suit is still in district court.

MS. SWEENEY: Well, but you are forcing guardianships on people where currently the law does

not force guardianships on people, and that is a huge change in the law and in the procedure. And I don't think that we should sort of slide that into a rule without an awful lot more discussion, because that's not the current state of the law. Right now it's not required that there be a guardianship in every case; and yet there may be a circumstance in which one or both parties wishes to request an ad litem or the Court may want to appoint an ad litem to check to see.

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HONORABLE TRACY CHRISTOPHER: But what kind of an incapacity are you talking about that wouldn't require a guardianship in the probate court but would require it in a civil lawsuit?

MS. SWEENEY: People who aren't strong enough to bring their own case and handle it themselves, people whore are sick --

HONORABLE TRACY CHRISTOPHER: Because they're not smart enough?

MS. SWEENEY: Because they're sick enough that they can't.

HONORABLE TRACY CHRISTOPHER: Then they need a guardian.

MS. SWEENEY: No, they don't. No, they don't.

MS. CORTELL: Do we need a guardian for

that or over their entire assets?

MS. SWEENEY: They don't need a guardian period. They have got a spouse that loves them and is taking care of them but is bringing the case as a next friend.

HONORABLE TRACY CHRISTOPHER: We don't know that. We don't know that the spouse is going to use the money for the sick person. That's the whole point of the guardianship. The guardian has to make yearly reports to the probate court that says you know, "This money that was awarded to my sick husband, I'm still spending it on him."

MS. SWEENEY: That is the whole point of a guardianship when a guardianship is sought because somebody is an incapacitated person. That is entirely different from the guardian ad litem who is requested by a party or who the Court thinks ought to look at a case to see whether a settlement is appropriate or whether in fact a guardianship proceeding is required. It's a quantum level of difference. And what you're doing is changing the law by this rule.

Now if you mean to change the law, say so. But that's not what we're being told.

CHAIRMAN BABCOCK: Hang on, guys. Too many hands up. Justice Duncan, then Carlos, then

Harvey and then Nina.

HONORABLE SARAH B. DUNCAN: I completely agree with what Paula is saying, that having a guardian of the person or of the estate is a really big deal. It is completely giving up your autonomous ability to direct your own affairs, and it is not something that some people ever want to happen to them, although it may be something they need if they are sued. So I completely agree that we should not require everybody who needs a guardian ad litem in a lawsuit to have a guardian, as that term is used, in the probate court that takes over their affairs.

The other thing that the subcommittee's proposal does is eliminate the Court's authority for determining that an already appointed guardian or next friend has a conflict that requires an ad litem. And I don't understand why we would do either. I'm not in favor of telling people you have to have a guardian if you're sued or if you have a claim that you choose to prosecute. Maybe I just come from really independent stock; but...

JUSTICE NATHAN HECHT: Repeat that. What was the third or fourth sentence earlier? What is your objection?

HONORABLE SARAH B. DUNCAN: My objection

to guardianships?

JUSTICE NATHAN HECHT: No. Just that that you were just last talking about.

HONORABLE SARAH B. DUNCAN: As I understand this, if you are sued or if you choose to prosecute a claim and you need a guardian ad litem to do that effectively, you are now going to have to go to probate court and have a guardian appointed for you, which I just don't see why that's necessary.

11:55

MR. BABCOCK: Carlos.

HONORABLE CARLOS LOPEZ: There may be cases where it's necessary; and I suspect that there may be cases where it's not. And I think this rule mandates it. And I think at a minimum I don't think we ought to send everybody to get a full blown guardian in probate court. I'm against that for policy reasons, I guess. But if we're going to do that, we shouldn't call it ad litem if they're not an ad litem.

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"Ad litem," you know, the way I remember from way back, an "ad litem" meant a temporary appointment for the purpose of that lawsuit basically. So if we're saying what we're doing is send them to probate to get a full blown guardianship, then we shouldn't be calling it -- in 173.1(b) it should say "The

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appointment of a guardian for an incapacitated person." It shouldn't be "ad litem."

I think it should be an ad litem because I think that's what we mean; but I'm not sure why we're going -- I guess we can. But I'm not sure why we're forcing people to go to probate court to do that.

CHAIRMAN BABCOCK: Harvey.

HONORABLE HARVEY BROWN: Go ahead.

CHAIRMAN BABCOCK: Nina.

MS. SWEENEY: I think we should vote on that here.

MS. CORTELL: I have several comments to offer. Wasn't it my turn?

MS. SWEENEY: Sorry, Nina. It was I just started talking.

(Laughter.)

MS. CORTELL: Do you want to go ahead?

MS. SWEENEY: No.

MS. CORTELL: The old rule of "Why fix it if it ain't broke," other than the language which was the original complaint to this rule I'm not aware that there was a substantive complaint with how the rule worked. And so my concern other than the one I'm going to give to you which has been the main focus of conversation, and I will get to that, I'm not sure

that we've been faithful to the spirit of the old rule and provided a trigger and a mechanism for when you have an appointment, because if you don't fall under the probate proceeding and you look under 173.2, and it's just not very clear to me that we have a triggering mechanism. So I think we maybe created a bigger problem than we needed to if we had been more faithful to the original rule.

But to get to the point of most of the discussion, let me give you an example. My husband often, he does ethics work at Baylor Hospital, and often has to go in very quickly into court to get lifesaving treatment. One example was that there was a mentally incapacitated adult whose parents were Jehovah's Witness would not consent to the transfusion that was necessary to sustain life. And they didn't need to go into probate court for a full blown guardianship. But then he went I guess to district court, got a separate appointment of a guardian under Rule 173 and was able to procure the lifesaving treatment. You did not need to go to the probate court for that. And to send all of those cases over there when that's not what you need doesn't make sense to me.

So my suggestion would be to be more faithful

to the original rule, not, of course do not use the language; but the concept and the triggering kind of mechanism that we had in the old rule, keep that and not shunt what doesn't need to go into probate court, don't require it to go there.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: May I ask, Paula, by what authority do you if you're representing a sick husband and you're representing the wife too and you style your lawsuit Wife As Next Friend of Husband because the husband is sick, by what authority do you do that? By what authority do you style your lawsuit that way?

MS. SWEENEY: Well, the way I've always understood the law in Texas is pretty much anybody can be a next friend to pretty much anybody unless they're challenged.

PROFESSOR DORSANEO: Rule 44.

MR. LOW: Right.

HONORABLE TRACY CHRISTOPHER: And the challenge is?

MS. SWEENEY: There is no challenge in my hypothesis. The wife wants to do it and nobody is contesting it.

HONORABLE TRACY CHRISTOPHER: Is there a

power of attorney between the husband and the wife?

MS. SWEENEY: No.

HONORABLE TRACY CHRISTOPHER: So without any power of attorney you're allowing the husband to
11:59 make -- or the wife to make decisions on behalf of the husband?

MS. SWEENEY: I'm not positing a husband in a vegetative state here for whom there would be already a guardianship. I'm positing a husband who
11:59 just isn't up to it. He may be still in the hospital. He may be somewhat disoriented. He may have good days and bad days. He may be so sick fighting his cancer and having his chemo that he can't deal with it. Maybe I have power attorney and maybe I don't.
12:00 Sometimes I do and sometimes I don't; but there's nobody complaining. There is no problem.

HONORABLE TRACY CHRISTOPHER: There is an ethical rule that says if you represent an incapacitated client, there has got to be guardianship
12:00 appointed.

MS. SWEENEY: This is not an incapacitated minor we're talking about.

HONORABLE TRACY CHRISTOPHER: Incapacitated client.

MS. SWEENEY: And we're not talking

about somebody who meets the legal definition of incapacitated or the distinction --

HONORABLE TRACY CHRISTOPHER: Then you don't need an ad litem.

12:00 MS. SWEENEY: Well, then don't appoint one.

HONORABLE TRACY CHRISTOPHER: I don't.

MS. SWEENEY: Okay. That's fine.

HONORABLE TRACY CHRISTOPHER: I mean, if 12:00 your husband is able to make his own legal decisions, then he doesn't need an ad litem.

MS. SWEENEY: But we've got a situation of a next friend who is prosecuting a case and the defense may well want a prove-up. They may well want 12:00 an ad litem. They may request an ad litem to determine exactly whether or not there is a conflict or whether or not there is a problem or whether the settlement is in the individual's best interest.

There is a gray area where it's not black and 12:01 white and you're not incapacitated and needing a guardian under the Probate Code; and as Justice Duncan pointed out, abdicating all of your rights to govern your own property or affairs, there is a level between fully functional and probate court guardianship where 12:01 next friend representation is appropriate and where an

ad litem review and court approval may or may not be appropriate.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: What if I'm representing the defendant in the very case that you're discussing? The husband is in the hospital. It's my money, my client's money I'm getting ready to pay.

MS. SWEENEY: Then you want finality.

MR. MUNZINGER: I as trial counsel for the defense. The defendant raised a question in my mind as to whether the husband's signature is going to be any good on the release because of his physical condition. I think that's what she was talking about.

MR. YELENOSKY: That's why you want a guardian ad litem and not a full guardianship.

MR. MUNZINGER: But let me ask my question. Let me go on just a second. So I'm now I'm in this quandary. I don't know whether your husband's release is going to be any good or not. Where does a guardian ad litem under that circumstance find the legal authority to give me assurance that the money I'm going to pay in settlement is good?

MS. SWEENEY: The guardian at litem doesn't give you any assurance. The guardian ad litem assures the Court that there is either not a conflict

or that the settlement is in the best interest of the individual; and then you get a Court order approving the settlement, and so you've got that much more finality.

12:02 MR. MUNZINGER: The judge has approved the judgment on behalf of a sui juris adult who is competent. That's -- in essence we have to have an agreed judgment. Do you agree?

MS. SWEENEY: Yes. Sure. You're
12:02 getting a settlement approval.

MR. MUNZINGER: But as a defendant's lawyer if the party has agreed to the judgment and I have question -- I'm not arguing with you. I'm trying to educate myself. I've never had the circumstance --
12:02 I'm a defense lawyer and I have a question as to the competency of the defendant. In classic legal terms is he or is he not incompetent? He's alive, he's in a bed, he can speak; but he needs a next friend to pursue his lawsuit and there is some question. I
12:03 don't know that a guardian ad litem gives me any more assurance as to the validity of the judgment under that circumstance. He's either he is competent or isn't competent. If he's not competent and he's an adult, as I understand it, at least under current law
12:03 he'd almost have to go to the probate court to have a

guardian appointed for him. His wife certainly can't act for him.

MS. SWEENEY: If he's incompetent, somebody has to go to the Probate Court on his behalf. But what I'm parroting is what defense lawyers have told me for 23 years, which is they want Court approval in those situations because they think it gives them and their clients more of a reliability of finality that they won't be coming back later saying 12:03 "No. My wife didn't have authority, and I was just temporarily unconscious or temporarily too dehabilitated by the chemo" or whatever.

MR. MUNZINGER: And if we have an ad litem rule that doesn't specifically address a 12:04 guardian ad litem for an adult who is otherwise presumed to be competent under the circumstances that you just talked about, I'm not sure as the defendant that I would feel that I have protection on the judgment. If a year later he comes out of whatever 12:04 condition it is and his wife has got a boyfriend and he says "Wait a minute. She has split and taken all that money, stud, and I had a cause of action, and you didn't pay me. You paid her."

MS. SWEENEY: You can't make her or you 12:04 can't make anybody go become a -- you can't force the

probate proceeding as a defendant. You have got no power to force her to go get a guardianship in probate court. You do want to settle the case however, because it's obviously a pretty good case if he's in such bad shape. You want finality, so you think "Well, at least I'm going to get an ad litem and I'm going to get Court approval." It in my judgment benefits the defense.

MR. MUNZINGER: Well, it certainly gives me an argument; but I don't know that it gives me legal finality under the circumstance.

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: That's how it works now. And that, I mean, it wasn't expressed as a problem.

MS. SWEENEY: Right.

MR. YELENOSKY: But what is a problem is for us to go head long into changing the law and just talking about it as if it's only about getting finality for defense counsel or whatever when what we're really talking about again here is what we talked about before, about freedom.

Are you saying an individual in order to prosecute a case always must have a guardianship? And that just can't be right. And there are many examples of people with mental retardation who don't need a

guardian, but for instance, may not be able to fully understand the difference between two settlement offers because they can't fully understand the financial implications. You can have somebody with a temporary incapacity due to acute mental illness and for whatever reason the case has to go forward at that time. So there has to be some mechanism that doesn't force a person into a guardianship proceeding in those circumstances.

12:06 CHAIRMAN BABCOCK: Harvey, then Justice Gray, then Carlos and then Bill.

HONORABLE HARVEY BROWN: It seems to me the problem we're trying to address with this rule is the over appointment of ad litems, not the failure to 12:06 appoint ad litems. And if that's true, we need to reach the solution partly by looking at 173.2(c) when we address Paula's problem by saying "except with the agreement of the parties." And then instead of making this "The Court must appoint an ad litem" we address 12:06 the issue Justice Hecht has raised which is we need to cover the opposite which is we don't want the Court to appoint ad litems in some situations. So what we could say is "Except with the agreement of the parties, the Court should not appoint an ad litem 12:06 unless A and B appear."

MR. LOPEZ: Unless?

HONORABLE HARVEY BROWN: "Unless" part one, "the defendant has made and offer and there is a potential conflict of interest." So that takes care of the over appointment. But --

MS. SWEENEY: Yes.

HONORABLE HARVEY BROWN: -- "the parties all agree" takes care of your problem.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I guess a question and then a comment. And I'll do the comment first. I think the answer to the problem posited by Paula and Richard's discussion, if there is enough at risk for the defendant to need the finality, they're probably going to compel the formal guardianship; but I'm reluctant to compel the formal guardianship in every case where there may only be $10,000 at risk. The defendant wants some additional assurance, and this provision of a guardian ad litem could provide that. So it seems to me to be some type of balance in there.

The question I would have is to the subcommittee. We have talked about it a lot. But does any member of the subcommittee see a problem with substituting "incapacitated person" for each place in which the existing draft of their proposal says

"minor"?

MR. LOPEZ: You mean adding it? Do you mean in addition to "minor"?

JUSTICE TOM GRAY: No.

MS. SWEENEY: You're right.

JUSTICE TOM GRAY: An incapacitated person is a minor -- or a minor, excuse me, is an incapacitated person.

MS. SWEENEY: So it would include both. That's a good point.

JUSTICE TOM GRAY: And so just substitute.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I don't know, whether -- I'm sure the subcommittee must have looked at Rule 44, which seems to me a companion, although apparently not in the numerical structure of the Revised Civil Statutes of 1925 of Rule 173. And it does simply say that if someone doesn't have a legal guardian, they sue by next friend. And the next friend may among other things with the approval of the Court compromise suits and agree to judgments which are binding when approved by the Court.

And 173 fits, current 173 fits together with that and probably isn't as informative as it needs to

be. And because it is separated by some distance from 44 it's harder to imply that this guardian ad litem has the same capacity to make a binding and effective settlement as a next friend would when the guardian ad litem is substituted for the next friend or for the legal guardian. That seems pretty clearly to be what is meant to mean.

And I can understand why defendants would worry about the ability of a guardian ad litem if it didn't say what the guardian ad litem's authority was and how binding the settlement would be if approved by the Court. That strikes me as to a certain extent to be paranoia; but I can at least understand. It's understandable paranoia.

But why would a defendant want to go to probate court and have an actual guardian appointed if it was perfectly clear that the guardian ad litem could with the approval of the Court get this thing finished in the event you even needed a guardian ad litem? It seems very strange to me that we would want to have so much legal machinery involved to solve an ordinary problem when the former way of doing it, although perhaps not crafted so clearly to us today, seems to make a good deal more sense.

CHAIRMAN BABCOCK: Carlos, you had your

hand up earlier. I'm sorry.

HONORABLE CARLOS LOPEZ: I can't remember what I was going to say.

CHAIRMAN BABCOCK: Pass?

HONORABLE CARLOS LOPEZ: Hang on a moment.

CHAIRMAN BABCOCK: Sorry.

HONORABLE CARLOS LOPEZ: Well, I was going to -- one thing I was going to sort of comment on and just add to the discussion of what people were saying, I wasn't focusing on Rule 44; but it's clearly ad litem. For example in Richard's case, if I was that defendant and if in that particular factual case I had some concerns about release, I'd make sure that the order appointing the guardian ad litem made it very clear what the powers were.

I mean, you know, now the argument you might get is "Well, 44 says it's binding." And the defendant says "That's great. I'm happy to be bound by it." What does that mean when I try to enforce the release, you know, three years down the road? How binding is that? And I'm hard pressed to think the Court would not realize that that release is binding because of the ad litem that was appointed and all the rest of the other stuff; but I don't know.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: For those who don't have Rule 44 in front of you, Bill ran through. But "Minors, idiots, lunatics, and persons non-compos mentis who have no legal guardian," so that's an incapacitated person with no guardianship "may be represented by next friend." And then "The next friend has the same rights as a guardian would have. If required, shall give cost for -- security for costs and may with the approval of the Court," which is why there is a Court approval in these cases, "compromise suits and agree to judgments, and such judgments," et cetera, "when approved by the Court shall be forever binding and conclusive upon the party plaintiff."

So that does give the defense a big fat cushion between them and somebody coming back after them. It does give the Court the authority we're talking about. It does allow the next friend to proceed the way we were describing, and it's not a problem that is supposedly out there that this rule is meant to address. So I really don't think we should standing existing law on its head because there are some guardian ad litems in The Valley getting too big of a fee, which is supposedly what started this whole

discussion.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, first of all, I just wish to say that Rule 44 is covered by the subcommittee headed up by Orsinger and Gilstrap. So if you guys want to take the ball from here, you're welcome.

(Laughter.)

HONORABLE JANE BLAND: You know, I don't have any problem with the situation that Nina spoke of and your situation where you say we get an ad litem to determine whether or not a legal guardianship ought to be opened up. But I don't think the subcommittee's intent, and if we've done that, we need to go back to the drawing board, was to stand existing law on its head. And this wasn't because of a problem foreseen in The Valley and it wasn't because the defendants wanted finality. It's because in Harris County most plaintiffs' lawyers with clients who are incapacitated open up a guardianship and get the next friend declared to be the guardian of that person not because of any defendants that they are going to potentially sue, but so that the person that they're representing, that incapacitated person that they're representing has the protections that are afforded to them under

the Probate Code for the future use of their funds, because otherwise there is the risk of this next friend who, you know, may or may not be bound by any fiduciary relationship, which we'll get into later on in the rule, can abscond with the funds and leave the incapacitated person without redress. Whereas if it's done through the probate court and through probate proceedings, there are some protections in place to insure that an incapacitated person receives the full benefit of whatever asset management is done on his or her behalf.

And so it's not an intent -- it's not to make things more complicated. It's not to fix a problem in The Valley. It is basically just a fundamental difference in how things have been handled I think in our county. And unfortunately our committee was a little bit Harris County heavy in drafting this. And so what we probably need to do is look at it once again from the perspective of other counties.

But I think you should recognize that if you're talking about a substantial amount of money, for a person who is not capable of making their own legal decisions the Probate Code affords that person some protections that an ad litem appointed under this rule does not.

MS. SWEENEY: But under current law it is not required to go to probate court and seek those protections.

JUSTICE JANE BLAND: Well, that is open to debate, Paula.

MS. SWEENEY: And now we're codifying it.

JUSTICE JANE BLAND: In Harris County it is the belief among lawyers, among many lawyers --

HONORABLE TRACY CHRISTOPHER: And the probate judges.

JUSTICE JANE BLAND: -- and the probate judges that if the person is not able to exercise their own, his or her own judgment in making legal decisions about his or her lawsuit, and probably more importantly, not capable of managing settlement proceeds from that lawsuit, making their own financial decisions, that the current law does require that a guardianship be opened.

And to address Justice Duncan's concern, guardianships are not necessarily permanent in nature. Temporary guardianships are opened up all the time. It's just a difference in the way that these cases are handled across the state.

And our goal is not to change the law or

anything like that, but to try to clarify it. And what I'm hearing is that we've clarified it too much one direction and so we need to rethink that. I don't know.

12:16 JUSTICE NATHAN HECHT: And here's what makes it worse: The Probate Code says that "In a guardianship proceeding the judge may appoint a guardian ad litem to represent the incapacitated person."

MR. YELENOSKY: And that's because there has to be a determination as to whether the person really meet's the criteria for a guardianship. And the criterion is not can they represent themselves in a legal case. Obviously --

12:17 JUSTICE JANE BLAND: But even in your example, Stephen, where you say you're working with a mentally retarded adult who can make some decisions, but maybe needs some help, if that person is entitled to a substantial settlement of two or three million dollars, --

MR. YELENOSKY: That's a condition you're placing on it. Even if I agreed with you, then you'd have to agree where there is not a substantial amount of money you shouldn't have to go there.

12:17 JUSTICE JANE BLAND: Well, then and

that's why I'm saying that we should consider the perspective. And Nina pointed out another issue was "Well, there isn't money at stake; but really it's just this lawsuit and that's it."

12:17 MR. YELENOSKY: Right.

HONORABLE JANE BLAND: There is no future obligation.

MR. YELENOSKY: Well, then we don't disagree that we need to remove the mandatory nature 12:17 of this. Then we may want to argue about how we get to the middle; but I think we're agreeing that we have to change this mandatory part.

HONORABLE JANE BLAND: I don't know if I'm ready to agree; but I understand the issue.

12:18 CHAIRMAN BABCOCK: She understands it; but is saying she doesn't agree with it yet. Bill.

(Laughter.)

PROFESSOR DORSANEO: I assume that everybody looked at Chapter 142 of the Property Code 12:18 about what you do with the money when you have a settlement when there is a minor, an incapacitated person. And that used to be -- that was part of Article 1994, and so was Rule 44. So it's probably, you know, too confusing given the fact that everything 12:18 that is in one piece gets separated and sent in

different directions and redrafted.

But not withstanding what everybody thinks in Harris County, I just can't believe that you would need to have a full blown guardianship. And if that's the law, the law is requiring too much administration.

CHAIRMAN BABCOCK: Bobby Meadows.

MR. MEADOWS: Well, I was just looking for a way to deal with this, because I agree. And Jane did a good job of explaining how we got here; and obviously this is the work of mainly Houston lawyers and judges, and I suppose it reflects a view about best practices more than it does any attempt to really take law and reverse it.

But I don't know exactly. I think we should talk to the probate judges. I think we ought to get an indication from this committee as to what, you know, the view is as to the best practices. I think the feeling in Houston, because this is the way it's done, is that that's, you know, an appropriate thing to do.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: I think it might be nice if some plaintiffs' lawyers were involved in this process, which has not apparently happened, number one.

CHAIRMAN BABCOCK: Which side of the docket do you represent?

(Laughter.)

MS. SWEENEY: I do a lot of pro bono work these days.

(Laughter.)

JUSTICE JANE BLAND: Bill Edwards is on our committee; and he agreed with you, that a guardian did not need to be available in every instance. And he did participate in one of our earlier conferences; but he was unavailable yesterday. So we do have some plaintiff's lawyers. And I really don't want to be, you know. I don't think that we got to this because of any -- we're just really trying to do what you-all want us to do. And this was all over the map at the last meeting, and we came up with this draft. We're open to suggestion. And I think you sent an e-mail and we made those changes. So I feel like we're trying to get your input.

CHAIRMAN BABCOCK: Carlos.

MS. SWEENEY: And I picked -- I'm sorry. I never did finish what I was saying.

HONORABLE CARLOS LOPEZ: Go ahead.

CHAIRMAN BABCOCK: Go ahead.

MS. SWEENEY: And the draft is way

better, and as to minors I think you've come a long way. Where we've hit the rock is on "incapacitated person."

JUSTICE JANE BLAND: Okay.

12:20 MS. SWEENEY: But Professor Dorsaneo didn't finish his thought, which is that the Section 142 Rule carries this same language and does deal with incapacitated persons who are not in guardianship and does require specific 142 Trust to protect that money. 12:21 So the hypothesis that Judge Christopher had of the next friend frittering away the money isn't supported by the law. And although I know that Bobby says it's best practice to do what some folks in Houston do and what the judges that are represented here prefer, it 12:21 is not necessarily best practice in my opinion nor the best practice that is carried out throughout the state nor is it something that is required by law nor does it represent unethical conduct by either lawyers or litigants or their next friends.

HONORABLE TRACY CHRISTOPHER: Who has made the determination of incapacity for a 142 Trust? Who has made that determination?

MS. SWEENEY: You make a motion to the Court for approval of a 142 Trust.

12:21 HONORABLE TRACY CHRISTOPHER: Who has

determined that the person is incapacitated?

MS. SWEENEY: The next friend who is bringing the case on their behalf as an incapacitated person is the next friend for that reason and is coming to the Court saying "I'm his next friend because he can't do it. And here is the testimony, judge. And here is the ad litem who had gone out to visit him who agrees with you; and here is the way we propose to do a 142 Trust under Court order that will protect the money (indicating)."

CHAIRMAN BABCOCK: Carlos.

HONORABLE CARLOS LOPEZ: I guess I never saw it, and I think it would be pretty rare. I guess you could have the case where there is sort of a disagreement about whether there is really incapacity here or somebody is just trying to pull a fast one. In the typical case that I saw it was pretty obvious when the person was incapacitated, and there wasn't any controversy about that.

I had a question for the Houston judges about what level. It sort of dove-tails into the 142 Trust argument. I always thought that an incapacitated person was protected by, unfortunately I guess in Dallas, the judges. Really we got very detailed and I felt like a money manager sometimes with the decisions

we were being asked to make about approving sort of the way this is going to work and the payout and whether the triple A rated company is going to be there 20 years from now and all this stuff. And I'm not saying it's necessarily good or bad; but that's just kind of how we do it, and it sounds a little different maybe.

12:23

PROFESSOR DORSANEO: That's what the statute requires, Chapter 42.

12:23

HONORABLE CARLOS LOPEZ: Yes. It always seems like the file on the 142 Trust was like this (indicating). And I don't know. I mean, because of that level of certainty I think that we just sort of assume that it wasn't an issue. And it sounds like maybe it is. So I don't know.

12:23

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH B. DUNCAN: I guess part of my problem with requiring everybody to get a guardian is this proposal seems to operate on the premise that the world is divided between those who are incapacitated insofar as the Probate Code is concerned and those that are fully capable of taking care of their own affairs in the context of a lawsuit whether they are the person suing or the person being sued.

12:23

12:24

I don't think that's an accurate reflexion of the way the world is divided. I think probably most people over the age of, let's say, 75 who are not lawyers are probably not competent to either be a 12:24 defendant or be a plaintiff in a lawsuit, but they are not incompetent as far as the probate court is concerned.

So I guess what bothers me is we're talking about this as though fully competent people for 12:24 purposes of the Probate Code are necessarily able to represent their own interests effectively in the context of a lawsuit. And I don't think that's a correct assumption.

HONORABLE TRACY CHRISTOPHER: That might 12:25 be a good point. Then we shouldn't put the term "incapacitated" in here. Perhaps we could just say "when represented by a next friend."

HONORABLE SARAH B. DUNCAN: That's sort of what the current rule does.

HONORABLE TRACY CHRISTOPHER: No.

JUSTICE SARAH B. DUNCAN: The current rule says if you're represented by a next friend who appears to have an interest adverse to the person you're representing, --

HONORABLE TRACY CHRISTOPHER: Right.

But what I'm saying is --

JUSTICE SARAH B. DUNCAN: -- then you get a guardian ad litem.

HONORABLE TRACY CHRISTOPHER: What I'm saying is instead of, someone has made suggestion that we put the term "incapacitated person" in there, that we eliminate that and said, let's say "when the person is represented by a next friend."

MS. SWEENEY: I like that.

CHAIRMAN BABCOCK: Chip.

MR. WATSON: I was going to ask Buddy how old he was; but...

(Laughter.)

MR. LOW: I will tell you I represented --

JUSTICE JANE BLAND: Yes. I think "75" is not a good --

MR. LOW: But we had, we filed a lawsuit for a lady who was supposed to have brain damage, and she was still pretty smart. Franklin Jones, Jr. and I did. We had to appoint a guardian ad litem; and the judge threatened to charge the jury that she had a higher IQ than both lawyers combined.

(Laughter.)

MR. LOW: That was Judge Parker.

HONORABLE SARAH B. DUNCAN: My only point is I think there are a lot of people in the general population who may not be competent to be a plaintiff or be a defendant and make legal decisions on their own behalf who are nowhere close to being incompetent under the Probate Code.

HONORABLE TRACY CHRISTOPHER: May I suggest these changes then?

CHAIRMAN BABCOCK: Judge, could you speak up a little bit?

HONORABLE TRACY CHRISTOPHER: Sure. Just a suggestion: "The Court may appoint a guardian ad litem when the defendant has made an offer to settle the party's claim and there appears to be a conflict of interest between the next friend and the party."

HONORABLE JANE BLAND: Tracy, there is a potential conflict I think is where --

HONORABLE TRACY CHRISTOPHER: Well, I don't know if we voted on that.

HONORABLE JAN P. PATTERSON: How about an issue of --

CHAIRMAN BABCOCK: Let's stick with one thing at a time.

HONORABLE TRACY CHRISTOPHER: So my

first suggestion is to leave in "there appears to be a conflict of interest," because that's the way the old 173 was; but and change "must" to "may," delete "or a minor or minors" from that first sentence and then replace "party" everyplace else.

CHAIRMAN BABCOCK: Paula, what do you think about that?

MS. SWEENEY: I like it. I still want to go back to "potential"; but I like that.

CHAIRMAN BABCOCK: Okay. Well, we'll get to that.

MS. SWEENEY: So you're going to -- so the last clause, "for the minor and the minors"?

HONORABLE TRACY CHRISTOPHER: "Between the next friend to the party and the party."

MS. SWEENEY: Okay.

CHAIRMAN BABCOCK: What do you think about that, Justice Bland?

HONORABLE JANE BLAND: I'm fine with it.

CHAIRMAN BABCOCK: Bobby?

MR. MEADOWS: That's fine.

CHAIRMAN BABCOCK: Richard?

MR. MUNZINGER: That would mean if the defendant makes any settlement offer in a case involving a minor plaintiff, the Court may appoint a

guardian ad litem who is now going to stand between the minor and the plaintiff's attorney in settlement negotiations. And I've heard several people today say that this is not necessitated, but at least wise, because of the offer of judgment rule. I'm not sure that that necessarily is the case. But I wonder what we are doing if one of the problems here is because, as someone else has said, in South Texas we get guardian ad litems who are making more money than the plaintiff's lawyers. It seems to me we may be compounding that problem, if it is a problem. I wonder why you have to have the appointment of the guardian ad litem when the offer is made as distinct from the current practice when a settlement is reached.

CHAIRMAN BABCOCK: Buddy and then Judge Sullivan.

MR. LOW: That was what I was going to say, the same thing. We're trying --

CHAIRMAN BABCOCK: People of a certain age tend to think alike.

(Laughter.)

MR. LOW: Who is as young as I am?

(Laughter.)

MR. LOW: No. But the problem is that

when you tell the judge he "may appoint" where most judges aren't going to when it's not necessary; but that's not what we're drawing the rule for. Some of those that are hasty to appoint and want to give two
12:29 million dollars to, you know, this guardian, so I don't think that cures it.

CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE KENT SULLIVAN: I was curious what the committee's view was relative to Harvey
12:29 Brown's suggestion, because we seem to have bypassed that. He had a specific suggestion about changing the language. Unless I missed it, I didn't hear what the reaction was to it. I thought it very interesting.

CHAIRMAN BABCOCK: Did you hear a reaction?

HONORABLE HARVEY BROWN: No, I didn't. I figured nobody liked it. But I do think that Tracy's idea though, while good, doesn't fix the problem of what Buddy was talking about, which was the
12:29 judges who appoint every single potential time that they could possibly do it.

MR. SULLIVAN: And your suggestion dove-tails with these discussions, so that's why I thought perhaps we should circle back to it.

MS. SWEENEY: Can you say it again?

HONORABLE HARVEY BROWN: I said "Except with the agreement of the parties, the Court should not appoint an ad litem."

MR. LOW: Ever?

12:30 HONORABLE HARVEY BROWN: Unless the parties agree, I mean if both parties want it. There is still the "unless."

MR. MEADOWS: Unless (a) and (b).

MR. LOW: Okay.

12:30 MR. BABCOCK: And I didn't stop there. I just didn't read it all. I'll read it all. "Except with the agreement of the parties, the Court should not appoint a guardian ad litem unless the defendant has made an offer to settle the minor's claim and

12:30 there appears to be a potential conflict of interest."

PROFESSOR ALBRIGHT: But then you have the only time the Court can appoint an ad litem is when you have settlement unless the parties agree.

HONORABLE HARVEY BROWN: Right. I don't

12:30 see --

PROFESSOR ALBRIGHT: Don't you need to have some kind of general enabling --

MR. YELENOSKY: Withdrawal.

COURT REPORTER: We need to have them recognized.

CHAIRMAN BABCOCK: Hold on, guys. Stephen.

MR. YELENOSKY: Well, in Nina's example with withdrawal of care the lawyer is in the hospital going in I guess in that scenario to get approval for a particular procedure, and you're saying that the other side would have to agree to an appointment. And why wouldn't they just say "We don't agree"?

CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE KENT SULLIVAN: I certainly think the statement made by Ms. Albright is a statement of what is proper; but I think the implication was made earlier that that is not necessarily what is being done in practice and that's one of the potential abuses that needs to be resolved by way of this rule, and that is that apparently, and maybe we need to discuss this to determine whether this is really the reality, but that apparently there are judges who appoint ad litems very early before there is any necessity and that that's a problem. And if that's the case, then Judge Brown's suggestion would be one way of trying to deal with it.

In other words, I don't want us to leap over it because it wouldn't appear to be necessary based on what may be a good practice or the like. I think

there is a clear suggestion that has been made in the course of our discussions that there are certain bad practices that are actually taking place.

CHAIRMAN BABCOCK: Judge Brown.

12:32 HONORABLE HARVEY BROWN: Stephen points to a good one. And what I was trying to address is a case of a lawsuit for money damages, because in a lawsuit for money damages unless the defendant makes some offer to settle, there is no conflict and there
12:32 is no reason to have an ad litem appointed. If they go to trial with a zero offer, there is no need for an ad litem.

MR. YELENOSKY: I agree. The rule is written to cover and exclude everything else and so it
12:33 excludes Nina's example.

HONORABLE HARVEY BROWN: Yes. You're right.

CHAIRMAN BABCOCK: Justice Duncan and then Bobby.

12:33 HONORABLE SARAH B. DUNCAN: I don't think what Harvey said is necessarily true. I agree with the general rule; but there may be forks in the road in the prosecution of a lawsuit that would benefit one group of plaintiffs as opposed to another
12:33 group of plaintiffs. If you've got different kinds of

damages, let's say, that any theory in this lawsuit is going to be expensive to develop and there is one type of damages that will benefit the next friends and one type of damages that will benefit those who are being next friended. There could be a conflict. And I guess that's my criticism of your language is there should not necessarily have to be an offer to settle beyond the table.

It's the conflict that I think causes the system to need some independent ad litem in there to evaluate the situation. So it may be that there is -- I think it's the settlement. What the offer of settlement does is enhance the possibility of that conflict and make it necessary to evaluate that conflict right now. But the offer of settlement is just another event that is capable of producing conflict to me. It's not the be all and the end all of the need for an ad litem.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: The current rule is what you're advocating, which is basically "The judge shall appoint a guardian ad litem when there is a conflict of interest." And I thought we were trying to limit it. So what we tried to limit it to is when the offer of settlement was

made.

It seems like we have a couple of things going on here. Do we want it limited because of certain circumstances where we might not want to limit? Do we want to limit it to when an offer of settlement was made? Or some people have even suggested basically when the offer of settlement is basically ready to be accepted. So those are sort of our three spectrum.

12:35 CHAIRMAN BABCOCK: Carlos had his hand up first.

HONORABLE CARLOS LOPEZ: I agree with Justice Duncan in a sense that the magic to it is the conflict, not really anything else, and there are

12:36 going to be times when the offer of settlement would trigger the conflict. There may be other times when something else triggers the conflict. There may be times when it's apparent from the beginning. I can't imagine all the scenarios.

12:36 But maybe we could write the rule in a way that ties it temporally to the finding of the conflict or the apparent conflict or whatever Paula. We just use the word "after." And I'm talking off the top of my head; but "After the Court has found that there is

12:36 a conflict or apparent conflict or potential conflict"

or whatever we end up agreeing on "the Court must." That's the trick is that you don't want them doing it any earlier than they have to; but it is mandatory. 173, the old one is very clear. It is mandatory. If there was a conflict, you had to do it. So if we simply tie it temporally to after the Court finds da, da, da, rather than "unless." "Unless" doesn't tie it temporally. You can do it even before there is a conflict if you want. I think that solves the problem that we say we're doing, which is make sure the judges do it when they're supposed to, but don't let them do it any earlier than they're supposed to. But I haven't tweaked the language by any means; but that's the idea.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: It seems that the committee was really addressing, and I don't mean to speak for the committee; but the appointment issue is one thing. But the problem that they were dealing with, the over compensation, is dealt with in the scope of the services and the compensation, which are separate parts of the rule. So even though they may be appointed real early, the scope of what they're going to do is going to address the over compensation issue. And so I mean, from my perspective it's better

to make sure they get appointed as earlier as they need to be appointed and then deal with the over compensation aspect through the other aspects of the rule that they have drafted.

12:37 CHAIRMAN BABCOCK: Carl then Buddy.

MR. HAMILTON: The Court Rules Committee looked at this in 1997 based upon Mike Wood's letter that was sent to us outlining a lot of the problems; but to sum it up the problems were that there was over 12:38 appointment of ad litems and too much money spent on ad litems unnecessarily. The Court Rules Committee drafted a rule and sent it up. I think it was among some of the papers. But the idea was that it ought to be limited to when a settlement is reached and that's 12:38 the way it works. When the parties reach a settlement then they go to the Court and say "Judge, we've reached a settlement now; but it's a lump sum amount of money and we have got two conflicting sides here, so we need to get a guardian ad litem."

12:38 And one of the concepts was that we did not want a guardian ad litem appointed any sooner than that because we didn't want the guardian to get involved in settlement negotiations. In fact some of them even get involved, if they are appointed early, 12:39 in taking depositions and the whole nine yards. So

the idea was to limit it to the point after settlement was reached.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Why wouldn't we say "the Court may appoint a guardian ad litem only under," like Carlos is saying, and follow and outline when it is? Because it's not just big money; but some Courts appoint a guardian ad litem, $200, $300 when it's not necessary. So it's not just the two million dollar guardian ad litem fees. It's the smaller ones as well that are not necessary, so we need to deal with both of them.

CHAIRMAN BABCOCK: Yes, Harvey.

HONORABLE HARVEY BROWN: One thing I don't like about a mandatory appointment of an ad litem is sometimes the parties don't want one because of how small it is. I mean, if mom is getting $1000 and the child is getting $1,000, the parties sometimes intentionally say "We know this may not be binding legally with this release. We're going to take the risk. We're not going to have an ad litem. We're just going to non suit the case."

If we make it mandatory, they can't do that. We have now inflicted an additional cost on small litigation that the parties don't want. If the

parties don't want it, why are we making them incur it?

CHAIRMAN BABCOCK: Okay. Justice Bland, how do we get out of this?

12:40 JUSTICE JANE BLAND: Well, I think we have already said change "must" to "may," so that will help on mandatory. And then maybe what we should do is "the Court must not appoint an ad litem if no potential conflict of interest exists."

12:40 MR. MEADOWS: Don't we need to know whether or not we're going to limit and define the scope of this to after settlement is made or we're going to allow involvement beforehand?

HONORABLE JANE BLAND: Well, I think

12:41 Carl is right in a money lawsuit that it's when the settlement is reached is when the conflict arises and parties reach a settlement. So we could change it to say "may appoint a guardian ad litem when the parties reach a settlement and there is a potential conflict

12:41 of interest between the next friend for the minor and the minor." But that doesn't cover Stephen and Nina's case where the conflict is not over the allocation of settlement proceeds, but rather over a decision about contact or care.

12:41 MR. YELENOSKY: Well, normally the

conflict is not between the person at issue and the next friend. There is no next friend. The hospital is going in there saying "We want to do this procedure. We want authority to proceed on behalf of this person. Please appoint."

HONORABLE JANE BLAND: We don't think the next friend is acting in the best interest of the decisionmaker.

MR. YELENOSKY: There is not a next friend. The parents are saying "We don't want to be in court. We are telling you don't provide the procedure."

MS. SWEENEY: Isn't that problem solved though by Judge Christopher's change from "minors and limited or incapacitated" to "parties represented by next friend"?

MR. YELENOSKY: No. There is no next friend.

MS. SWEENEY: I know. Therefore this rule doesn't come into effect.

MR. YELENOSKY: Oh, well, I guess I was assuming the rule was going to exclude everything else that involved appointment of an ad litem. And if it does, it's not written to take that pitch.

MS. SWEENEY: Yes. You're right.

CHAIRMAN BABCOCK: Harvey.

HONORABLE HARVEY BROWN: I don't think the rule can be triggered on when there is an actual settlement, because sometimes that is too late. You go to trial on a wrongful death case. There is no settlement. I'm not appointing an ad litem. Five days into the trial, six week into the trial they announce "Okay. Go appoint an ad litem." "Okay. We'll have an ad litem. We'll go tell the jury 'You wait.'" Usually it takes a few days. She is going to take a few days to look at this.

It has to be a little bit sooner than that. Plus, although we don't want them too early, we do want them in times sometimes that are critical. In mediation, for example, an ad litem can be a big help. Sometimes the conflict is not just when the money has been agreed to, but it's beforehand when the child should want to settle, but mom does not want to settle. We have to fix that situation as well. It can't just be when they've already reached an agreement.

CHAIRMAN BABCOCK: I think somebody said this earlier too. Isn't there a potential conflict if there is an offer of settlement which could potentially shift fees? So that would be another.

Bill.

PROFESSOR DORSANEO: I gather -- I missed the meeting. I gather that the language in 173 was regarded as unsatisfactory, "appears to the Court to have an interest adverse to such minor," et cetera, because it was too broad. Is that why this opaque "conflict of interest" language has been substituted?

(Laughter.)

PROFESSOR DORSANEO: I don't think that is a solution to any problem to say "a conflict of interest," because I don't know what that means in most of the context in which it's used unless it's articulated more clearly. Maybe the language in 173, "the guardian or the next friend appears to the Court to have an interest adverse to such minor" is too broad. And it could be made more narrow by saying "appears to have an interest adverse to such minor which is being promoted by -- to the minor's disadvantage" or something like that that would be broader than "there is a settlement," but not so late in the game that we're past some point of jeopardy.

CHAIRMAN BABCOCK: Carl in a second. If anybody has a white Yukon.

PROFESSOR DORSANEO: That's me.

CHAIRMAN BABCOCK: Well, you're in a

space you're not allowed to be in.

MS. SWEENEY: It just went that way (indicating).

(Laughter.)

12:45 PROFESSOR DORSANEO: Well, I had one.

MR. LOW: You can ride with me.

(Laughter.)

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Two comments: One is 12:45 that I think that I agree with Harvey that maybe when the settlement is reached is not necessarily always the appropriate time. But if there is going to be an earlier time, that time could be triggered by a motion as soon as an adverse interest is determined. In the 12:45 absence of a motion it would be when the settlement is reached and there is apparent conflict because it is one lump sum of money.

And the other comment is as to Stephen's situation, I don't think that is covered under the 12:45 rule now. Don't you do that under a different procedure?

MR. YELENOSKY: I'm not sure. I mean, we haven't done anything like that.

MR. HAMILTON: I don't think that 12:46 situation is covered under 173 and 44 because there is

no lawsuit involved.

CHAIRMAN BABCOCK: We need to take a lunch break. Perhaps, Jane, over lunch if you could try to distill this.

12:46 JUSTICE JANE BLAND: Well, maybe if we could get some guidance on who wants it to be at the time of reaching the settlement versus --

CHAIRMAN BABCOCK: Earlier.

JUSTICE JANE BLAND: -- earlier, that

12:46 would be helpful.

CHAIRMAN BABCOCK: Okay. Let's do that right now.

HONORABLE JANE BLAND: And then would a sentence following the current sentence that "The

12:46 Court must not appoint an ad litem if no potential conflict of interest exists" be something that people would want? It would emphasize to the trial judge what you really have to look and see is if there is a conflict. And I'm using "conflict"; but I understand

12:46 that Mr. Dorsaneo had "adverse interest."

MR. MEADOWS: He's gone.

CHAIRMAN BABCOCK: Well, he's gone.

(Laughter.)

MR. LOW: Hurry up and you'll get done.

12:47 (Laughter.)

HONORABLE JANE BLAND: If we could get a tally on those two things, we would know whether or not we should focus on the timing or leave the timing alone.

CHAIRMAN BABCOCK: Okay. Let's do that. The timing is the first question. And the two options are only at the time a settlement is reached; and the other option is some earlier time which we'll have to figure out when that is. So everybody that thinks that the timing should be only at the time that a settlement is reached raise your hand.

MR. JEFFERSON: This is a mandatory appointment at the time settlement is reached?

CHAIRMAN BABCOCK: If there is a conflict or adverse interest.

HONORABLE JANE BLAND: Well, we've changed it to "may." I think everyone was in agreement that it shouldn't be mandatory. If in fact what we're trying to do is curtail the ad litem use, then we don't want to give anyone an incentive to appoint more ad litems if they're not needed.

CHAIRMAN BABCOCK: So only at the time of settlement. Everybody in favor of that raise your hand.

HONORABLE SARAH B. DUNCAN: Only time.

CHAIRMAN BABCOCK: Okay. Everybody that thinks that -- we have one vote, one hand up. Everybody that thinks it ought to be at some earlier time? So it's a pretty wide margin, 23 to 1 on that.

12:48 JUSTICE JANE BLAND: Okay.

CHAIRMAN BABCOCK: So you've got that, Jane?

JUSTICE JANE BLAND: Yes.

CHAIRMAN BABCOCK: Now the second thing

12:48 you want to vote on is?

HONORABLE JANE BLAND: Whether we should include in a second sentence that would say something along the lines that "The Court must not appoint an ad litem if no potential conflict of interest exists."

CHAIRMAN BABCOCK: Okay. Everybody that thinks --

MR. HAMILTON: Can I say something about that?

CHAIRMAN BABCOCK: Yes. Sure.

12:48 MR. HAMILTON: I think that's too broad, because I've been involved in cases where there was obviously no conflict or potential conflict, but just because they're minors --

HONORABLE JANE BLAND: Okay. How about

12:48 "unless the parties agree" --

MR. HAMILTON: Okay.

HONORABLE JANE BLAND: -- "the Court must not"? I'm sorry. And Harvey had that, and I should have gotten that in there.

MR. HAMILTON: Okay. Yes.

JUSTICE JANE BLAND: Would that make you feel more comfortable?

MR. HAMILTON: Yes.

MS. SWEENEY: Say it again.

JUSTICE JANE BLAND: Okay. I'm sorry. "Unless the parties agree, the Court must not appoint an ad litem if no conflict of interest exists."

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I don't see how we really address this issue until we address Mr. Dorsaneo's issue about the opaqueness of this language.

CHAIRMAN BABCOCK: Judge Sullivan.

MR. SULLIVAN: There is actually case law on this point I remember a long time, and I assume it's still current, that actually having the appointment of an ad litem stricken because there was no conceivable adverse interest. So I think that the clarity in the rule is very desirable, I think, to have it appear on the face of the rule, particularly

if I'm correct in what the current state of the law is.

In other words, I will tell you what I remember about the case. We had an adult individually and as next friend for a child, and the adult's claim was barred by the statute of limitation, no issues, no ifs, ands or buts. It was judicial and declared by the courts that were barred by the statute of limitation, so there was no conceivable adverse interest there.

At that point it was solely proceeding as next friend. So we took the position there could not be an ad litem appointed and there was case law. And I think it would be a beneficial impact to have it on the face of the rule.

CHAIRMAN BABCOCK: Okay. So everybody that is in favor of having the second sentence more or less along the lines that Justice Bland just recited raise your hand. All those opposed? By a vote of 22 to 2 that passes in favor of the second words.

MR. YELENOSKY: And I might have voted for it if I understood you were going to take into account withdrawal of care situations; and that one just didn't seem --

CHAIRMAN BABCOCK: Well, it doesn't need

to be unanimous.

HONORABLE HARVEY BROWN: He's right. We need to figure that out.

MR. YELENOSKY: It's not just me. I thought there was the sense that there needed to be --

MR. GILSTRAP: Yes. That needs to be carved out.

HONORABLE TRACY CHRISTOPHER: Can I make a suggestion? Just from a drafting point of view say "The Court must appoint a guardian ad litem only when the defendant has made" rather than a "may" and then a "must not" --

HONORABLE HARVEY BROWN: I agree.

HONORABLE TRACY CHRISTOPHER: -- just from a bad drafting point of view?

HONORABLE HARVEY BROWN: I agree.

CHAIRMAN BABCOCK: Sure.

MR. MEADOWS: We're for a good draft.

HONORABLE TRACY CHRISTOPHER: Does not that give us the same result?

CHAIRMAN BABCOCK: Can you do that over the lunch hour?

HONORABLE JANE BLAND: Yes.

CHAIRMAN BABCOCK: Anybody hungry?

(Lunch recess.)

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CERTIFICATE OF THE HEARING OF

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I, ANNA RENKEN, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on the 16th day of January, 2004, and the same were thereafter reduced to computer transcription by me. I further certify that the costs for my services in the matter are $ 1284.00 charged to Charles L. Babcock. Given under my hand and seal of office on this the 11th day of February, 2004.

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