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HEARING OF THE SUPREME COURT

ADVISORY COMMITTEE

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Taken before Anna L. Renken, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 22nd day of August 2003, between the hours of 9:05 a.m. and 11:17 o'clock a.m. at the Texas Law Center, 1414 Colorado, Austin, Texas 78701.

VOTES TAKEN

CHAIRMAN BABCOCK: Shall we get started, guys? Richard, are you ready to roll?

HONORABLE JAN P. PATTERSON: "Ready to roll"?

09:05 CHAIRMAN BABCOCK: Ready to roll.

HONORABLE JAN P. PATTERSON: That's very ominous.

CHAIRMAN BABCOCK: Okay. We're back on the record; and Richard is going to take us to the next spot.

09:05 MR. ORSINGER: We were on page eight, I believe.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: And we were, I think had not resolved the question of whether we were going to do like

09:05 the Feds and merely authorize the Court to reject a settlement if there is no opt out opportunity or whether we were going to require in Texas that there be a notice of the terms of settlement coupled with the opportunity for class members to opt out if they don't like the

09:06 settlement.

CHAIRMAN BABCOCK: Are we going to talk about whether they can opt out?

MR. ORSINGER: No. We don't -- I mean, we don't have to talk about that. We can leave the record as it is and move on, if you want to.

CHAIRMAN BABCOCK: I thought it was decided yesterday we were going to do the House Bill 4 changes.

PROFESSOR DORSANEO: Yes. That's what I thought we were going to do.

09:06 MR. ORSINGER: Let's move on. Are we going to skip even the noncontroversial Federal stuff? Let me just -- let me mention one thing at the bottom of page eight, the fourth to the last line we ought to take the word "voluntary" out in light of the earlier change we made.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: "Any class member may object to a proposed settlement, dismissal or compromise."

CHAIRMAN BABCOCK: Right.

09:06 MR. ORSINGER: And then at the top of page nine we get into the appointment of class counsel; but that's not in House Bill 4. That's a Federal Rule thing. And then we get down to -- we're on page 10 that carries on, appointment procedure, procedures for determining

09:06 attorneys' fees. That's all Federal Rule stuff.

PROFESSOR DORSANEO: Go to page 12.

MR. ORSINGER: And you end up on page 12 where we talk about how to actually set the fee. And this is we feel like a mandate from House Bill 4 that the fee

09:07 is going to be on the Lodestar method. "Lodestar" we have

defined based on federal case law as basically the number of hours spent times a reasonable hourly rate. That is what we believe "Lodestar" means in the Federal system.

House Bill 4 says the Texas Supreme Court may in
09:07 it's discretion permit a multiplier, which can be, which would be times the Lodestar calculation, a multiplier up to four times on the up side or on the downside down to one fourth. House Bill 4 does not require this Rule to include a multiplier. Our subcommittee has recommended to
09:07 the full committee that we recommend to the Supreme Court that they use their discretion and permit trial Courts to take the hourly rate times a reasonable fee and multiply that by four or up to four or multiply that down to one fourth. And this language is pretty much right out of the
09:08 statute.

CHAIRMAN BABCOCK: Okay. What does everybody think about whether we should recommend that the Court put in the four times increase and the 25-percent decrease? Buddy.

09:08 MR. LOW: Richard, isn't it true that most Courts that do allow the Lodestar, part of that Lodestar is discretion to, dependent on results and complexity and so forth, add a factor or divide it, but use a factor? Don't most Courts do that? The Federal Courts I know do.

09:09 MR. ORSINGER: You know, we're taking the

word "Lodestar" to mean the time spent times a reasonable hourly rate.

MR. SOULES: And nothing else?

MR. ORSINGER: And no multiplier beyond that. But the reasonable rate is to be determined we say by reference to our ethical standards for a reasonable fee and other applicable law. So there are factors that would allow you to deviate from $400 an hour times the number of hours.

09:09 MR. LOW: Well, Lodestar is traditionally *Johnson* factors and *Johnson* factors include that.

MR. SOULES: I agree with that.

MR. LOW: I don't know. You can call it what you want to; but what we're calling Lodestar is not Lodestar.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Maybe I can clear this up. The Lodestar figure is the hourly rate times a reasonable -- times the number of hours. The Lodestar method includes both the Lodestar figure and the multiplier. As far as we could tell both the state and federal cases generally they use a multiplier as part of the Lodestar method; but it's clear in the way House Bill 4 is written that, you know, the Court has got to decide whether it wants to put in a multiplier and it puts

limits on the multiplier. And we've just got to decide are we going to recommend to the Court that we go to that maximum limit or some other limit?

MR. LOW: I'm not making a recommendation. I'm making a statement as to what traditionally it is.

MR. GILSTRAP: But you're correct.

MR. LOW: And so people generally copy the *Johnson* factors. That's what you go to.

MR. GILSTRAP: And that's what we have got down in comment (c), that is the *Johnson* factors; and that's the source of the last sentence. In making the determination the Court shall consider the factors set forth in Texas Disciplinary Rule of Professional Conduct which includes 10 of the 12 *Johnson* factors.

MR. LOW: Right.

MR. GILSTRAP: And the way the Courts have done this they say "Well, we're going to" -- the way a lot of them do it is say "Well, first of all, we're going to use some of the *Johnson* factors in calculating what a reasonable attorney's fee is; and then we're going to consider the other *Johnson* factors in determining, you know, how much of a multiplier we apply. It's just kind of the reference that you use. But you know, we didn't feel we should be that specific. So we said in making determinations both the hourly rate and the multiplier the

Court should consider the factors in Disciplinary Rule 104.

MR. LOW: All right.

CHAIRMAN BABCOCK: Isn't the argument that you heard at the legislature on this multiplier issue that if you come up with a Lodestar figure, which is a number of hours times the reasonable hourly rate, that you are adequately compensating class counsel and to add a multiplier is an unreasonable penalty on the defendant and an encouragement to file class action litigation; and therefore the argument is there should be no multiplier at all? That's the argument on one side of the case.

And the argument on the other side is "Look, these class actions can be socially beneficial. They're very complex. They require a huge outlay of money by class counsel as they're trying to proceed with this. We know this costs a lot of money; and we shouldn't discourage class action , but allow a Court in its discretion to have the ability to increase the Lodestar figure by this method." That's the two sides of the debate, isn't it?

MR. GILSTRAP: I think so. But you have to remember that before that, you know, the debate was "Are we going to use the Lodestar method or are we going to use the percentage recovery method?" And Texas courts have been allowed to use the common fund method, a percentage

of the common fund, which can generate a much higher figure, and that's the national debate. And the legislature has ended that debate in Texas and said "We're not going to do common fund anymore. We're going to do Lodestar." So now it's up to us to determine what Lodestar, you know, what the parameters of the Lodestar method are.

MR. LOW: The Supreme Court of the United States approved a percentage; but that is not available to us. We don't have that to consider on the basis that, you know, you have put a lot of time, work, no guarantee, the same that somebody does in a personal injury case. You may get nothing; but that's not available to us here, so we don't even need to think about it.

MR. GILSTRAP: Under House Bill 4, you know, regardless of what we do with Lodestar, the available attorney's fees for class action counsel have been drastically cut, because we don't have the percentage of common fund method anymore. That's not available anymore, and that was where the big money was.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: And that will be so in a case that settles reasonably early even if the multiplier is at four. Right, Frank?

MR. GILSTRAP: I think so, yes.

CHAIRMAN BABCOCK: Well, to put it a different way: Does anybody want to speak out against the subcommittee's proposal, which is to give the Court the discretion to increase the attorney's fee award by an amount not to exceed four times the Lodestar figure and to decrease it by not more than 25 percent of the Lodestar figure? Is anybody against it?

MR. ORSINGER: Down to one quarter. It's not 25 percent. It's a maximum of 75 percent down.

09:14 CHAIRMAN BABCOCK: Right. Down one quarter. I misread that. Is anybody against this? Does anybody want to speak out against this?

(NO RESPONSE.)

CHAIRMAN BABCOCK: Okay. So everybody likes what you did, Richard.

09:15 MR. ORSINGER: Okay. Well, let me just point out FYI, the last sentence in subdivision (i)(1) is not language directly from the statute. It's just our spin on it, that we want to tell the Court to refer to the grievance factors for a reasonable fee and other applicable law meaning there may be case law about certain special features of class actions that are not expressly stated in our ethics rules; but the ethics rule is the standard by which a reasonable fee is usually measured whether for grievance purposes or even for purposes of fee

shifting. So we just thought we would adopt all that without trying to reinvent it or just completely leave it silent.

MR. LOW: Under certain federal causes of action they provide what the fee is, and generally that is Lodestar; but they may have factors a little bit different, so you have to put that in there depending on what the case is.

CHAIRMAN BABCOCK: The "other applicable law."

MR. LOW: Right.

CHAIRMAN BABCOCK: Judge Gray.

HONORABLE TOM GRAY: If I'm going to be asked to review the award of attorneys' fees in a class action for reasonableness, I think it would be very helpful if the trial Court was required to document why he applied a multiplier, because at that point the other part is relatively easy and you have the evidence of the hours and the fees. All that's going to be there. Why a trial Court may have decided to apply a multiplier would not be necessarily part of the decision making, documented decision making process.

And then is there going -- what standard of review? Is it strictly going to be an abuse of discretion which is virtually impossible then to reverse on appeal, or is it

going to be a de novo review, or what do we do on appeal? I just need some help.

MR. ORSINGER: If you look back on page 11, and we skipped over the procedure for setting a fee because we wanted to do the House Bill 4 part; but on subdivision (3) on page 11 we require a hearing and we require that the Court state its findings and conclusions either in writing or orally on the record.

Now we haven't gone into any greater detail about what the findings have to be; but we are requesting separate written findings. We're not invoking the Rule 296 procedure because we're not going to have a final judgment or anything else; but we are at least requiring that these findings be articulated in writing or orally on the record. Now then that doesn't help on your standard of review; but the standard of review in judge-based fee determinations there seems to have been two schools of thought. I know that Sarah issued an opinion on this issue about whether it's an abuse of discretion standard or whether it's a sufficiency of the evidence standard or whether the sufficiency of the evidence standard is folded into the abuse of discretion standard. And that's I think where the trend has been. Do you agree with that, the trend has now been to fold sufficiency of the evidence in to abuse?

HONORABLE SARAH B. DUNCAN: In my opinion Justice Hecht wrote the opinion that resolves how one determines attorney's fees in *Bouget vs. Herring*.

HONORABLE NATHAN HECHT: And I'm just a lowly justice.

MR. ORSINGER: Well, them maybe Justice Hecht can enlighten us.

HONORABLE NATHAN HECHT: Is it the trend to fold it in? Yes.

MR. ORSINGER: Yes. Not to treat it as if it is a separate analysis. You don't have a sufficiency analysis as part of the abuse of discretion analysis.

HONORABLE NATHAN HECHT: People try to draw a distinction; but the trend is to converge.

MR. LOW: Richard, what do they do? I mean, how would that be different in a statutory attorney's fees, as a reasonable attorney's fee, and they appeal, you know, say the attorney's fee is unreasonable? How would this differ from that?

MR. ORSINGER: It doesn't.

MR. LOW: So and generally on that it looks like the questions that are asked would be answered by the cases that have decided that this traditionally are attorneys' fees.

MR. ORSINGER: That's agreed as far as the

standard of review is concerned.

MR. LOW: That's what I mean. I asked the question.

COURT REPORTER: Could you give me that cite again?

HONORABLE SARAH B. DUNCAN: *Bouqet vs. Herring*, B-o-u-q-e-t vs. H-e-r-r-i-n-g.

COURT REPORTER: Thank you.

MR. GAULTNEY: What volume?

(LAUGHTER.)

CHAIRMAN BABCOCK: Okay. We're back to this House Bill 4 provision.

MR. ORSINGER: Okay. I would just ask you to look at the comments. We tried to be as fair as we can about it, citing the relevant authority that everyone would agree on and solicit any criticism. And if not, I think we can move on to paragraph two.

CHAIRMAN BABCOCK: Your comment (a) you say "Attorney's fee in a class action may be awarded from the common fund recovered for all class members." Is that at odds with what Frank just said a minute ago?

MR. GILSTRAP: No. The comment is really a statement of current law prior to the passage of this Rule.

MR. ORSINGER: Well, I mean, you only

have -- the only two sources of authority for the recovery is you either have a fee shifting statute or you have a common fund out of which the fees can be paid. Now how the fees are paid under each is what this Rule does. This Rule doesn't create a right to recover fees other than the law may provide either because of a fee shifting statute or the common fund theory. So I think that this is accurate, although we could add another sentence in here that in our instance that's used there is a fee shifting statute.

CHAIRMAN BABCOCK: Well, the last sentence struck me as potentially confusing if this is in the comment to the Rule since currently there is no method for calculating the attorney's fee to be awarded from the common fund percentage method and the Lodestar method. From what I understand the percentage method is no longer available. So why are we making that a comment to the current Rule which changes that?

MR. ORSINGER: We don't have to. We don't have to tell them what the law was before it changed.

CHAIRMAN BABCOCK: That would be unusual for a comment.

MR. ORSINGER: And I don't know that these comments, I mean, we don't even have to put these comments in the Rule. These comments are here for the committee's

consideration; and we can take them all out, or we can edit them when they go from the committee to the Bar.

MR. GILSTRAP: I don't think anyone on the subcommittee is wedded to the comments. We just put these down to help people like me that don't normally deal with this area kind of navigate through it.

CHAIRMAN BABCOCK: It strikes me that comment (a) at least is potentially confusing and not necessary for the Rule. I don't know if anybody else feels that way.

MR. ORSINGER: It is definitely not necessary to the Rule. We don't have to tell them in a Rule of Procedure what the substantive law is that gives rise to the procedure in question. We can assume that they know that and confine ourselves to the procedure.

MR. LOW: One thing is, I mean, it would make it I guess it should be clear that you can't do that anymore. So that would be one reason for it, you know, a comment that no longer is that available, if you want to put that. But I guess if anybody reads what is written, if they can't figure you can't do it anymore, they're not going to get very far anyhow.

(LAUGHTER).

CHAIRMAN BABCOCK: What about comment (b)? Is that something that is necessary?

HONORABLE SARAH B. DUNCAN: No.

MR. ORSINGER: Well, the statute uses the term "Lodestar" and so do we. And so it's not something that is common to Texas practice, although it's certainly mentioned in our case law. Do we just let them go research it on West Law or Lexis and figure out what a Lodestar figure is, or do we tell them what a Lodestar figure is?

HONORABLE SARAH B. DUNCAN: We do that in subdivision (1); and really subcomment (b) is nothing more than case cites added to subdivision (i)(1).

MR. ORSINGER: You know, if we're not going to have a comment on Lodestar, then maybe we should consider deviating slightly from the statute and take the term out and just say, I guess, "When awarding fees the Court shall determine the number of hours reasonably worked and multiply that times a reasonable hourly rate" rather than use the special definition.

CHAIRMAN BABCOCK: Doesn't the statute use "Lodestar"?

MR. GILSTRAP: The statute says "Lodestar."

CHAIRMAN BABCOCK: That's the reason to leave it in, I think. Steve.

MR. TIPPS: Well, I think it just introduces some mystery, because it's pretty clear that most people

don't know what the term "Lodestar" means. And I think we either should eliminate reference to it in the Rule and simply have the Rule say what it says, which is really all anybody needs to know, or if we feel like we need to use the term because the legislature did, then it seems to me we need to tell people in a comment what it is. We're introducing unnecessary confusion.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: According to the Oxford English dictionary "Lodestar" means "a guiding star on which one's attention or hopes are fixed."

MR. TIPPS: Well, that solves it then.

(LAUGHTER.)

MR. YELENOSKY: Let's put that in.

MR. LOW: The legislature had great discussions about that. They might not have known what the term meant, but they did use that term; and that term is a universally accepted term. It's just like a lot of things that we use; and it might mean different things to different represent people defining it, but that is a universally accepted term. It gives you that guiding star even thought the light might flicker here and there and yonder.

(LAUGHTER.)

CHAIRMAN BABCOCK: See what you started.

Well, it seems to me that the subcommittee has done a good job with this Rule by saying "Here is what the Lodestar figure is. Here is how you get to that." And then you can increase or decrease the Lodestar figure. It's defined here.

MR. LOW: Right.

CHAIRMAN BABCOCK: And this is perfectly clear to me. Luke, what do you think?

MR. SOULES: I'm not sure I know what Lodestar means. My impression is a little different from what this definition is; but that's okay.

CHAIRMAN BABCOCK: Well, but you know what it means in this Rule.

MR. SOULES: After all the discussion I heard that the 1.04 factors can come into play where at different junctures I think there is some confusion; but it's okay. That gives us room to deal with the issues over time and get them resolved through the judicial process.

I don't think this is as clear as people are saying it is. I hear Frank making comments about it and Buddy making comments about it; and my impression of the Lodestar factors has always been 1.04 plus half a dozen other things that have developed in federal cases over time, and ultimately it boils down to a reasonable fee for

the necessary services, not a reasonable and necessary fee. The real words that describe what we're trying to get to is "a reasonable fee for the necessary services," not for necessarily even the work done.

09:27 MR. GILSTRAP: Although, Luke, in that last sentence we do say "Disciplinary Rule 1.04 and other applicable law." That was our attempt to allow for these other factors that are sometimes considered.

MR. SOULES: That's why I'm not saying much
09:27 about this. I'm happy the way the debate has gone, that there is still room in particular circumstances to try to articulate reasons why the fees should be less or more maybe within some arithmetic multiples or dividers.

CHAIRMAN BABCOCK: The statute says "If an
09:28 award of attorney's fee is available under applicable substantive law."

MS. SWEENEY: You all have got to talk louder.

CHAIRMAN BABCOCK: House Bill 4, Section
09:28 26.003 says "If an award of attorney's fee is available under applicable substantive law," -- is this dealing with class action?

MR. ORSINGER: Yes.

CHAIRMAN BABCOCK: 26.003?

MR. ORSINGER: Yes.

CHAIRMAN BABCOCK: -- "the trial Court shall use the Lodestar method to calculate the amount of attorney's fees to be awarded to class counsel." It seems to me if we don't use that term in the Rule, somebody can
09:28 go back to the statute and say "Well, wait a minute, you know, the statute said we can use the Lodestar method." So we've got to say what our definition or what the Court's definition is of Lodestar, and that's set out here. Yes, Paula.

09:28 MS. SWEENEY: I think Luke's point is a good one. The Lodestar figure in the existing lore isn't just hours times hourly rate. There are other factors that go into that, a lot more nebulous factors. These are the black letter factors. But it may be that this first
09:29 sentence, the legislature said "Lodestar." The legislature didn't say "Lodestar" meaning the hours times hourly rate." And perhaps we leave it at "Lodestar" and then use the citations that are attached to inform that definition. But I can't imagine anybody filing a class
09:29 action lawsuit who is going to be so puzzled by the term "Lodestar" in the Rule that they're going to stop.

CHAIRMAN BABCOCK: Yes. Well, and it seems to me that what has been drafted here does what the legislature has given the Court authority to do, which is
09:29 to get to a number and then increase it or decrease it.

And this last sentence here says you're going to look at the section 1.04 factors which capture 10 of the 12 *Johnson* factors and other applicable law, so the Court has all the discretion it needs to pluck out whatever it needs to look at. Bill.

PROFESSOR DORSANEO: Go ahead (indicating).

MR. SOULES: You're saying to increase or decrease or to fix the Lodestar? Because I think the Court has the right to look at 1.04 to set the Lodestar.

MS. SWEENEY: Exactly.

PROFESSOR DORSANEO: That's what it says though. It say's "multiplying the number of hours reasonably worked." So you have to decide what number of hours were reasonably worked. Then a reasonable hourly rate, you have to decide whether the rate in the formula is reasonable. And that's, the last sentence says "in making these determinations," and I think that's a little vague; but it includes the things in the first sentence as well as the second sentence multiplier or reducer.

MR. SOULES: Uh-huh (yes).

PROFESSOR DORSANEO: That's what I think the committee intended for that to be interpreted to mean.

MR. GILSTRAP: Yes. And --

PROFESSOR DORSANEO: It seems very faithful to me.

MR. SOULES: It's fine with me. I don't have a problem with the way it's written. I have some disagreement with the way, with the articulation of what is the meaning of the way it was written. I think there
09:31 is room to argue about that; and I don't really think we need to do that particularly today. I think we have got good language as far as a Rule is concerned; and we're all going to be duking it out about exactly what that may mean for a while until we get some decisions.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Two comments: One, Luke mentioned the word "necessary." I think that is usually the test is whether the attorney's performance or whatever he has done has been reasonable and necessary. We don't
09:32 use that word; and I'm not sure we ought not to.

And the other thing is that we mentioned earlier about that comment (a), about getting rid of contingent fees or percentage methods; but 1.04 includes that. So
09:32 are we saying that even though the Court has to determine the fees by multiplying the number of hours times the hourly rate, the Court can nevertheless consider under 1.04 that there is a contingent fee contract, because that is part of 1.04? Or do we want to eliminate the consideration of the contingent fee contract?

09:32 MR. SOULES: The Lodestar factors include

consideration of whether or not the fee is contingent.

MR. ORSINGER: Risk.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH B. DUNCAN: I think the interchange between Luke and Bill pointed out that there really is a conflict between (i)(1) and comment (b). Comment (b) says under the Lodestar method the number of hours worked times an hourly rate is viewed as the Lodestar of the Court's fee determination. That doesn't reference at all the 1.04 factors or the reasonably -- hours reasonably worked times a reasonable hour rate, which is in (i)(1). So I propose we just get rid of the comment --

MR. SOULES: Amen.

HONORABLE SARAH B. DUNCAN: -- because it confuses things.

CHAIRMAN BABCOCK: I agree. Stephen.

MR. YELENOSKY: This is just really wordsmithing: But I don't think the second sentence, the first phrase is actually what we mean. It says "The Court may increase or decrease the Lodestar figure." What we mean is that the Court may increase or decrease the award above or below the Lodestar figure; but the Lodestar figure is set by the prior sentence.

MR. GILSTRAP: Well, the award, there is no

award until the Court makes its final calculation. What you're saying is that the Lodestar figure is somehow the award.

MR. YELENOSKY: Well, I don't know what the language should be; but it seems to me that you don't really mean that the Court then increases or decreases the Lodestar figure. The term is Lodestar figure --

MR. GILSTRAP: Okay.

MR. YELENOSKY: -- and then it multiples that or depreciates that based on the factors.

MR. GILSTRAP: Would you be happy with "resulting figure"?

MR. YELENOSKY: I'm sorry?

MR. GILSTRAP: Would "resulting figure" do it?

MR. YELENOSKY: I think so. I'm sure you can come up with better language than I can; but that's the sense of it.

MR. GILSTRAP: I see what you're saying, yes.

CHAIRMAN BABCOCK: Can you fix that, Frank?

MR. GILSTRAP: Yes.

MR. ORSINGER: House Bill 4 calls it "increase or decrease the fee award calculation by using the Lodestar."

MR. GILSTRAP: That's kind of a mouthful.

MR. ORSINGER: It's not very convenient to put that in the Rule; but that's what the statute is that we're supposedly following.

09:35 MR. MUNZINGER: What if you said "The court" --

MR. ORSINGER: You could just say "this calculation," "may increase or decrease this calculation or this" --

09:35 MR. SOULES: Just use the words out of the statute. It's not that many words.

MR. MUNZINGER: "The court may increase or decrease the award based upon the Lodestar figure; but the attorney's fees award must not exceed four times its 09:35 effort." That's in essence is what the statute is commanding.

CHAIRMAN BABCOCK: Right. Richard.

MR. ORSINGER: I think we need to be sure we remember or recognize that the statute uses the term 09:35 "Lodestar method" where we're using the term "Lodestar figure" because we believe the term "Lodestar method" includes the Federal multiplier, and that that is really not what the legislature meant. What they meant was to determine a Lodestar figure and then you can multiply that 09:35 later, because I think probably we all agree the method

includes a multiplier. So we have actually substituted Lodestar figure as if it's a specific calculation to which further machinations are applied.

MS. SWEENEY: I know yesterday when we used the word "includes" versus what it means we were really fixated on the exact choice of the words the legislature made.

MR. ORSINGER: Well, we're going to run headlong into all the case law, because the method includes determining the Lodestar amount and then altering that based on factors. --

MS. SWEENEY: Right.

MR. ORSINGER: But the legislature has written a statute in such a way that the method is just the figure; and then whether you can alter that by multiplying is a separate determination that the legislature hasn't determined. They've let the Supreme Court determine that. But to me I think we have to quit using the term "method."

CHAIRMAN BABCOCK: What about the point that if we reference Section 1.04, that we are now incorporating that into our Rule the propriety of doing contingency fee awards?

MR. ORSINGER: Well, I think it's foolish to think that a trial judge who increases an hourly rate from

$400 to $1200 an hour because the fee is contingent is for that same reason going to come back and multiply that fee by three because it's contingent. Maybe they would; but I don't see why they would. If the trial judge knows that they've increased the hourly rate because of the contingency, then why would they want to multiply it by three because of the contingency?

HONORABLE CARLOS LOPEZ: The problem with that is that the *Johnson* factors give the Court a full panoply of different factors that can be awarded to try to make the fee ultimately reasonable. And I think you either need to have them all or you don't have them.

The case I had that was a civil rights case where the award was a dollar, a nominal award, the whole contingent fee thing went out the door. So you had to take other factors, the *Johnson* factors. Not 1.04 factors; but the *Johnson* factors are what they are. It's not just Texas law. It's all the way to the Supreme Court, the U.S. Supreme Court.

So I think we need to make it clear what we're doing; and this is an area where I think semantics does make a difference. I haven't seen where the legislature -- I haven't seen the language right in front of me where they talk about what a Lodestar was, you know, the method or the figure. I think the Lodestar method is

clear. It's when you use a Lodestar approach to figure out the reasonable fee. And the Lodestar is the fee times the hourly rate; and the Lodestar method is the ultimate method for finding the fee based on reason starting with the Lodestar and dumping in the *Johnson* factors.

09:38

MR. ORSINGER: The statutory language is on page 15. And they use the term "Lodestar method" in paragraph 26.003(a), and they don't explain it; but they appear to believe that that is different from a multiplier, so I think that those of us on the subcommittee have assumed that when the Supreme Court, when the legislature said "Lodestar method" they meant the Lodestar, which the case law says is the hourly rate times a reasonable fee. That's the Lodestar. And then the method is to adjust that based on other factors.

09:39

09:39

HONORABLE CARLOS LOPEZ: That's fine. I wasn't there, and I have no idea. I know what somebody means when they say "Lodestar method," because I know what that is. And I don't think that's -- I mean, I suppose everything is open to debate. I think I know from reading the case law what Lodestar method is, using a Lodestar to come up with that first base figure and then forming the *Johnson* factors.

09:39

MR. ORSINGER: Well, you're not suggesting the legislature said you could have a Lodestar method that

09:39

might include a multiplier times the hourly rate and then go ahead and multiply that number by another factor of four, are you?

HONORABLE CARLOS LOPEZ: No. The *Johnson* factors aren't a straight multiplier. They're very wishy-washy sort of, you know, experience of counsel, the complexity of the issues involved, all kinds of stuff, and so they're not multipliers at all.

CHAIRMAN BABCOCK: Well, but all those things go into the reasonable hourly rate. If I'm right out of law school and charging $700 an hour, that probably doesn't fly.

HONORABLE CARLOS LOPEZ: I agree. That's right. I don't disagree with that.

MR. MUNZINGER: The answer to Richard's question that he just posed, I think the answer may well be "yes." The legislature in essence is saying use the Lodestar method which we understand involves the calculation of a Lodestar figure and an adjustment by the Court in its discretion; and "Texas Supreme Court, if you wish to impose limits on the exercise of discretion, you may do so in the adoption of a Rule." That's what I think the legislature could be interpreted as saying here so that what you have done in my opinion is exactly loyal to the statute. But in answer to your question, I think the

legislature could say "Use the Lodestar method. The Lodestar method we understand contemplates A, the calculation of a number based upon hours and a rate modified by reasonableness and B, an adjustment by the
09:41 trial Court based upon the exercise of the trial Court's discretion. And Supreme Court, if you want to put limits on that, do so.

HONORABLE CARLOS LOPEZ: The reasonableness can come in. You're right, Richard, it can come in on the
09:41 front end or it can come in on the back end. It can't come in twice. I mean, I agree with you on that.

MR. GILSTRAP: Well, I think the cases say, some of the Texas cases especially say "Well, in calculating your reasonable hourly rate we'll consider
09:41 some of the *Johnson* factors, and in deciding on a multiplier we'll consider some of the *Johnson* factors." The cases I've seen say you can't use the same factor in both calculations. So maybe you use five of the *Johnson* factors on reasonable hourly rate and seven on multiplier;
09:42 but you can't do both.

HONORABLE CARLOS LOPEZ: Right.

MR. GILSTRAP: But we didn't feel we should get that detailed.

CHAIRMAN BABCOCK: Let's talk about comment
09:42 (c). First, is this a comment that should go with the

Rule, Richard?

MR. ORSINGER: You know, I have to admit, I don't have a clear sense on when the Texas Supreme Court likes to put a comment on a Rule. And this may be too specific or...

HONORABLE NATHAN HECHT: Well, we used to didn't; but the Feds do. And a lot of times it's helpful to see the thought process of what you were trying to get at. In the Discovery Rules we felt like we had to. Otherwise there were so many changes you couldn't tell sometimes whether a substantive change was intended or exactly what, so there was more reason to do it in the Discovery Rules. Then we have done it some in the TRAP Rules. But I think we don't have a set policy on it; but if it's useful in explaining the development of the Rule, I think at least we should consider it.

For example, I think we would certainly want to consider a comment on the "as soon as practicable" language, because otherwise I don't think the Bar is necessarily going to appreciate whether that means sooner or later or exactly what is going on here. So I think you have to have one there; but other places it just depends.

MR. ORSINGER: My personal perspective would be that I wish there was some way for us to have a comment that was to the Bar when the Rule came out, but that would

not stay in there for the next 15 years, because you know, I don't mean that this *Johnson* case is going to be, not have been modified by the Fifth Circuit afterwards. And I feel certain we're going to have some Texas Court cases that come out after the Rule issues.

MR. GILSTRAP: I don't think *Johnson* is going to be modified. I think *Johnson* has been written in or the Supreme Court has adopted *Johnson*.

MR. ORSINGER: Maybe that won't change. Maybe we should be citing to the Supreme Court case instead of the *Johnson* case.

MR. GILSTRAP: Except that everybody cites to *Johnson*. But you are correct, Richard, in that it's one thing to have the comment when the Rule is passed and another thing to have a comment that hangs around the rule book for 10 years and becomes obsolete.

MR. ORSINGER: To me this does not merit being in the Rules for 10 years; but it does merit being here now if there is some way maybe for us to have an advisory comment.

CHAIRMAN BABCOCK: We'll calendar that.

(LAUGHTER.)

MR. ORSINGER: Have an expiration date on the comment.

CHAIRMAN BABCOCK: What does everybody think

about the comment, putting aside whether or not it's going to disappear in three years? Buddy.

MR. LOW: That's the first thing anybody thinks of. If you mention that, they think of the *Johnson* factors. That's where they go to. That's the Bible. The Bible may change, this interpretation or that; but I don't think as long as Richard and I are around, unless the legislature changes it, that the *Johnson* factors are going to go away. They'll be interpreted and so forth; but that's surely the quote "guiding star" for this.

CHAIRMAN BABCOCK: Okay. So you're in favor of the comment?

MR. LOW: I would think so.

CHAIRMAN BABCOCK: Yes. Anybody opposed to the comment?

HONORABLE SARAH DUNCAN: I have a question.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH B. DUNCAN: What are the two factors in 1.04 that are not in *Arthur Anderson*?

MR. GILSTRAP: I think maybe one of them is because your civil rights case made you so unpopular you couldn't take on other cases. There is a couple of factors that seem specific to the civil rights aspect of *Johnson* that didn't make it to the eight parts of 1.04 that include 10 of the *Johnson* factors.

CHAIRMAN BABCOCK: The Adicus Finch factor.

MR. GILSTRAP: The Adicus Finch factor.

MR. SOULES: Except it's kind of there in 1.04 anyway.

09:46 CHAIRMAN BABCOCK: Yes.

MR. SOULES: The effect of doing this piece of work and how that limits --

CHAIRMAN BABCOCK: Precludes you from taking other work.

09:46 MR. SOULES: -- limits your ability to take other work.

CHAIRMAN BABCOCK: Yes.

MR. SOULES: I think probably those factors are in 1.04 if you dig into it and want to interpret it a

09:46 certain way.

CHAIRMAN BABCOCK: Yes, Jeff.

MR. BOYD: The other question: Is it inconsistent? Is the Rule inconsistent with the comment when the Rule says you shall consider the 1.04 factors,

09:46 but then the comment says you may consider the *Johnson* factors when there are more *Johnson* factors than there are 1.04 factors?

CHAIRMAN BABCOCK: Well, you pick up other applicable law, "shall consider 1.04 and other applicable

09:46 law." So I don't think it's inconsistent. Richard, then

Judge Gray.

MR. ORSINGER: The last two sentences of Comment (c) are just intended for our purposes here, and there is no desire for that to be part of a permanent comment.

CHAIRMAN BABCOCK: So that the comment would be only the first sentence or the first two sentences?

MR. GILSTRAP: The first two.

CHAIRMAN BABCOCK: The first two sentences. Okay. Judge Gray.

HONORABLE TOM GRAY: Since you brought up the word "shall" that appears in (i)(1) in the last sentence, I look forward to the receipt of many briefs discussing the harmless error analysis because the judge had no evidence in front of one, him of her, of one of the 10 factors listed in the Disciplinary Rules, because as written it says "The trial Court shall consider." And if there is no evidence on one of them, how could the judge have considered it?

MR. LOW: Couldn't it say "as applicable."

CHAIRMAN BABCOCK: But that would be a good appellate point, wouldn't it, if no evidence of any of those factors?

MR. ORSINGER: No. He's talking about maybe no evidence on two of them.

CHAIRMAN BABCOCK: I see.

MR. ORSINGER: How can you consider something that there is no evidence on?

MR. GILSTRAP: "I considered it, and there wasn't any evidence of that; but there were nine other *Johnson* factors, and I considered those."

HONORABLE TOM GRAY: I look forward to the briefs, because you know somebody is going to make the argument "The trial Court by the Rule had to consider these factors. There is no way the judge could have considered the fact that the" -- just pick one of the many -- "there is no evidence that the client knew that the attorney was going to be unable to take on other cases. There is no evidence of that in the record." So and all I'm suggesting actually is the word "shall" be examined to see if there is another word that should be used there instead of "shall."

CHAIRMAN BABCOCK: My recollection is Section 1.04 says these factors are not, some may apply and some may not. They're not exclusive.

HONORABLE TOM GRAY: On 1.04 subsection (b) they use the term "may. "Factors may be considered in determining the reasonableness of the fee."

HONORABLE KENT C. SULLIVAN: What if you said "Shall consider the Rule, you shall consider 1.04"

and don't refer to the factors?

CHAIRMAN BABCOCK: What about that, Richard?

MR. ORSINGER: I don't have a problem overruling that brief. So I don't see why we ought to write the comment. I mean, to me if somebody says that it's reversible error because in considering the factors there was no evidence to support two of them, I have no problem taking care of that. And I don't see why we need to torture the language in the comment to eliminate that argument; but other people may differ with that.

CHAIRMAN BABCOCK: Well, we're not talking about the comment now. We're talking about, Judge Gray is talking about the sentence.

MR. ORSINGER: Even the sentence "shall," I mean.

CHAIRMAN BABCOCK: Judge Bland, what is your take on it?

HONORABLE JANE BLAND: My only concern is if my case is transferred to Waco.

(LAUGHTER.)

HONORABLE TOM GRAY: There is a high probability of that happening.

(LAUGHTER.)

CHAIRMAN BABCOCK: Anybody else?

HONORABLE TOM GRAY: All you have got to do

to fix it is, as suggested by someone else, take out the reference to "the factors set forth" and say "shall consider," take the Disciplinary Rules of Professional Conduct and you've fixed that problem.

09:50 HONORABLE JANE BLAND: That would work.

CHAIRMAN BABCOCK: That doesn't hurt anything, I don't think. Do you think, Richard? Does that hurt anything?

MR. ORSINGER: If we eliminated the

09:50 reference to *Johnson*?

CHAIRMAN BABCOCK: No. No. We're up in the Rule now.

HONORABLE TOM GRAY: Because you've got the reference there to "other applicable law" at the end of

09:50 that.

MR. TIPPS: Take out the words "the factors set forth in."

CHAIRMAN BABCOCK: Right

MR. ORSINGER: I don't know. 1.04 is way

09:50 you determine an unreasonable fee. I mean, is that exactly --

CHAIRMAN BABCOCK: We're not taking 1.04 out, Richard. Go back to the (i)(1).

MR. ORSINGER: Yes. I know. But --

09:51 CHAIRMAN BABCOCK: "In making these

determinations the Court shall consider Texas Disciplinary Rules of Professional Conduct Section 1.04 and other applicable law."

MR. ORSINGER: The Rule includes more than the factors for determining a reasonable fee. Rule 1.04(a) is the prohibition against charging an unreasonable, illegal or unconscionable fee. And (b)are the factors you can consider in determining the reasonableness.

09:51 I don't like the idea that we're sending them to a grievance concept; but I don't mind sending them to this part of the grievance concept that sets out the standard for a fee.

HONORABLE SARAH B. DUNCAN: Section 1.04(b).

09:51 CHAIRMAN BABCOCK: Section 1.04(b), because the way it is now you have got that argument, Richard.

HONORABLE TERRY JENNINGS: Consider the applicable factors. May I make a suggestion?

CHAIRMAN BABCOCK: Yes. What about that,

09:52 Judge Gray?

HONORABLE TOM GRAY: Are they not all applicable?

MR. TERRY JENNINGS: It depends on the case. Some factors weigh heavily in the case and other factors

09:52 may not.

HONORABLE DAVID GAULTNEY: We're just asking him or her to consider. I mean, I guess we're saying that you should go through the Rule, so I don't think we have to do anything. I like frankly the proposal here, just "You shall consider the Rule."

09:52

CHAIRMAN BABCOCK: 1.04(b).

HONORABLE DAVID GAULTNEY: 1.04(b.)

CHAIRMAN BABCOCK: Limit it to sub (b). What do you think about that, Richard, "the Court shall consider"?

09:52

MR. ORSINGER: If you're asking me to compromise, I'm okay with that compromise. Whether you're asking me if I think it's necessary, I do not think it's necessary.

09:52

CHAIRMAN BABCOCK: But you've got some appellate and district judges who think we should.

MR. ORSINGER: Okay. Well, if we're only taking votes here among the appellate judges, I lose.

(LAUGHTER.)

09:53

CHAIRMAN BABCOCK: Well, we can vote the full committee.

MR. ORSINGER: Hey, I'm easy. I'm easy to get along with. You just asked me.

CHAIRMAN BABCOCK: Let's put subsection (b).

MR. GILSTRAP: So it's going to say "In making the determination the Court shall consider Disciplinary Rule 1.04(b) and other applicable law."

CHAIRMAN BABCOCK: Right. Let's do that. Bill.

PROFESSOR DORSANEO: The odd thing about the statute and about the Rule as a result of that is that although we use the term "reasonably worked" for hours and "reasonable hourly rate" this whole provision and the statute too don't really make it plain that what we're trying to get to is what the reasonable fee is, what a reasonable fee award is. That is clearly what Rule 1.04 of the Disciplinary Rules is about. (b) says "Factors that may be considered in determining the reasonableness of a fee may include, "skipping some words, "the following:"

I wonder if it might not be better to change the last sentence a little bit more probably making these determinations to something more like Rule 1.04 "in making or in determining the reasonableness of a fee the Court may consider."

MR. GILSTRAP: Bill, the problem I have with that is that ties it to merely the determination of the Lodestar figure.

PROFESSOR DORSANEO: I don't think it does.

MR. GILSTRAP: That's where you determine

your reasonable fee. And then you multiply the reasonable fee times a multiplier. And we want to make it clear that you can consider the 1.04 factors in determining the multiplier as well.

09:54 PROFESSOR DORSANEO: That is a second level determination that more is necessary in order for the fee to be reasonable or less is necessary in order for the fee to be reasonable.

MR. GILSTRAP: You could read it that way.

09:55 HONORABLE CARLOS LOPEZ: "Fee." You mean when you say "fee" you mean fee, not the hourly rate.

PROFESSOR DORSANEO: Well, I mean hours. I mean rate, and I mean and figures.

HONORABLE CARLOS LOPEZ: Fee. The whole

09:55 fee; and that's the difference.

MR. LOW: The Federal --

MR. SOULES: That's what the Fed is.

MR. LOW: That's the way the Federal proposal is, "a reasonable fee."

09:55 HONORABLE CARLOS LOPEZ: They usually talk about "reasonable fee." We just gloss over it and consider the rate, --

PROFESSOR DORSANEO: Well, again --

HONORABLE CARLOS LOPEZ: -- the reasonable

09:55 fee under *Johnson*.

PROFESSOR DORSANEO: -- making these determinations in the last sentence is a puzzle. Two of them are clearly determinations of reasonableness, the number of hours reasonable and the rate that someone is
09:55 saying is the rate should be used is reasonable. And then the next one, "may increase or decrease the Lodestar," it doesn't say what you're after, you know. And I think what you're after is ultimately --

MR. LOPEZ: What they say.

09:56 PROFESSOR DORSANEO: -- what is reasonable.

MR. LOW: The Federal Rule says "may award reasonable attorney's fees."

HONORABLE CARLOS LOPEZ: The fee or the award that is reasonable. Not backing into the hourly
09:56 rate. I mean, you can do it that way; but you shouldn't have to do it that way. Because what does the fact that somebody can't get other business have to do with an hourly rate? I mean, it's not really. *Johnson* says just the factors that go in there. You can do it by upping the
09:56 hourly rate if you want. That's one way; but it's not the only way.

CHAIRMAN BABCOCK: Well, sometimes when you're taking on representation at the front end you'll say "my normal rate and what most people charge in this
09:56 community is $250 an hour; but I know that this case is

going to consume me. It's going to be real unpopular. People are, you know, my kids are going to get shunned at school, so I'm going to charge $500." Now for a different, for another case, for every other case in this county it's not reasonable; but for this one it is."

HONORABLE JANE BLAND: Isn't that what you charge anyway, Chip?

CHAIRMAN BABCOCK: Excuse me?

HONORABLE CARLOS LOPEZ: Do you charge $500?

(LAUGHTER.)

CHAIRMAN BABCOCK: Yes. My kids are often shunned at school, just about every client I have.

(LAUGHTER.)

PROFESSOR DORSANEO: I just don't like "these determinations" without indicating what the third determination really is other than what the mathematics of it are.

CHAIRMAN BABCOCK: Well, there are two determinations, the Lodestar figure and then increase or decrease.

MR. GILSTRAP: We could say "In determining the Lodestar figure and in determining the multiplier the Court shall consider Disciplinary Rule 1.04(b) and other applicable law.

CHAIRMAN BABCOCK: I like that, "the

multiplier, if any." You don't want to load that up. Does everybody feel okay about that?

MR. SOULES: As long as you don't say "reasonable fee, if any."

09:58 CHAIRMAN BABCOCK: Okay. Luke will haunt you if we say that. All right. Judge Gaultney.

HONORABLE DAVID GAULTNEY: I know there was some discussion about comment (a); and I'm not concerned about it. I understand that there was -- the last

09:58 sentence needs to go. But the first sentence --

CHAIRMAN BABCOCK: Comment (a) and (b) are gone.

HONORABLE DAVID GAULTNEY: Is there any concern that the way this is written it might be

09:58 misconstrued as a fee shifting Rule?

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: The question I was having maybe is the same one he is raising. If you have a class action, say, a negligence class action of some type where

09:58 there is no substantive law provision for the award of attorney's fees, how does class counsel recover attorney's fees?

HONORABLE DAVID GAULTNEY: The only way -- that's my point.

09:58 MR. ORSINGER: A common fund fee.

MR. BOYD: That's why you can't get rid of comment (a), because comment (a) is the only place that authorizes payment of attorney's fees to class counsel out of the common fund.

09:59 HONORABLE DAVID GAULTNEY: That's my understanding of the way is that absent a settlement, absent a settlement that you have got a common fund that is recovered for the class. And so the attorney's fees that are being assessed, the reasonable attorney's fees 09:59 are assessed against the common fund, because every class member has benefited by the representation. But absent an explanation, if we just have something that says "In awarding attorney's fees," award sounds like in addition to the recovery, which I'm not sure that's the history of 09:59 the attorney's fees.

MR. BOYD: That's even more, made more complicated, because House Bill 4 could be read to mean that attorney's fees are only available to class counsel if attorney's fees are available under applicable 10:00 substantive law. That's the language out of House Bill 4. So if you have a contract case or a DTPA case, you can get your attorney's for class counsel; but if it's a refinery explosion or release of pollution or something so that it's a negligence case, there is no provision to allow for 10:00 the award of attorney's fee to class counsel.

MR. GILSTRAP: Yes, there is. There's the common law. That's the common fund doctrine. That's the applicable substantive lawsuit. I don't think applicable substantive law is limited to statutes.

10:00 MR. ORSINGER: If your analysis is accepted, that limits the application of House Bill 4 to fee shifting statutes; and we don't think the legislature wanted to. They wanted it to apply to fee shifting statutes; but probably more likely they wanted it to apply 10:00 to common fund awards.

MR. BOYD: There are a lot of plaintiff's class counsel here that could argue this better than I could. But if that's what we intend, maybe this first sentence of comment (a) ought to be moved into the text of 10:01 the Rule under subsection (h).

HONORABLE DAVID GAULTNEY: My only concern is whether or not it is --

CHAIRMAN BABCOCK: Well, this section is trying to implement the House Bill 4 directive as to if 10:01 we're going to make a decision about whether you are going to have multipliers or not. We've made that decision as House Bill 4 has directed us to do, and you're setting up a procedure as to how you do this. But if we wander over into the area of what the legislature meant by substantive 10:02 law, whether they meant statutory fee shifting statutes or

common law, common fund, I think -- I don't think that is something we ought to be doing.

MR. BOYD: So is the idea then that neither House Bill 4 nor this proposed Rule apply in a negligence class action or other action where there is no statutory provision?

CHAIRMAN BABCOCK: That's up to the parties to argue. I mean, I can see somebody might make the argument that under 26.003 a defense counsel may say "Wait a minute. Attorney's fees aren't available under the applicable substantive law in this negligence case. We don't shift fees in that way." And the joinder is "Oh, yes, you do. There is a common fund and you take it out of that." Yes, Richard.

MR. ORSINGER: I don't mind going on the record that I don't think that the legislature was as worried about fee shifting as they were common fund; and I believe substantive law includes both equity and statutory law, and that the legislature intended the fees to be taken out of a common fund to be under the limitations of House Bill 4.

And in addition to that I don't think that we ought to go very far into delving into substantive law in a Rule of Procedure. If anyone is really worried that someone is going to interpret this Rule as to create the right to

recover attorney's fees, which I'm not worried about that, then we could do it the same way the legislature did by saying "If an award of attorneys' fee is available under applicable law, then the Court must first determine." And
10:03 I frankly don't think that is necessary. I think it goes without saying that you look first to the substantive law to see if you have a right and then you look to the Rules of Procedure to see how you litigate that right. Buddy.

MR. LOW: Traditionally attorney's fees were
10:03 created that we copied our rules from the Federal Rules. And so attorney's fees were recoverable to class counsel by that; but if attorney's fees were addressed under maximum loss or something like that, then you followed that. But it was not intended, the class rule was
10:04 intended to pick up those cases, but not overlap, not collect under both. So the Rule should not change that. I don't think it was the intention of the legislature to change and say "You just don't get attorney's fees unless it comes within a statute." I don't believe that was the
10:04 intent.

CHAIRMAN BABCOCK: I think we're all saying the same thing. Bill.

PROFESSOR DORSANEO: After listening to all of this, maybe we could just be a little more faithful to
10:04 the statute. I'm looking at the statute; and it begins

and we could begin this provision this way: "If an award of attorney's fees is available under applicable substantive law," and skipping some words, "the trial Court shall use the Lodestar method to calculate the amount of attorney's fees that will be awarded counsel. The Court shall first determine the Lodestar figure by applying the number of hours reasonably worked" and then keep going. And that is something better than the statute in terms of explaining the methodology, but it's otherwise very faithful to the statute and not a lot of language either.

MR. LOW: But one of the problems is like maximum loss, they follow that, that Lodestar; but there are other statutes that may follow something a little different; but we don't know that every federal statute follows that, so we can't say. I mean, you have to follow whatever the statute your case comes under, whatever, it is if it's a -- I mean, we have got to follow that if the statute says that.

CHAIRMAN BABCOCK: Right. That's what the last sentence is intending to say when they say "other applicable law."

MR. LOW: Right.

CHAIRMAN BABCOCK: But Bill's suggestion is that we pick up the language from the statute that says

"If an award of attorney's fee is available under the applicable substantive law," and then just go into the Rule. I don't think that's necessary myself; but if everybody else wants to do it, I don't think it harms anything.

PROFESSOR DORSANEO: And I do think our comment here, the main comment that we ought to have is one that references the statute, because that's what -- that's the other place where people would need to go. Particularly if you don't track the statute, somebody would need to go and say, they need to do what I'm doing you need to have the statute here (indicating) and you need to have the Rule here (indicating) in order to figure out the drill.

10:06 CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: Because the first thing people are going to be arguing about is whether you can get attorney's fees under at all.

CHAIRMAN BABCOCK: Right. Richard.

10:07 MR. MUNZINGER: Does existing Rule 42 have a provision relating to attorneys' fees? See, the problem that Bill is addressing then would be the practitioner picking up the idea that since the new Rule addresses attorney's fees, it's intended --

PROFESSOR DORSANEO: Right.

MR. MUNZINGER: -- to create something substantive. And I agree with Bill. I think that to insure that we don't create that impression among practitioners we begin with the legislative language which would make us faithful to the statute.

CHAIRMAN BABCOCK: Sounds good to me. Can we get that done?

MR. ORSINGER: Sure.

CHAIRMAN BABCOCK: Anybody else?

MR. SOULES: I don't know whether it's going to allow or to destroy the availability of attorney's fees. Maybe common fund is there; but under applicable law you may have a contingent fee with a class rep. You may have the right to recover attorney's fees because it's a breach of contract class action case. But where is your right to get any money from the class members in the substantive law? You don't have a written fee contract with them.

MR. GILSTRAP: It's under the equitable common fund doctrine.

MR. ORSINGER: Isn't the equitable fund theory part of the substantive law even though it's an equitable concept?

MR. SOULES: I guess it is something that just has now developed.

MR. GILSTRAP: That's how the common law equity, I mean, that's what happens.

MR. SOULES: I know that's what happens.

CHAIRMAN BABCOCK: Okay. Where we are I think is I think we're going to ditch comment (a) and (b). We are going to have comment (c), the figure (2) sentences, and we're going to reference House Bill 4.

MR. ORSINGER: Which our note does only. I think the note ought to be a comment and we just ought to refer to Section 26.003.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: Not subdivision (a). Just "see" or "based upon," something like that.

PROFESSOR DORSANEO: I think we ought to say something, Richard, like "This is meant to implement" or -- we've used language like this before.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: "Fulfill the statutory responsibility to make Rules to implement the provisions of whatever."

CHAIRMAN BABCOCK: We got the concept down. Does anybody else have comments about this before we move on?

MR. GILSTRAP: Yes, one. Since I sense that, you know, because of the time constraints it may not

be coming back to the subcommittee, I'll just note that the language that we've used here in the last sentence, the reference to Disciplinary Rule of Professional Conduct 1.04 needs to be squared with, --

10:09 MR. SOULES: (d).

MR. GILSTRAP: -- and I mentioned this yesterday, Rule 167.1, footnote four, that's where the committee took another stab at articulating how you determine reasonable attorney's fees under *Arthur Anderson* 10:10 and *Perry* and Disciplinary Rule 1.04. And somebody just needs to look at those two things and make sure that they're in harmony.

CHAIRMAN BABCOCK: The offer of settlement Rule you mean?

10:10 MR. GILSTRAP: Yes.

CHAIRMAN BABCOCK: Good.

MR. ORSINGER: Be sure the reference, because we're going to need to -- do you want us to rewrite a draft, Chip, or do you just want to leave the 10:10 record the way it is?

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Rewrite it.

MR. ORSINGER: Okay. Then be sure the reference is to 1.04(b).

10:10 HONORABLE TERRY JENNINGS: May I make one

point?

CHAIRMAN BABCOCK: Yes.

HONORABLE TERRY JENNINGS: This may not be important at all; but just in case. We don't have any authority to overrule Disciplinary Rules; and some day that could be changed. Would it be possible to list the factors, or is that just?

MR. GILSTRAP: Let me say if that happens, a lot of dominoes are going to fall. For example, the legislature has now, and this is in comment (c), the next to the last sentence. They expressly referenced Disciplinary Rule 1.04 in this amendment to the Residential Construction Liability Act as to how you determine attorney'S fees. I mean, they've written it in there.

HONORABLE TERRY JENNINGS: Got you.

MR. GILSTRAP: And it may be I guess there may be some if somebody decides to amend 1.04.

CHAIRMAN BABCOCK: We need to make a note to whoever is in charge of that, if you change that.

MR. LOW: There is a drive to follow the model rules now; and that will probably be done before the *Johnson* factors will be done.

(Laughter.)

MR. ORSINGER: But we have the same problem

if we set out factors. And if they adopt a Rule that adds or alters or edits three of the factors, then we have the same problem. I don't see how we can prevent against it.

CHAIRMAN BABCOCK: Okay. Let's go on to the next one.

MR. ORSINGER: Okay. Top of page 13, paragraph two is straight out of House Bill 4. The pro rata, if the recovery is cash versus noncash in a certain ratio, the fees have to be in that same ratio.

CHAIRMAN BABCOCK: Does everybody understand that?

MR. ORSINGER: It's really verbatim.

MR. GILSTRAP: It's pretty clear. If you get an award, if the class gets, all gets coupons that allows them to get new tires, the attorney's fee is going to get a bunch -- the attorney is going to get a bunch of coupons that allows him to get new tires. I mean, it's an absurd result; but that's what it says. And we can complain about it all we want; but that's what the legislature said.

MR. ORSINGER: But that will probably keep more of the people from opting in to eliminate class action.

MR. LOW: What about a civil rights case? I mean, what are you going to get?

MR. GILSTRAP: If the policemen all get retroactive fee increases or retroactive promotions, is the attorney going to get retroactive promotions?

MR. LOW: Do I get to be appointed as a police officer then?

(LAUGHTER.)

CHAIRMAN BABCOCK: You get to wear a badge, Buddy.

MR. GILSTRAP: It's really troublesome. I mean, you know, I think the legislature has the idea that somehow a lot of these settlements were in some way trivial or something like that; but I mean, you think about someone that gets a coupon that allows them to have a heart valve replaced. I mean, you know, and now the attorneys' fee, the attorneys won't get paid.

COMMITTEE MEMBER: Attorneys don't have hearts.

(LAUGHTER.)

MR. SOULES: Who gets to put the hearts away?

HONORABLE CARLOS LOPEZ: You need a coupon for a heart first.

CHAIRMAN BABCOCK: Ann, did you have a comment?

MS. MCNAMARA: Me?

CHAIRMAN BABCOCK: Yes.

MS. MCNAMARA: I really think, talking about in my own personal view this just make cases harder to settle, --

10:13 MR. YELENOSKY: Yes.

MS. MCNAMARA: -- because you don't have currency to settle. That's what the legislature has done. I'm not sure what we can do about it.

MR. YELENOSKY: Is there legislative history 10:13 on noncash benefits that would explain what happens if, for example, one of our cases what we get is architectural assess ability at 711s. What does the attorney get? Is that a noncash benefit?

MS. SWEENEY: There's no history on it. The 10:14 testimony is "Hey, this is really stupid; but it came out as it came out."

MS. MCNAMARA: We should probably just move along.

MS. SWEENEY: Well, I want to say that I 10:14 object and am not going to vote for anything this stupid. I don't think that we need to do something that makes no sense just because the legislature did it. How the Courts deal with that, I don't know; but I don't think that collectively sticking our heads in the sand and saying 10:14 "Well, since the legislature said you get your heart

valved replaced" is an appropriate thing to do. And I don't know.

I think some of the work on the Rule is very good. I personally would like to take a separate vote on this section, because it is absolutely ludicrous to propose this be the only law on that subject.

MR. SOULES: It's very anti defendant.

MS. SWEENEY: Anti what?

MR. SOULES: Defendant. It forces the class resolution to be money. It forces cases that might be resolved with coupon reasonably, not stupidly like has happed in a few places or heart valves. It forces those cases to be resolved with money. So the company, the defendant has got to come up with money instead of something to substitute for money. A lot of the cases are not going to settle. And it's very anti defendant in that respect; but so be it. The plaintiff's lawyers will just have to stick with money as a resolution for class actions.

MS. SWEENEY: Well, I still say that we ought to consider voting on this section for that reason. It does not make sense, and it isn't good public policy; and just because the legislature said it doesn't mean we should blindly agree with it.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Completely apart from that debate, this is a little bit unusual, because we don't have a statute that sets out substantive law, and we're attempting to craft a statute that implements that. The
10:16 legislature having perhaps had second thoughts about trying to write the Rules of Procedure over there at the capitol building has said "This is what we want the Rule to contain; but we're going to let you guys write it." And they actually say that the Rule that the Supreme Court
10:16 promulgates "must provide."

And so I feel like more so than the ordinary substantive statutes that we have been given a directive, the Supreme Court has been given a directive. And I think the vote is fine; and I think that we can air our views;
10:16 but as a practical matter I think that they've asked the Court to do the Rule writing instead of having them do it. And frankly, I'm grateful for that; and I think we should write a Rule that's consistent with their clear directive.

CHAIRMAN BABCOCK: Yes. The statute doesn't
10:17 leave any room for argument on this. Yes, Carlos.

HONORABLE CARLOS LOPEZ: Is there appetite on this committee for doing something along the lines of trying to go back to the legislative history? If they're trying to get rid of these "BS" coupon cases, somehow say
10:17 that, as opposed to all noncash. Because civil rights, we

sort of flippantly joke about this. How do you compensate a lawyer? My case that I handled is because the sheriff had, you know, they calculated the release date wrong and the guy was in jail six months longer than everybody agreed he should have in there.

10:17

HONORABLE TOM GRAY: Was that a class action lawsuit?

HONORABLE CARLOS LOPEZ: No. No.

HONORABLE TOM GRAY: Are the access cases are they class action lawsuits?

10:17

MR. YELENOSKY: Sometimes they are and sometimes they may not be.

HONORABLE TOM GRAY: Maybe it means you opt out, I mean, you opt not to bring those as class actions. You sue each 711 or sue them individually.

10:18

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: I don't know what the experience of the people here is; but in the federal hearings the testimony was that there are hardly ever any more federal civil rights class actions just because standing rules give all sorts of groups standing to raise the same issues and they don't bring them as class actions.

10:18

CHAIRMAN BABCOCK: Texans against Censorship.

HONORABLE NATHAN HECHT: Yes, to name a rogue group of lawyers.

CHAIRMAN BABCOCK: To name a rogue group of lawyers.

(LAUGHTER.)

MR. SOULES: Would the statute -- I'm putting on my defense hat here for a moment here. Would the statute give us any room to allow an attorney's fee agreement in the course of the settlement to be made between the class counsel and the defendant that would not be considered benefits recovered for the class?

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Did the subcommittee pick up that part of the federal Rule about no one can tailor agreements?

MR. ORSINGER: Yes. Because that's -- well, no. It doesn't say you can't have them. It says you have to disclose them, which is what the proposed federal change is, and we've adopted that. It doesn't say you can't have a side deal; but it says if you have a side deal, you have to disclose it at the fee hearing and to the members of the class so that they can object.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: Let me ask what do you do if you get a declaratory judgment and if the declaration adds

value to the class? How would you under this Rule compensate the class counsel for that?

MR. ORSINGER: If you were recovering your fee under a fee shifting?

10:20 MR. DAWSON: No. I'm talking attorney's fee in a class action. If I get declaratory judgment and there's 100,000 people and its very beneficial to them, what do I get as an attorney's fee under this proposed Rule?

10:20 MR. ORSINGER: What I was saying is under the Declaratory Judgment Act you have a fee shifting provision, and the fee shifting provision stands independently from the benefits received by the class members. So it seems to me arguable that if you're 10:20 recovering your fee under the Declaratory Judgment Act, you're not taking your fee out of the portion of the benefits recovered from the class. Then you wouldn't be entitled to that same allocation. Now maybe that's wrong. I would be curious to see if anyone else reads it the same 10:20 way.

MR. LOW: Richard, what if instead he got an injunction to require? There's a lamp, a $10 lamp and it's dangerous and it's causing fires and they won't recall it, and there's 10,000,000 of them out there. And 10:21 he gets them, forces them to recall that lamp. How does

he get paid? Now there is nothing for that. Does he get a bunch of lamps?

MR. ORSINGER: If that's a breach of warranty case, isn't there a right to recover a fee for a contract?

HONORABLE CARLOS LOPEZ: If it's a DTPA case, some cases say "yes." Some cases say that's not a contract. It's a breach of warranty case.

MR. ORSINGER: If it's a DTPA case, can you recover your fee under this?

MR. LOW: DTPA though, you can't. It's very difficult to get. Look to see what you can really have a class for. So...

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I think we ought to adopt the Rule as written by the subcommittee or have Paula's up-and-down vote on it and let those who don't want to vote against it. But the Court ought not to be in a position of second guessing the legislature.

The Court doesn't make law and we don't either. The people we elected make the law. Let the Court resolve these issues on a case-by-case basis as they come up. We're debating public policy. I don't think we're going to be able to write a Rule that will meet every eventuality or every contingency; and I think we've got a

lot of work to do. The legislature gave us clearly a bad law. Write what they've written and let's move on to the next subject.

CHAIRMAN BABCOCK: Good point. Carlos.

10:22 HONORABLE CARLOS LOPEZ: They've asked us to implement a bad law, and we have to make it workable. I can disagree with it. That's fine. But if it's actually the point of not being workable, I think there we have a problem. And I don't know if it's a duty, but an

10:22 obligation to do something. I'm thinking of scenarios where this is not workable. And so if we're supposed to implement it, i.e. make it work, I think we need to do that.

CHAIRMAN BABCOCK: Richard said this one is

10:23 a little different than some of the other directives. This is in 26.003(b). And it says we must have a Rule that says this; and I don't see much room to maneuver. Maybe others do. Ann.

MS. MCNAMARA: I really think we're into the

10:23 realm of unintended consequences given what the legislature has done. It's not clear it won't work somehow. Yes, I agree with Luke. It's very anti defendant. You're not going to be able to settle a lot of cases you settled almost under the ordinary course of

10:23 business before. On the other hand, some of the other

changes like the change in supersedeas bond, I think this means that more cases will be going to trial and be appealed. So Lord knows, if the legislature thought that was one of the consequences they were leading to; but I think this is all going to play out. But given the fact that they've given us a clear directive as to this aspect of this, I'm not sure what we can do other than to move ahead. And I think if we leave it out, we get back into the "got you." We'd just be helping practitioners by putting it all down in one place and then let the Court decide what they want to do with it.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: There is no option for leaving this out. I mean, it's our duty is to send this Rule to the Court. And I guess the Court could make the decision that it didn't want to pass the Rule despite the legislative directive. I can't imagine that happening; but that's not our call. I mean, I don't see any wiggle room here. And I'd love to find it; but the legislature says the Supreme Court will adopt the Rule that provides this, end of story.

MR. SOULES: I think there is a little wiggle room in the statute. It talks about attorney's fees awarded. And there may be a way to get attorney's fees to the attorneys other than by Court award in a class

action.

MR. GILSTRAP: I think that can be read very broadly to include attorney's fees under a statute.

MR. SOULES: I think so too.

10:25 MR. GILSTRAP: I mean, I think it could include all attorney's fee whether under the equitable common fund doctrine or under a statute. They've got this limitation on it.

MR. MUNZINGER: Why couldn't you agree? Why 10:25 couldn't the defendant agree to attorney's fees and the judge not even address the issue?

MR. BOYD: Because settlement has to be approved by the Court in a class action.

MR. MUNZINGER: So he approves it.

10:25 MR. ORSINGER: The whole purpose here is to keep plaintiff's lawyers and defendants from entering into settlements that provide these conditional benefits to class members. And the corporations, just like the airlines, if they overbook, they don't give you $400. 10:26 They give you vouchers to fly on their airline for tickets that would cost $400. There is a certain percent of people who will not use their tickets. And so the defendants say "Okay. We're going to settle for 40 million dollars." And 39 million of that is in coupons 10:26 that maybe only 12 percent of the class members are

actually going to cash in. So when you get around to where you get back to Luke's point, lawyers aren't going to take coupons anymore because they don't want their fees in coupons, so they're going to insist that the companies come up with money. So instead of spreading the cost of it out over the next 12 or 18 months worth of airline flights now they're going to have to come up with cash now to settle the case; and it's going to make it harder to settle a case.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: I suggest you change the language in the second line to "attorney's fees awarded in this action" to "attorney's fees awarded under this Rule."

MR. ORSINGER: You know, I like that idea to the extent that it supports the argument that if you have fee shifting, that fee shifting shouldn't be in the form of coupons. Fee shifting should be in the form of the standards under the statute. Even if you do have fee shifting, you're going to be determining that fee pursuant to this Rule, because we set up procedures for hearings and notice and everything else. So I'm not sure that your change would move the fee shifting statutes outside of the coupon Rule.

MR. YELENOSKY: The statute says "action."

MR. GILSTRAP: Under subdivision (i).

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: 26.003(b) says "Rules adopted under this chapter must provide that in a class action, if any portion of the benefits recovered for the class are in the form of coupons or noncash common benefits, the attorney's fees awarded in the action must be cash and noncash amounts in the same proportion as the recovery for the class." "In the action" is in the statute.

10:28 CHAIRMAN BABCOCK: Right. I tend to agree with that. I don't think you can split the words.

HONORABLE SARAH DUNCAN: I don't think there is any wiggle room over even the verbiage of the Rule.

HONORABLE CARLOS LOPEZ: No wiggle room.

10:28 CHAIRMAN BABCOCK: Bill and then Stephen.

PROFESSOR DORSANEO: Richard, do we have a comment that says in effect that the Court has to put this in the Rule and we don't know what it means?

(LAUGHTER.)

10:28 PROFESSOR DORSANEO: That's really what I would like to do.

CHAIRMAN BABCOCK: We can't.

MR. ORSINGER: I think we can put that in the record. But you know the Supreme Court isn't going to 10:29 say that. And it will just make us feel better to do it;

but probably we should leave it in the record here and send them a clean rule.

CHAIRMAN BABCOCK: We do know what it means.

PROFESSOR DORSANEO: I don't know what it means. I don't know whether it's for common fund cases, for statute cases. I don't know whether it's independent from the paragraph that we just dealt with that talks about using the Lodestar method and making specific calculations.

10:29 CHAIRMAN BABCOCK: Let me make a prediction.

PROFESSOR DORSANEO: It's a lot of nonsense to me.

CHAIRMAN BABCOCK: Let me make a prediction. If you get one of those cases, you will figure it out.

10:29 (LAUGHTER.)

HONORABLE CARLOS LOPEZ: Using the Lodestar method.

CHAIRMAN BABCOCK: All right. Okay. Let's move on to the next one.

10:29 MR. ORSINGER: Okay. Then the next one is the effective date issue. And for those of you who couldn't make it out of the comment, the oddity about this statute is although some parts of the statute have effective dates other than September 1, 2003, I think the 10:29 subcommittee felt like this part of the statute was

effective September 1, 2003. However the statute does not itself change substantive law unlike every other statute I've ever read. It says the Supreme Court shall promulgate a Rule that makes changes in the way we do
10:30 business and that Rule must be promulgated by 12/31/2003. The effective date of the statute meaning, i.e. the bindingness of the direction to the Supreme Court became effective on September 1; but the actual change that they're requiring is not in the statute. It's in the Rule
10:30 that will be issued pursuant to the statute no later than December 31 of 2003.

So the fact that you have an effective date of September 1 on the statute does not mean that you have that effective date in the Rule you adopt. So we could
10:30 say that the effective date in the statute is the date the Rule becomes effective, or we could say it's effective September 1, or we could say it's effective by the deadline which is December 31.

MR. SOULES: Or later.

10:31 MR. ORSINGER: I guess the Supreme Court could say later; but I think the legislature may quit sending Rules back to us if we delay it a year or two. But at any rate, having said that we have a sliding effective date because of the unusual nature of this
10:31 statute not changing law, but telling the Supreme Court to

adopt rules that change the law, we have to decide whether that effective date whatever we agree on is going to apply based on when the lawsuit is filed or when the class is certified or when the fee award is determined.

10:31 I mean, it's conventionally changes in the law are effective either for lawsuits filed on or after the effective date or for cases tried on or after the effective date. We don't want the cases tried on or after the effective date, because we don't want a bunch of

10:32 appeals from final judgments for class certification hearings that occurred under the old law when it was perfectly proper to do what we did. So obviously we've got to make the rule effective, to not make it retroactive to where it undoes things that we've already done.

10:32 So in my view, and we were very split on this, so we have no recommendation. In my view we ought to probably just do something that we all agree to and just say the Rule is effective to cases filed on or after September 1. But a decent alternative is the Rule is

10:32 effective as to all proceedings which occur on or after September 1 of 2003, I meant to say.

CHAIRMAN BABCOCK: You agree that it ought not to be 1997?

MR. ORSINGER: Actually it's 1977, I

10:33 believe, isn't it?

MR. GILSTRAP: That's correct, 1977.

MR. ORSINGER: Oddly enough our current Rule says that it's only effective for cases filed after September 1 of '77. And that's of historical importance. So if we have no effective date, which some people on the subcommittee wanted no effective date, litigate it and let someone else figure it out. At the very least we have got to take this effective date out because it's 20 years old or 30 years old.

10:33 CHAIRMAN BABCOCK: Give or take a few years. Okay. What do people think about that? Judge Peeples. I just wanted to make sure you're paying attention.

HONORABLE DAVID PEEPLES: I'm all ears.

CHAIRMAN BABCOCK: Frank.

10:33 MR. GILSTRAP: Certainly the simplest way to do it would be to say either September 1st or the date the Rule goes into effect and say that it only applies to suits filed after that date. That's obviously the simplest and clearest way to do it. The problem is that 10:33 there are a lot of class actions around that are already filed, some of which are going to be around for a long time, that are going to be operating under the old Rule.

And there was some sentiment on the committee that while maybe we need to apply these new rules to those 10:34 class actions, we couldn't just retroactively apply it to

all of them because if the case has been certified and it's up on appeal, you don't want it being undone based on the new law. So the other approach that was articulated was, well, maybe there is a way we can say that if it hasn't been certified, the certification Rules apply. If the notice hasn't gone out, the notice Rules apply.

10:34

That is an intellectually satisfying way to do it. I have just got some questions whether we can actually write a Rule that would effectively work that way. It's a good idea. I'm not sure it's practical.

10:34

CHAIRMAN BABCOCK: Aren't you also if you do anything other than make it subject to actions commenced on or after September 1 of 2003, aren't you potentially adjusting radically the expectations of people getting into this litigation? Because if I'm a plaintiff's lawyer and I have taken a case with knowing what the law is, now you've completely turned the economics of my case upside down.

10:35

MR. GILSTRAP: Although we have the power to do it because of the procedural statute. But the questions is should we do it? Because everybody has played by the old Rules and filed the lawsuits under the old Rules.

10:35

CHAIRMAN BABCOCK: Right.

MS. SWEENEY: The September 1 deadline, if

we say this Rule is effective to cases filed after September 1 versus December 31st or some other date, is there any feasible way this Rule will make it to someplace that people have access to it by September 1?

10:35 MR. ORSINGER: It's going to be published in the October Bar Journal. So no. The answer to that is no. Not unless they're going to the -- I mean, the only place. No. The answer is "no."

CHAIRMAN BABCOCK: That's not quite right, 10:36 because, Chris, tell me if I'm wrong. I believe the Court's intention is to publish the Rule. Like the MDL Rule will be published on our website and maybe on the Court's website.

MR. GRIESEL: Yes. And we talked with the 10:36 State Bar. They'll be up on the State Bar's website and do the e-mailing from it as well and we've contacted a majority of the publishers and told them what is sort of coming down the pike.

MR. ORSINGER: Yes. But that doesn't amend 10:36 what I said. I mean, there is a very small number of Texas practitioners that are going to check those web sites.

MR. YELENOSKY: But they have HB 4.

MR. ORSINGER: Yes. I mean, HB 4 is also 10:36 available on the legislative website.

MS. SWEENEY: HB 4 says the Court is to do these things; and so people will be waiting for the Court to quote "do them." And I think -- I don't know. I mean, I just have a lot of problem with hidden law that isn't sort of accessible through the usual channels, assuming that someone is going to go pinging on the right website.

10:37

CHAIRMAN BABCOCK: HB 4 has deadlines by which the Court must act. That's why we're meeting so often this summer.

10:37

MS. SWEENEY: I know that. But all I'm saying is September 1 is 10 days from now.

CHAIRMAN BABCOCK: Right.

MS. SWEENEY: And even -- I mean, Chris, is there any likelihood the Court is going to in the next 10 days actually get something out? I'm not trying to put anyone on the spot; but just the practical standpoint of the practitioners finding this.

10:37

MR. GRIESEL: There is a great likelihood that by September 11th or earlier, which is the last day to communicate with the Bar Journal, the Court will issue an order dealing with the class action fees. And the question will be whether the Court puts that as an emergency rule or whether the Court puts that as a January 1st effective date. The Court will before August 29th when I lose enough members from the Court that I can't get

10:37

10:38

an order signed will act on the MDL panel, 407, and the TRAP 24 Rules change and those will be out the door. So there is envisioned two sets of signed orders, one dated sometime near August 29th, 2003, and the second dated sometime near September 11, 2003.

10:38

MS. SWEENEY: I would recommend that we proceed in a sequence and have the Rule come out before the effective date and choose the December 31st, cases filed after December 31st just so people see what is coming and make their decision prospectively, and as you say, Chip, not have decisions that were made based on existing law, investments made on existing law completely overturned.

10:38

CHAIRMAN BABCOCK: Judge Patterson.

10:39

HONORABLE JAN P. PATTERSON: I agree with the concerns; but I think the Supreme Court's intention is otherwise. In Judge Hecht's August 20 letter to us he said "The Court intends to promulgate Rule changes regarding multi district litigation effective September 1 as required by House Bill 4 inviting public comment after they become effective and may make further changes. It is important that Rules be in effect September 1 due to the statutory deadline."

10:39

MR. YELENOSKY: That's the MDL.

HONORABLE JAN P. PATTERSON: I understand

it's MDL; but I'm saying that that's probably their intention. This is also a statute effective September 1.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I mean, they can make it effective whenever they want to. Some people might feel we only give them direction and think that it might be fairer to do it December 31st, or some think it's okay September 1st or when; but I think our job is to tell them what we think and then let them think whatever they think.

MR. SOULES: I think frequently and routinely the legislature makes its legislative changes effective to cases filed after a given date; but that has not been the routine in the Rules. The Rules go effective and they apply to cases in the pipeline. They may not go effective until January 1. If they go effective January 1, they're going to be effective, if they follow the routine of Rule changes, they will be effective to cases in the pipeline. So a case in the pipeline that has not yet had an attorney's fee award made would be affected by this if it goes effective January 1, 2004, and no attorney's fee award has been made yet in that case already pending.

MR. ORSINGER: In response to what Luke just said, that was the way the Discovery Rules were handled. This is a peculiar Rule, because the Supreme Court, I

mean, the legislature has changed substantive law in my estimation in House Bill 4; but they've done it by directing the Supreme Court to implement those substantive law changes in procedural Rules. And so in a sense I think we're implementing substantive law changes which will eventually apply to suits filed on or after rather than something that is purely procedural like how many answer to interrogatories, how many interrogatories can you send, how many hours of deposition can you take. And I think you can argue that because since we're implementing a substantive law change about the recoverability of fees and things, that at least as to those components about how you calculate the fees, the stuff that House Bill 4 requires we ought to see this more as a statutory change than as a Rule change. And then other parts of the Rule that we're recommending changing which have to do with the appointment of intermediate class counsel and other things that are more procedural in nature, perhaps those should be effective immediately rather than based on or after. But the House Bill 4 changes to me we're being asked to implement legislation, not change procedures.

MR. SOULES: We're going to have just a slug of class actions. We're going to encourage a multiplicity of class actions to be filed before the effective date if

that is what is done.

CHAIRMAN BABCOCK: Not if it's secret and it's real short.

(LAUGHTER.)

10:42 MR. SOULES: That's what happens every time in tort reform. It's not unique in Texas. It may cause people to rush up and get their cases resolved and get their cases, the fees awarded by the end of the year in the cases that are already pending; but it's not going to 10:43 cause a big rush of filing of class actions that may or may not have significant merit. But if we just make this apply to cases that are filed after January 1, 2004, we're going to see in the next 120 days a host of class actions filed.

10:43 CHAIRMAN BABCOCK: Great point.

MR. SOULES: I don't think that's what should be done.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN P. PATTERSON: I was going to 10:43 urge whether we adopt the September or December date -- and I think the record should reflect that your comments were made in jest.

CHAIRMAN BABCOCK: Yes. Although there are some people that are worried about the secretiveness of 10:43 this.

HONORABLE JAN P. PATTERSON: Well, and well they should. But I was going to urge that we make it a bright line and make it actions commenced, because the effect and the consequences in pending cases I think is just enormous; and that way it does give people a bright line. That's the effect in all statute changes is that there is a change or a flood of litigation at the end; and I think we need to deal with that, but we need a bright line.

10:44 CHAIRMAN BABCOCK: Carlos, can I butt in?

HONORABLE CARLOS LOPEZ: Sure.

CHAIRMAN BABCOCK: Judge, what about Luke's point though that if you make it subject to actions met, then you're going to have this flood of filings in the next three months; and the substantive provision of House Bill 4 and particularly the one about the noncash settlement and coupon and everything the effective date of that is September 1.

MR. GILSTRAP: No.

10:44 CHAIRMAN BABCOCK: It's not? What is it?

MR. GILSTRAP: Because the statute just tells the Supreme Court to pass the Rule.

CHAIRMAN BABCOCK: That's right. And they said the Rule has got to be done by December 31.

10:44 MR. GILSTRAP: The Rule. But it doesn't

say.

CHAIRMAN BABCOCK: House Bill 4 is --

MR. ORSINGER: Look at it this way: House Bill 4 tells the Supreme Court to do something. The instruction is effective on September 1. The deadline for doing it is December 31; and the day the Supreme Court does it is the day it happens. So you really have three dates here, if you want to think of it in those terms.

MR. SOULES: If this is affecting cases in the pipeline, rather than the flood at the end, then the rush is going to be to settle and resolve the cases that are in the pipeline before the effective date of the Rule. And to me that is a more attractive policy, because the lawyers having relied on and having expectations of being able to resolve their class action cases under the old Rules have got 120 days to get that done. And if they don't, then they are going to roll under these new rules and have to live with them; but it doesn't encourage a flood of litigation. It still gives them time, both plaintiffs and defendants time to get down to business and get cases resolved before the end of the year under the old rules. To me that's the best policy is to proceed that way rather than to have them --

HONORABLE JAN P. PATTERSON: You're assuming the incentive is the same on both sides with respect to

the old Rule.

HONORABLE CARLOS LOPEZ: Why can't we advise the Supreme Court to make it December 31 and filing, based on the date of filing? If the Supreme Court decides it needs to make it September 1, they can do that.

MR. SOULES: December 31 is okay.

HONORABLE TOM GRAY: As I understand Luther, he's making the argument that it not be applied to filings, that it be applied to proceedings after the date. And the reason I agree with that is because I have a bit of a problem on a procedural rule with a class action hearing going as I understand it this date -- let me ask that question first. Is this date applying to the determination of what is going to be an appropriate class under the various categories as we've changed it also?

MR. SOULES: If you do it like the Discovery Rules, what has already taken place is valid under the old Rule. You don't go back and revisit under the new Rules.

MR. GRAY: Exactly.

MR. SOULES: You don't go back and revisit under the new Rules; but you proceed from the effective date forward under the new Rules. They govern the future proceedings.

HONORABLE TOM GRAY: And so all the proceedings that occur on January 15th are going to have

the same standard on review, the same analysis applied --

MR. SOULES: Yes.

HONORABLE TOM GRAY: -- regardless of what date they were filed. And I think that's a good thing.

10:47 MR. SOULES: A class certification that occurred in '03 or '02 or '01 is going to be governed by the, reviewed by the laws of '03, '02, '01. Class certification in '04 is going to be governed by the law in '04.

CHAIRMAN BABCOCK: Judge Patterson, then Buddy, then Richard, then Bill.

HONORABLE JAN P. PATTERSON: I think we can perhaps draw two groups of changes some of which really reflect *Bernal* and *Schein* and others which reflect

10:48 substantive changes of the legislature. And it seems to me that cases in the pipeline attorneys can continue to mold and accommodate many of the changes that sort of reflect current case law; but to change, as Richard says, some of the substantive aspects to cases in the pipeline

10:48 is surely going to bring a flood of issues into the courts. So I really think I'd really prefer a bright line "action commenced." It's fair to all parties and attorneys who are notified in advance. Otherwise I don't see how it can be fair to parties who currently have

10:48 litigation going on.

MR. LOW: Luke, the Discovery Rules were not done --

CHAIRMAN BABCOCK: Am I starting to act like Luke now?

10:49 MR. LOW: They were not done that way, because remember the Court came out with a December order, and it made it unclear; and they had to clarify that the action commenced after a certain date, actions commenced were under the new. Actions commenced before then were 10:49 under the old. So we continued to operate, because they made an order, December the 10th order clarifying that.

And so it was not as stated, because I talked to Justice Phillips about it. We had judges that were treating it differently, one like Luke says and another 10:49 like I'm saying. And they came out with an order clarifying it saying if it's filed, that's when you determine which one.

MS. SWEENEY: We had issues like if you had expert interrogatories out, which now we don't have --

MR. LOW: Right.

MS. SWEENEY: -- expert interrogatories, people were saying "Na, na, na. Now I don't have to answer that."

MR. LOW: Yes.

10:50 MS. SWEENEY: They did. They went back and

said "actions filed after." So the Rules apply.

MR. PEMBERTON: I was going to say you're both right. Some Rules applied to only the date, and some applied only to when the case was filed, and some of the new Rules wouldn't work if you applied them retroactively like discovery periods. So dependent on the Rule, what happened is counsel had different approaches.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: On the House Bill 4 stuff, which is the attorney's fee stuff, and I distinguish that from the other procedural changes we are talking about, I'm really concerned that people have been out there committing resources and making one-way irreversible decisions on a good faith reliance on substantive law and procedure that existed at the time that they invested the money, did the work, filed the non suits, made the side settlements. And for us to come in now and say you may have been litigating this case for three years, and now all of a sudden you're going to get an hourly rate times a multiplier in coupons after you have invested the resources of a dozen law firms for four years, that is just incredibly unfair to me. And instituting the fee changes for House Bill 4 which I consider to be a change in substantive law, it just doesn't seem fair to me that everyone who has made decisions in the past to say because

you haven't had your fee set until the end of a three- or four-year lawsuit that now all of a sudden all of the decisions you made for the three to four years are irrelevant and now completely different economic factors apply.

MR. BABCOCK: Carl and then Bill.

MR. HAMILTON: 23.02 says the Act applies only to cases filed after the effective date of the Act. The Act is part of what we're dealing with. So I think that is a directive that we have got to say in a Rule pertaining to attorneys' fees that that only applies for cases filed after the effective date of this Act.

CHAIRMAN BABCOCK: Well, put another way, it's what I was trying to say before. By the way, as a matter of policy I kind of like Luke's idea; but Section 23.02(a) says "All articles of this act" other than Article 17 which it's not dealing with, "All articles of this Act take effect September 1, 2003."

MR. ORSINGER: But, see, the weirdness of the statute is the statute doesn't change substantive law. The statute directs the Supreme Court to adopt a Rule. So you might have some wiggle room.

CHAIRMAN BABCOCK: What Carl is quoting is from subsection (d) of Article 23.02 which says "Except as otherwise provided in the section, this Act applies only

to an action filed on or after the effective date of this Act." So the statute is addressing this point by saying that post September 1, 2003, cases this Act applies to.

HONORABLE CARLOS LOPEZ: But the Act doesn't implement the Rule.

HONORABLE SARAH B. DUNCAN: That's right.

HONORABLE CARLOS LOPEZ: The Act orders the Supreme Court to act by a certain date.

CHAIRMAN BABCOCK: I'm sorry. I didn't tie up my thought. I like Luke's idea of having the effective date of the Rule apply to pending cases; but this seems to run counter to that and would say that this Rule could not be applied to cases that were not, were filed prior to September 1. That was, that's the point I was trying to make. And Luke, what do you think about that?

MR. SOULES: (No response.)

CHAIRMAN BABCOCK: Because I like what you are saying. You say December 31. That way everybody has got 128 days to get their house in order if they want to; but I don't know if this let's us do that.

MR. SOULES: I think it does.

MR. LOW: There was a big argument in the legislature over that, a big thing with the Texas Trial Lawyers.

MR. YELENOSKY: We can't hear you, Buddy.

MR. LOW: There was a big argument over that. That is in the statute for a reason. I wasn't part of the arguing team; but I was on the sideline. And they were arguing about the effective date; and that was a big issue.

CHAIRMAN BABCOCK: Do you know what the argument was?

MR. LOW: Yes. I mean, some wanted the effective date to apply as to cases no matter when they were filed, and you know, different people had different views.

MS. SWEENEY: That was the argument.

CHAIRMAN BABCOCK: Richard.

MS. SWEENEY: I'm sorry. I'm trying to answer your question. And that was the -- I hesitate to use the word "compromise"; but that was the result --

MR. LOW: Right.

MS. SWEENEY: -- was that cases filed after. And that's why that was put in.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: The second sentence of Section 23.002(d) may resolve the discussion. "An action filed before the effective date of this Act including an action filed before that date in which a party is joined or designated after that date is governed by the law in

effect immediately before the change in law made by this Act." That law is continued in effect for that purpose; and the statute draws no distinction between procedural law or substantive law. When you read Section 23.002(d) and you read both sentences it appears they have resolved the argument for us.

Secondly, previous Rule 42 had an effective date provision in it in Section (g) which said it did not apply to actions filed prior to whatever that date was, September 1, 1977. So I think that my personal belief is that the statute itself has resolved the discussion; and the question now is to choose which effective date applies.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH B. DUNCAN: I don't think that section resolved it, because the Act doesn't change the procedure in class action cases. It does direct the Supreme Court to change the procedure. It also directs the Supreme Court to change the substantive law on attorneys' fees. And as most of the people here know, you can find a case standing for whatever you want vested rights to mean under the ex post facto law prescription.

I don't want to go there. That's really hard law. It makes for really long briefs. And it's, what ex post facto means to me is just fundamental fairness. And it's

not fair when somebody has an attorney's fee agreement in a class action case that says I'm going to get a percentage of the common fund recovery to say "No, you're not, because the Supreme Court was directed to pass this Rule that says you're only going to get coupons."

10:57

We could go through the Rule and figure out what is procedural and what is a substantive law change and say the procedural changes are effective immediately. The substantive law changes are effective December 31st or whenever the Rule makes the Court, the rule effective.

10:57

And I see Justice Patterson grimacing as I am grimacing. I don't want different provisions of the Rule to be effective at different times. So given that we can't change the substantive law on people before the effective date of this Act or of the Rule, it's my view that we should say that this Rule is effective for all cases on or after December 31st or whatever the effective date of the Rule is.

10:57

CHAIRMAN BABCOCK: Judge Jennings.

HONORABLE TERRY JENNINGS: My only point is this: Is the only reason we're making this change is because it's what the legislature has asked us to do; and that's why we're making this change. So the effective date, I think I would back up what Judge Duncan just said. It ought to be September -- it ought to be the date filed.

10:58

10:58

That ought to be the date. And it's just a matter of we all know the old rule, that you don't change the rules in the middle of the game. And as Richard said, you know, people have made decisions. They've made decisions; and it is just fundamentally unfair to change the Rules in the middle of the game. We all know that from grade school on the playground. You don't change the Rules in the middle of the game. I think it's that simple.

CHAIRMAN BABCOCK: Richard, then Lamont.

10:58 MR. MUNZINGER: I agree with what Justice Duncan said. I don't think we should change the rules of the game; but I do think that statute has made that mandatory on us because they've used the phrase "governed by the law in effect immediately before the change in law made by this Act," which is referring to an effect as opposed to an effective date. And the procedural law is being changed.

But I agree with you. I think it ought to be we ought to give the Bar plenty of notice and do it December the 31st in fairness to everybody.

HONORABLE TERRY JENNINGS: There are probably inconsistencies here that we haven't even anticipated or seen yet.

MR. BOYD: If the concern, Chip, is making it apply to cases filed on or after the date is that we're

now inviting a flood of cases to be filed in the next 120 days, what's the down side of making it effective to cases filed on or after, but picking the earliest date possible whether that is September 1 or September 15 or October 1 or just as soon as the Rule can practically be implemented? What does that leave undone, or what are the arguments against doing it that that?

MR. JEFFERSON: That's a different issue to me. I agree with Richard that it's really a matter of fundamental fairness. And if practitioners now look at House Bill 4 and they want to know what is the date that my class action rule is going to change on me, they probably ought to look at the class action rule and look at 26.001(b) and see that it says "The Supreme Court shall adopt rules under this chapter on or before December 31st, 2003."

Now we can have a debate about what this actually means with respect to the other effective date measures in the statute; but I think the first place the practitioner is going to look to see what is the date I have got to worry about when the class action rules are going to change they're going to hone in on December 31st, the first date that's right there in the section under class action.

MR. BOYD: But it's "on or before."

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: I guess I should comment I agree with all the comments about not changing the rules of the game. In response to Luke's proposal about "Well, let's make it proceedings after December 31st," it's not that easy. If you've got a case that you've been working on and, say, you're a plaintiff's class action counsel, first of all, you have got to get notice that the Rules are going to get changed. Then you've got to get a class certification hearing, and then the trial Court has got to go through the rigorous analysis required by the law and then issue a certification order, trial plan. And I'm not sure that all that can get done between the time that notice of the rules is published and the end of the year.

Furthermore it seems to me we're making other changes in Rule 42; and it would seem to me more practical to put all those out at once rather than have piecemeal, "Okay. We're going to change this effective September 1st; but then we're going to make these other changes that are going to be effective December 31st." We're going to have piecemeal changes.

I would advocate making it actions commenced after December 31st so we can get all these changes in one packet and publish the whole new Rule at once as opposed to piecemeal.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: I agree with what Alistair just said. I have more of a drafting comment. If we leave the effective date in (j) like it is, it makes it look like the entire class action Rule is not effective until whatever date we pick, which can't be the case. It's either the amendments that are effective on a particular date, or another way you could do it is if you wanted the procedural things that we talked about to be effective to ongoing cases after it's adopted, you could say (i), "This section (i) shall be effective only with respect to actions filed after a particular date." I don't have a real thought about which way it should be; but it should not be the way it is here.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I would agree. First of all, I agree with Alex' point. And secondly, I don't think we ought to defer all of the other beneficial procedural changes that are in the federal law to cases filed, because it's not necessary. No one is harmed by a requirement that the trial court issue findings or do the trial plan at the time that it certifies.

So to me I think we should have the truly remedial procedural components go into effect for hearings that haven't been yet, and these House Bill 4 substantive

changes should be applied only to cases filed on or after the effective date.

MS. SWEENEY: How do you carve those out?

MR. ORSINGER: Because they're just -- it's just this one subdivision. House Bill 4 changes are just subdivision (i); and any of the other changes we approve are either coming from the Jamail proposal, the Federal Rules or our assessment of *Bernal* or we're breaking derivative actions out and saying cross refer them to the statute.

CHAIRMAN BABCOCK: We need to have three things decided, and I think probably by vote. One is whether or not it's going to relate to actions versus proceedings. The second is whether or not it's going to be all provisions or just House Bill 4 provisions and this effective date. The third is whether it's September '03 or December 31, '03.

MR. GILSTRAP: I don't understand the first one, "actions or proceedings."

MR. ORSINGER: Proceedings would be like a hearing. It's like Luke's proposal. The proceeding is the certification hearing, the attorney's fee hearing. So you're breaking the case down into what stage of procedure you're reaching rather than when it's filed.

CHAIRMAN BABCOCK: In other words, if the

Rule change would apply to cases that are currently pending that have already been filed. The proceedings haven't happened yet.

MR. GILSTRAP: Wouldn't it make more sense to vote up or down to begin with as to whether or not the entire Rule should be prospectively applied? In other words, if --

HONORABLE CARLOS LOPEZ: Right. I can't vote on A if I don't know what is procedural or substantive.

CHAIRMAN BABCOCK: I know there is a cart and a horse here. I don't mind doing that.

MR. ORSINGER: Well, and especially remember that we haven't even discussed whether to go to opt in; and if we did go to opt in, that would mean that if you hadn't had your class certification hearing yet, we're making that. I mean, let's remember if we're going to break it down to proceedings, that there are some significant changes we haven't even discussed yet.

CHAIRMAN BABCOCK: Buddy. You took us to this thing, so...

(LAUGHTER.)

MR. ORSINGER: I know I did, because it's a House Bill 4 thing.

MR. GILSTRAP: If the committee votes, for

example, to say that the entire Rule will apply only to cases filed after a certain date, then that problem goes away.

CHAIRMAN BABCOCK: Right.

11:05 MR. GILSTRAP: If we then say "No. We're not going to do that," it becomes more complicated.

CHAIRMAN BABCOCK: So you want to do it my way. You want to vote on action versus proceedings first?

MR. GILSTRAP: No. I want to vote on a

11:05 resolution as to whether or not the entire Rule will apply to cases filed after, only cases filed after a certain date. And if that passes, --

CHAIRMAN BABCOCK: Isn't that what I just said?

11:06 PROFESSOR DORSANEO: That's what he just said.

HONORABLE CARLOS LOPEZ: Without regard to whether you call it procedural or substantive, just the whole thing.

11:06 MR. HATCHELL: I just want to add one little wrinkle to the cases filed notion. It's not necessarily the best term because you can have a pending filed case that could be converted to a class action. You need to accommodate that in some way or another.

11:06 CHAIRMAN BABCOCK: Okay. Let's take our

first vote. And everybody, and we'll take the committee's proposal, subcommittee's proposal. And that is this Rule should be effective only with respect to actions as opposed to proceedings. So this would not be Luke's
11:06 proposal. This would be the subcommittee's, with respect to actions commenced on or after, and we'll talk about the date later. So if you're in favor of it applying to actions.

MR. YELENOSKY: The whole thing. Not just (i)?

CHAIRMAN BABCOCK: Right now we're talking about the whole thing. We'll see if we want to limit that later.

PROFESSOR ALBRIGHT: What this is saying is
11:07 the lawsuit, the class action is filed after this date?

CHAIRMAN BABCOCK: The lawsuit, the action. It doesn't matter what kind of an action it is.

HONORABLE SARAH DUNCAN: How do we vote on this particular vote if we only think that the substantive
11:07 law should be applied to actions done?

MR. GILSTRAP: You vote against.

MR. BOYD: You should do vote number two before you do vote number one. That's what they're saying.

11:07 HONORABLE CARLOS LOPEZ: I agree with you.

HONORABLE SARAH DUNCAN: I don't think you could vote.

MR. BOYD: All or piecemeal first and then --

CHAIRMAN BABCOCK: Do you want to do that, Richard?

MR. ORSINGER: I'd prefer to do that.

CHAIRMAN BABCOCK: All right. Richard is the subcommittee chair. He prefers to do that.

11:07 PROFESSOR DORSANEO: What is "that"?

MR. ORSINGER: We are going to vote whether you should differentiate between the truly procedural changes and the substantive changes for purposes of the effective date. So you vote, if you want everything 11:07 procedural or substantive to be controlled by one effective date, this is your vote.

HONORABLE TOM GRAY: So we are now acknowledging that the rules do affect substantive law?

MR. ORSINGER: The House Bill 4 components 11:08 of this Rule I'm not going to tell anybody that it's not substantive. I haven't heard anyone here say that it's procedural.

PROFESSOR DORSANEO: I'm not sure what it is.

11:08 CHAIRMAN BABCOCK: Well, it's a hybrid.

MR. BOYD: Without regard to whether it's technically substantive or procedural, do we want to take each of these issues substantively for purposes of deciding an effective date, or do we want to take them all together as one?

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: And let me just say there is only going to be two categories, because we're not going to have 15 or 20 different choices here. There's two changes that are substantive and all the rest are procedural. And this is a vote on the House Bill 4 attorney fee calculation stuff in my opinion.

11:08

11:08

CHAIRMAN BABCOCK: So basically how many people want to have two effective dates, two different effective dates as opposed to one effective date? Would that be a good way to say it?

MR. ORSINGER: I believe that's our choice.

CHAIRMAN BABCOCK: Okay. How many people are in favor of having two different effective dates? Raise your hands. How many are opposed to having?

11:09

MR. GILSTRAP: Are in favor of one.

CHAIRMAN BABCOCK: Are in favor of one. It's a pretty close vote; but the in-favor-of- ones and opposed-to-twos are 14 and the twos are 12.

11:09

MR. YELENOSKY: Say that again.

HONORABLE SARAH B. DUNCAN: That was really unclear.

CHAIRMAN BABCOCK: The vote was 14 to 12. 14 people wanted to have one effective date.

11:09 MR. YELENOSKY: If that date is 12/31 and not 9/1.

CHAIRMAN BABCOCK: Right.

MR. YELENOSKY: That's why we voted for it.

CHAIRMAN BABCOCK: Well, there's no way to 11:09 do this. There is no way to do this. All right. So let's move on to the next one. Actions versus proceedings, would that be the next one, Richard?

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Okay. Let's take the 11:10 subcommittee Rule and say all those who want the Rule to be effective only with respect to actions commenced on or after a particular date.

MR. TIPPS: This is assuming we only have one date based on our earlier vote?

11:10 CHAIRMAN BABCOCK: We just have one date. So it's going to be "a" date. We don't know what that date is yet. That's the third vote. All right. We're voting on actions, because that's in the subcommittee proposal. All those in favor of "actions" raise your 11:10 hand. All those in favor of "proceedings." By a vote of

23 to four it's "actions."

All right. Now all those who want September 1, because that's in the subcommittee proposal; and the other choice I think is December 31.

11:11 MR. GILSTRAP: I guess the third choice might be the date that the Supreme Court says that the Rule becomes effective.

MR. ORSINGER: Which can be no later than 12/31.

11:11 MR. GILSTRAP: Which can be no later than 12/31. I think that may be a little more palatable.

MR. BOYD: Well, that's the alternative to September 1 or December 31?

CHAIRMAN BABCOCK: I heard a consensus for 11:11 December 31 frankly.

MR. BOYD: My vote would be for the very earliest date that the Court can adopt the Rule, formally adopt the Rule.

CHAIRMAN BABCOCK: You're a September 1 guy then.

MR. BOYD: If that's September 1. And then but otherwise if it's September 15 or whatever it may be.

CHAIRMAN BABCOCK: The earliest, sometime in September.

11:11 MS. SWEENEY: I think we vote three options,

Chip, based on the comments.

CHAIRMAN BABCOCK: Yes.

MS. SWEENEY: Earliest practicable, September 1 or December 31st, those are the only three options. Let's just vote on it.

CHAIRMAN BABCOCK: Okay. You know that the earliest is September 1, because you can't do it any earlier than that. And we know the latest is December 31, because the statute says you can't do it any later than that, so there is some time in between there. So I suppose if people want to split it into three votes, we could do it that way.

MS. BARON: I just want to point out it's always better to have a notice and comment period if you can have it. And I do think that it's important that the Bar get to see the Rules before they're adopted and comment on them in a way that is meaningful. And September 1st would not permit that to happen.

CHAIRMAN BABCOCK: That's been discussed.

MR. BOYD: I agree with that; but --

CHAIRMAN BABCOCK: We have talked about this issue.

MR. SOULES: We haven't really talked about this issue at all.

(LAUGHTER.)

MR. SOULES: There are cases that are settled where preliminary settlements have been approved. Notices have gone out to class members and the settlement classes and the final hearings are set in September. It will close those cases up that involve coupons, and the attorney's fees are already agreed.

CHAIRMAN BABCOCK: So you're a December guy.

MR. SOULES: If you back this up to September 1st, what in the world happens to those cases?

(Multiple conversations.)

CHAIRMAN BABCOCK: Hold on. The court reporter can't get mumbling.

MR. GILSTRAP: We voted to have it apply only prospectively.

MR. ORSINGER: Right. But we don't know the Supreme Court is going to do that, so I think Luke's concern floats here.

CHAIRMAN BABCOCK: All right. Harvey.

HONORABLE HARVEY BROWN: Something like "60 days after the proposed Rules have been published in the Bar Journal," something that allows for at least some time period for people to be aware, but doesn't make the Court go all the way to December 31st if it doesn't elect to do so.

CHAIRMAN BABCOCK: I think what I'm hearing

here is that there may be some middle ground between September 1 and December 31, and some people would like to vote for that.

HONORABLE CARLOS LOPEZ: I'd vote for on or before December 31; and that's it.

HONORABLE DAVID GAULTNEY: Following notice and comment.

CHAIRMAN BABCOCK: Do you want to do it that way? Have September 1 as one vote and then on or before December 31? It's what the statute says.

MR. GILSTRAP: Yes.

CHAIRMAN BABCOCK: Okay. All right. Let's do it that way then. The subcommittee proposal is September 1, so let's frame it in that way. All those in favor --

MR. GILSTRAP: But that's not the subcommittee's proposal. That's just --

MR. ORSINGER: The subcommittee took no position.

MR. GILSTRAP: It wasn't the subcommittee's position.

MR. ORSINGER: We just changed the date there so that people could see what it would look like.

CHAIRMAN BABCOCK: Okay. I'm sorry.

MR. ORSINGER: We really we were so divided

we could not make a recommendation.

CHAIRMAN BABCOCK: All right. So the subcommittee has no recommendation. Do you want to vote first on "on or before December 31" or "September 1"?.

11:14 MR. ORSINGER: On or before December 31.

CHAIRMAN BABCOCK: On or before December 31. All right. Everybody in favor of on or before December 31.

HONORABLE JAN P. PATTERSON: How about 11:14 October 12?

(LAUGHTER.)

MR. ORSINGER: How about Halloween?

(LAUGHTER.)

CHAIRMAN BABCOCK: Those who are against 11:14 that; and the default I guess would be September 1. The lonely dissenter. 26 to one. So on or before December 31.

Justice Hecht, while you and Justice Jefferson were out playing --

11:15 HONORABLE NATHAN HECHT: You screwed it up?

(LAUGHTER.)

CHAIRMAN BABCOCK: Screwed it up.

MR. ORSINGER: Since Justice Hecht wasn't here, the "on or before December 31," we concluded that 11:15 the statute said that it couldn't be applied to lawsuits

filed before September 1. Did we not conclude that? So that before December 31 --

HONORABLE NATHAN HECHT: Why did you conclude that?

MR. BOYD: Well, we didn't conclude that. But we voted that it should not apply.

MR. ORSINGER: Yes. Let's clarify that for a minute.

CHAIRMAN BABCOCK: Let's see if we can summarize our vote. The first was that the effective date that we recommend, whatever that is, should apply to all provisions of the new Rule and not just to some of them, although that was a close vote of 14 to 12.

The second thing we voted on was that, as the draft language says, it should be with respect to "actions" and not proceedings. There was some sentiment in the committee that it should, that the Rule change, the effective date of the Rule change should capture pending cases and not just newly filed cases; but that -- we didn't vote that. We voted that it should be to actions, with respect to actions commenced on or after. And that would be the effective date of the Rule, which we voted the effective date of the Rule should be on or before December 31, 2003.

And there was sentiment in the committee that there

ought to be a comment period, since we are so drastically changing things, including the economics of class action practice, so that people who are either going to get into a class action or -- I guess people going to get into a class action need to know what they're getting into so that they have adequate notice about the rule. Is that a fair summary of what we just did?

MS. SWEENEY: Yes.

CHAIRMAN BABCOCK: Okay. Let's take a break.

(Recess 11:17 to 11:42 a.m.)

CHAIRMAN BABCOCK: Okay. Should we get back at it? I didn't realize this; but apparently because there are so many more people that have attended this session that the table is longer, and so people at that end can't hear people down here and we can't hear you sometimes from down there. So with the exception of Dorsaneo, of course, everybody speak louder. Bill, you're fine. You're at the right level from talking to all those students all the time.

(LAUGHTER.)

PROFESSOR DORSANEO: Thank you.

CHAIRMAN BABCOCK: Actually it was Chris' line I just stole from him. Okay. Let's get back to it.

MR. YELENOSKY: Could we ask for a courtesy?

We are almost on this door back here. Every time somebody goes out the door and lets it swing back it bangs in our ears. And so if you would please close the door softly behind you, we'd appreciate it.

11:43 CHAIRMAN BABCOCK: Teach you to sit down there.

(LAUGHTER.)

MR. YELENOSKY: I'm happy to move; but then I'd be closer to you.

(LAUGHTER.)

MR. ORSINGER: My suggestion is that we take up Bill Dorsaneo's language on what the certification order should contain. We touched on it yesterday. Bill wrote it overnight and had it typed, and it was

11:44 distributed just recently. Bill, would you?

PROFESSOR DORSANEO: Does everybody have one of this one-page sheet (indicating)? Okay. Let me tell you a little bit about what I did. I went to school on what people said yesterday, particularly looking with some

11:44 care at the language that is on page three of the committee draft, repeating what our current Rule says about (b)(4) now (b)(3) actions, which is taken I believe verbatim from Federal Rule 23.

The first thing I noted is that in contrast with

11:45 (b)(1) and (b)(2) actions the (b)(3) provision talks about

findings. "The Court finds that the questions of law or fact common to the members," et cetera, which does suggest that even sometime back for (b)(3) actions it was contemplated that some sort of pencil-to-paper approach would be taken to the analytical process. And that's what Jeff Boyd was talking about yesterday when he said the Rule has findings requirements in it already, and what I had drafted didn't match that; and he was exactly right.

So I concentrated on what (b)(3)--

MR. BOYD: Did you get that down?

COURT REPORTER: Yes.

PROFESSOR DORSANEO: -- says somewhat vaguely and recast that in the language of the Texas Supreme Court opinions in crafting this paragraph (d). Now in contrast to what I had the other day, which was an attempt to perform that same task, I think that it should be noted that, for example, *Henry Schein* says, like Judge Bland said, that Rule 42 does not require adoption of a trial plan in so many words by that name set out in a separate document. The Rule requires a rigorous analysis and a specific explanation of how class claims are to proceed to trial.

I'm breaking that down in terms of what the cases say and to try to develop a process. Really we're talking about a rigorous analysis that has particular steps, what

I think Judge Peeples was talking about; and then in addition that, in addition to that or as an extension of that a plan giving a specific explanation of how class claims, quoting *Schein*, are to proceed to trial.

11:47 Now I'm not sure exactly what the *Schein* opinion means by "class claims"; but I'm thinking of that as meaning all of the claims made in this class action. Perhaps it means only the common questions; but it's at least not the same sort of terminology. So that's -- that

11:48 was my starting point; and that only took about an hour last night to get started.

But following the same approach, that is to say providing this specificity in this drill only for 43(b)(3) cases my thought is that it should work like this: "The

11:48 certification order must state the elements of each claim," and I have in brackets there "[cause of action]," because we tend to use the term "cause of action." I don't think it makes any particular difference myself whether it's "claim" or "cause of action" or "defense."

11:48 And recognizing that we have both denial defenses and affirmative defenses I don't think we need to say "affirmative defense" here. I think it's clear enough. So you start out by identifying the elements of each claim or defense asserted in the pleadings.

11:49 And after that's done the issues of law or fact

common to the class members are identified, and any issues of law or fact affecting only individual class members are identified. Now again, if you put the (b)(3) language, what we're now calling (b)(3) adjacent to this, you can see that they match. The (b)(3) provision talks about questions of law or fact common to the class members, and it does say "any questions of law or fact affecting only individual class members." So we have that process worked out.

11:49 And then the next question would be what are the predominating issues? And the definition of predominating issues in *Bernal* and *Schein* and a number of cases are the issues that will be the object of most of the efforts of the litigants and the Court. And that's verbatim out of those cases.

Then I'm shifting gears a little bit to a superiority type analysis. And again, if you look back at (b)(3), you would see something else that needs to be taken into account is whether there are other available methods of adjudication for the controversy. (B)(3) talks about them being, other methods that are available to the fair and efficient adjudication of the controversy; but in my own mind I have to know first whether there are any available methods of adjudication that are alternatives. And then the next step would get me to be thinking about

whether they're better methods.

So I've gotten all of this worked out. And then to me the process would logically work like this under the cases: "In addition if the Court determines that the 11:51 common issues predominate over any questions affecting only individual members, the certification order must explain specifically why the issues common to the members of the class predominate over individual issues, why a class action is superior to other available methods for 11:51 the fair and efficient adjudication of the controversy, and," and this is the specific trial plan part, "how the class claims and the issues affecting only individual members can be tried in a manageable, time efficient and fair manner."

11:51 And that's my attempt at working this through a process that is understandable. It could say more. I don't think it should say less. You could also finish it off by saying what the outcome is if you wanted to. I don't know whether that's necessary; but this is the best 11:52 I could do before the evening finished last night.

CHAIRMAN BABCOCK: Bill, really nicely done. Stephen.

MR. TIPPS: I thought it was well done too. I have a question, Bill. With regard to the second part 11:52 that is predicated on the clause, "If the Court determines

the common issues predominate," is the Court going to issue a certification order under (b)(3), would it not necessarily have come to that conclusion?

PROFESSOR DORSANEO: Well, that might mean I'm taking "certification order" to mean an order granting or denying certification.

MR. TIPPS: Okay.

PROFESSOR DORSANEO: It might be better to say "The order granting or denying certification must state." But then I thought "Well, if it is going to deny certification, why would you necessarily have to go through all that trouble?" But this is a two-way street. I mean, you can appeal it either way. So that was my thinking, Stephen.

MR. TIPPS: Okay.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: I think, like Stephen said, I think you can take out the parenthetical between the commas because (d) contemplates "for any class certified" at the top.

PROFESSOR DORSANEO: Oh, yes.

HONORABLE JANE BLAND: So you could just put "In addition, the certification order must explain specifically."

COURT REPORTER: Say that one more time,

what your suggestion is with the punctuation.

HONORABLE JANE BLAND: Just to delete the parenthetical between the commas. Just "In addition, the certification order must explain specifically." Because 11:53 if the Court determines that the common issues predominate over any questions affecting only the members clause, I think it's unnecessary, since you don't get to (d) unless, you don't get to the requirements of (d) unless it's a class that has been certified or that the trial Court has 11:54 ordered be certified.

PROFESSOR DORSANEO: And it wouldn't be better to change the "or any class certified" up at the top. I don't think it loses anything.

HONORABLE JANE BLAND: I think it would be 11:54 good to leave (d), the top part alone, and then just take out that extra clause.

CHAIRMAN BABCOCK: Yes, Jeff.

MR. BOYD: Or for simplicity sake, take out that entire two-line interruption in the list.

11:54 PROFESSOR DORSANEO: It might be good to do that.

HONORABLE JANE BLAND: Yes.

MR. BOYD: "The certification order must state," and then just list them. And I have a couple of 11:54 other suggestions. I also think Bill obviously did a

great job here; but what I'm -- you know, the purpose of this is to enable, twofold: Number one, to make sure that the trial Court has truly and thoroughly analyzed these; but second, enable better review on appeal. I don't think it's to make it harder necessarily to certify in terms of the work burden.

11:55

This number (3) listing any issues of law or fact affecting only individual class members, it makes me think of federal court practice where you've got to sit down and list every single issue you can think of that may come up. And this is going to happen early in a case where the burden of trying to list any issue of law or fact affecting only individual class members may be a great burden. Whereas all that really matters is what are the common issues that affect everybody where the answer as to one is answered as to all and comparing those to the obvious individual issues. There may be other individual issues out there; but for the obvious ones that the Court can see at the time. So I wonder. It's a long way of saying I wonder if (3) ought to be in there. And then (5), I wonder if that couldn't just be wrapped into (7).

11:55

11:55

11:56

PROFESSOR DORSANEO: Let me take the (3) first. I think that technically you're right. The cases tend to talk about these individual issues on a non person-by-person basis. They talk about reliance, for

11:56

example. That's an individual issue. We're not talking about "Mary Jones" by that name. It might be better to say "any issues of law or fact that are not common to the class members" or to say something like "affecting only
11:56 individual class members or groups of class members," something like that; but I don't know.

MR. SOULES: How about "any identifiable issues of law or fact"?

PROFESSOR DORSANEO: I would rather do it
11:57 the issues of law or fact that are not common than the ones that are common myself. I don't -- what I tried to do is to be faithful to the (b)(3) language, which is I don't know which way is a better way. And I understand exactly what you're saying. Nobody really thinks that
11:57 they have to write down for each individual class member. They don't even know who these people are.

CHAIRMAN BABCOCK: What do you think, Mike?

MR. HATCHELL: What I think is that (3) is extremely important. And whether or not you tinker with
11:57 the language or not is inconsequential to me; but (3) is what drives the trial plan. The trial plan needs to deal with these individualized issues and explain how the hell they're going to be tried in a way that doesn't overwhelm the common issue, so it's got to be in there in some way.

11:57 HONORABLE JANE BLAND: I agree with Mike;

and I think it's important for the trial Court to weigh in its predominance analysis what these individual issues are; and one way to do that is to make the trial Court include those in the order, and that puts the trial Court's focus on the issue.

In addition the party opposing the class is always going to come forward, at least in my experience, has always come forward with the problems associated with individual issues and trying them. And I wouldn't expect that anyone would expect the trial judge to have to go outside the record and think of individual issues that haven't been brought to his or her attention. So I would guess that the issue will be joined for the trial Court and the trial Court won't be unaware that these individual issues are all there. This Rule will help that trial judge know that you have to review individual issues in connection with analysis of class certification, and if you don't, your order is not valid.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: I'd along those lines suggest some changes to subparagraph (8). And I would propose it read "how" and then insert "any individual issues raised by the class claims and defenses will be tried in a meaningful, time efficient and fair manner."

CHAIRMAN BABCOCK: Okay. Change "can" to

"will."

MR. DAWSON: Yes. But I would add that "any individual issues raised by the class claims and defenses will be tried."

CHAIRMAN BABCOCK: Bill, can you hear what he is saying?

PROFESSOR DORSANEO: He has a deep voice. So could you say it again, Alistair?

MR. DAWSON: Sure. I would have it read
11:59 "how any individual issues raised by the class claims and defenses will be tried in a manageable, time efficient and fair manner."

MR. BOYD: And delete the part about the issues affecting only members of the class?

12:00 MR. DAWSON: And then delete the part that says "the class claims and the issues affecting only individual members."

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: If I understood that
12:00 correctly, haven't we said the trial plan doesn't have to include a plan on how to try the common questions? Didn't you just say the trial plan has to include only the uncommon questions?

PROFESSOR DORSANEO: Yes. I thought he did.
12:00 I don't mind the change; but I think we need to have, and

I used the term "class claims" in here myself to mean common questions; but I think the trial plan has to include that. We focus on the trial plan not dealing with the individual issues, because a lot of the trial plans we 12:00 see that are inadequate just ignore those as if they don't exist and identify some sort of a generalized issue that is it; but I think it has to be both.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: And you don't want 12:01 an argument or, more of an argument than there already is of what is individual and what is class. Obviously a trial judge who certifies a class may think that the fact that it's going to have to apply different law for claims depending upon the residency of the class member is not an 12:01 individual issue. It's a common issue. And so I mean, you don't want any unnecessary arguments about what is individual and what is class. Do you see what I mean?

PROFESSOR DORSANEO: (Nods affirmatively.) So you want them both in there, class and individual?

HONORABLE NATHAN HECHT: Well, I'm just saying whatever you do I wouldn't -- those terms are not clear without dispute or argument in a class action.

MR. ORSINGER: Why don't we just, say, say "how the issues of law and fact can be tried" and not 12:01 bother to force the differentiation?

MR. SOULES: I think the purpose of this is to force the differentiation. We could say "how the common claims" and then pick up what Alistair was saying, "and any individual issues raised by the claims." Or you could have "how the common claims and individual issues" -- I'm not going to put a lot of other words in there -- "that can be tried effectively."

CHAIRMAN BABCOCK: Is that a crystal ball, or what is that?

MR. SOULES: Yes. Exactly.

(Laughter.)

HONORABLE DAVID GAULTNEY: Why can't it simply say "how the claims and defenses will be tried in a manageable, time efficient and fair manner"?

MR. SOULES: Because the purpose of this is to cause there to be a differentiation and a weighing of those two and can they be blended so as to be tried together. It's to create that analysis rather. And I think that the language just suggested doesn't force that analysis. It's broader. It could be used as a way to escape from making that analysis.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: I would I guess modify my earlier proposal to say "how the issues of law or fact raised by the class claims and defenses either can or will

be tried in a meaningful, time efficient and fair manner."

PROFESSOR DORSANEO: I like it the way I had it, which is probably understandable, since I spent some time doing it this way. It could be done in some different way. I think, although I didn't have *Bernal* --

(Ms. Sweeney enters conference room. Door sounds.)

MS. SWEENEY: Sorry.

(LAUGHTER.)

12:03 HONORABLE NATHAN HECHT: The culprit is back in the room.

PROFESSOR DORSANEO: Let the record reflect there is a disturbance, back of the room.

CHAIRMAN BABCOCK: Right. Banging the door.

12:03 PROFESSOR DORSANEO: This language, I think "manageable, time efficient and fair manner" comes from the *Bernal* opinion on 22 SW 2d on page 434, I think.

CHAIRMAN BABCOCK: Just a guess. Right?

PROFESSOR DORSANEO: No. There is other

12:04 language there that might be better language. The focus of it tends to be on the individual issues; but I do think it needs to say "the class claims or the issues of law or fact common to the class members," which could be said that way. Or it could be said "class claims, common

12:04 claims" and then make it clear that we're also talking

about the individual issues which could be issues affecting only individual members or some other jargon, and that both of them need to be in a plan showing that they can be tried, will be tried in a manageable, time efficient and fair manner to pick up other language in *Bernal* without sacrificing the substantive rights of the parties. I didn't have *Bernal* so I didn't add that in.

And that may be getting a little bit too aggressive in the articulation of the standard that needs to be met; but it is something like this. And this is my effort at saying what should be done; and I've just tried to say what else could be done to make it worded differently, but to have essentially the same meaning which I believe is the meaning that the Supreme Court opinions, Texas Supreme Court opinions have been giving current Rule 42.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: Conceptually I agree with what Bill said, though I would add "defenses" to this as well.

HONORABLE TOM GRAY: My suggestion rather than adding in "defenses" is if you took "class claims" and made it as common issues, you picked up the defenses I think by it.

MR. DAWSON: I don't agree. I don't necessarily agree with that.

HONORABLE TOM GRAY: Okay.

MR. DAWSON: I mean, there are affirmative defenses that can be raised that may raise individual issues.

PROFESSOR DORSANEO: I don't have any problems with adding "defenses." I think there are some Texas cases that say that defenses are somehow out of the picture. I think that's completely out of step with the jurisprudence nationwide and that just needs to be changed. If the Court doesn't think that's so, then they can leave "defenses" out in the draft that they approve.

CHAIRMAN BABCOCK: Okay. Good point. Any other comments on Bill's proposal here? Yes, Stephen.

MR. TIPPS: One comment just goes back to what we were talking about initially. I agree with Jeff that if these requirements are to be applicable only if a class is actually certified, that we ought to take out the "in addition" sentence.

CHAIRMAN BABCOCK: I think we have agreed to take that out.

MR. TIPPS: But with regard to Bill's comment that there might be some benefit served by requiring the trial Court to make at least some of these findings even if it decides not to certify for purposes of facilitating appellate review, then you could leave the "in addition" sentence in and simply change the beginning

to say "An order granting or denying certification under Rule 42(b)(3) must state." So I'm not sure whether we're trying to achieve that goal as well or not.

PROFESSOR DORSANEO: Well, it is true, as Stephen says, that it might well be that the defense of an order denying certification would be -- that both parties would be aided by the determination of these matters whether there is an order denying or granting certification?

12:08 MR. TIPPS: The question is whether we want the Rule to be applicable only when classes are certified, or do we want it also to be applicable to the denial of a class certification?

PROFESSOR DORSANEO: That would be my -- 12:08 that's what I thought I was doing yesterday; but I was only thinking that about three quarters of the time when I was doing it.

CHAIRMAN BABCOCK: Well, how do we want to fix that if that's what we want to do?

12:08 PROFESSOR DORSANEO: Well, what would be done is you could change the opening, "for any class certified under Rule 42(b)(3)" to something like "For any" --

MR. TIPPS: My language is "An order 12:08 granting or denying certification under 42(b)(3) must

state."

PROFESSOR DORSANEO: That would be fine.

MR. TIPPS: And then you leave in the "in addition," because that's dependent upon a decision to
12:08 certify or a decision that there is predominance.

MR. DAWSON: Or you could change "why"s to "whether"s and then you could take out the "in addition" language.

COURT REPORTER: Say that one more time, Alistair.

MR. DAWSON: You could change the "why" in (6), (7) and (8) to "whether."

PROFESSOR DORSANEO: That would be true as well.

12:09 MR. BOYD: Well, almost. "Why" is yes or -- I mean "whether" is yes or no. "Why" asks for explanatory reasons. So what you do is you change "why the issues common to the members of the class do or do not predominate."

12:09 PROFESSOR ALBRIGHT: But why don't you want, if they're denied class actions, why do you not want them to explain why they denied the class action?

MR. BOYD: I do. That's why I'm saying that instead of like, for example, subparagraph (6) if you
12:09 change "why" to "whether," then you have just got a yes or

no answer. And I'm saying leave "why," but add "do or do not" before "predominate."

PROFESSOR ALBRIGHT: And then take out that sentence?

12:09 MR. BOYD: And take out that interruption sentence.

PROFESSOR ALBRIGHT: And so you'd do all of these in every order?

MR. BOYD: And you'd have to do that with 12:09 each one of these subparagraphs. (1) you wouldn't have to change. (2), I guess you would say "any issues of law or fact common to class members."

PROFESSOR DORSANEO: Yes.

MR. BOYD: Like (3). (4) --

12:10 CHAIRMAN BABCOCK: That's a lot of work if you're denying a class.

MR. BOYD: It is.

CHAIRMAN BABCOCK: What do you think, Judge Sullivan?

12:10 MR. SOULES: I'd like to weigh in on that. The trial judges without clerks and so forth, like they are in the federal system, I would like the trial judges to weigh in on all this explanation if the class is denied.

12:10 CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE KENT SULLIVAN: I'm just waiting to get to the appropriations part of this.

(LAUGHTER.)

MR. BOYD: As a defense lawyer I'd be happy to draft the order for the judge who is going to be willing to sign it.

MR. LOW: Just like a Charge.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Yes. I agree with that. This is no more burdensome than findings of fact and conclusions of law after a trial. You just tell the winner to draft them.

On paragraph (5) I don't like the "whether" there, because I think you may get back a yes or a no and would rather state, just say "other available methods of adjudication that may exist," because if you just want to know, if you ask them whether they exist, they may say "yes" and not tell you what they are. That doesn't help you.

MR. BOYD: That was the other point I was starting to make when we decided to focus on (3). And that is that number (7) basically forces you to answer number (5). So you can just delete (5) and go with (7) only, just "why a class action is superior to any other available methods."

MR. ORSINGER: Well, to me they are slightly different. And maybe we don't want to know what other methods are available; but remember, we're forcing the lawyers and the judges to go through a thought process in this Rule. And do we want someone to go to paper with what the alternatives are? "Even though they're being rejected, what other methods are there?" "The following four; and then in number (7), why I think a class action is superior to those four."

If you just ask why the class action is superior to other available methods, you're going to get a rote recital of why class actions are good and you'll never even know what the alternatives were that were rejected.

MR. BOYD: So how about if we made (7) say starting with the introductory sentence at the top, "A certification order must state any other available methods for the fair and efficient adjudication of the controversy and why a class action is or is not superior to such methods"?

MR. ORSINGER: I don't see a compulsion to combine the two. I mean, why not just have them lay out while they're laying things out the alternatives they considered and then at the end ask them to justify their ruling between the alternatives?

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I'm really struggling with the benefits of requiring the trial Court to do these things when the trial Court denies the certification. I guess I'm struggling with it because my recollection is the standard of review on appeal is abuse of discretion. Right? And I can think of no circumstance in Texas jurisprudence where the appellate court has said the trial court should have certified the class.

MR. SOULES: The court of appeals has done that.

HONORABLE LEVI BENTON: And of course I know we could argue about whether or not the reviewing courts are really undertaking an abuse of discretion standard. That's a whole 'nother discussion for another day. But If it's an abuse of discretion standard, it just seems like a lot of work for naught. So I would urge that the work not be required if the trial Court decides to deny the request for certification.

CHAIRMAN BABCOCK: Yes, Judge Peeples.

HONORABLE DAVID PEEPLES: On the issue of whether you ought to have to give all this detail if you deny certification, I think that depends upon what are the reasons for making it be detailed. If you want to facilitate appellate review, I can see how either way you would want to do it. But there is a second reason that I

think argues in favor of doing this if you certify it, but not if you deny it. And that is I think we want judges before they go down this road to think about what that road is going to look like. And if you're going to
12:14 certify, yes, you're going down the road; but if you deny certification, you're not. And so why do you have to describe the road you didn't take? So I would say and I am just questioning why we would want (d) to be done when you deny certification.

12:15 CHAIRMAN BABCOCK: Because Hatchell wants to attack your order. What do you think, Mike? What do you think about Judge Benton and Judge Peeples' point?

MR. HATCHELL: Oh, goodness. I certainly think that from the standpoint of judicial economy that
12:15 they both make a good point; but I guess from the standpoint of fairness I'd have to say because it is an appealable order and because cases have been, you know, taken up to the appellate court from the denial of certification, that fairness dictates that we ought to
12:15 give the appellate court the road map in the same way so that they can discern whether or not discretion was properly applied.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: These cases come up
12:15 infrequently. And so I don't think it's going to be a

drain on a trial judge, you know, 98 percent of the time; and I think even if you decide not to go down the road of class action, in many instances you're contemplating another result like a mass action , for example, with 1500 individual plaintiffs. And I think it is important to consider those alternatives; and I don't think it's unduly burdensome given the infrequency with which these cases arise.

CHAIRMAN BABCOCK: Buddy and then Richard and then Carlos.

MR. LOW: In keeping with what David says, I mean, the judge has to go down that road, so it's not a question. He's got to go down it whether to find out whether he's going to grant it or not. So he's been down the road and he knows the reasons, so I don't think it's an imposition for him to state in both cases why, because he's gone there. He's gone through every element.

CHAIRMAN BABCOCK: Okay. We went Richard and then Carlos and then Judge Gray.

MR. ORSINGER: On paragraph (8) we probably don't want the trial Court to hypothetically state a trial plan for a class action that wasn't certified. Can we consider not requiring number (8) and just say "and where a class is certified how the claims would be tried"?

PROFESSOR DORSANEO: We could put that. We

could put the "if the Court determines" in front of "that" if we don't put it in front of anything else. That would make sense.

MR. ORSINGER: I mean, rather than if they determine all these things, why don't we just say "if a class is certified." Isn't that what they do? Don't they certify a class? Can't we just shorten it by saying "and if a class is certified, how the class claims."

12:17

PROFESSOR DORSANEO: Yes. That's what I just said.

12:18

MR. ORSINGER: No. You said "if" and then started having the standards for when a class could be certified. I'm talking about --

PROFESSOR DORSANEO: I'm happy with what you just said.

12:18

MR. ORSINGER: Yes.

(Conference door slams.)

CHAIRMAN BABCOCK: We just had a door violator. Carlos.

(LAUGHTER.)

CHAIRMAN BABCOCK: Carlos, did you want to make a comment?

HONORABLE CARLOS LOPEZ: Yes. Richard took us in a different direction. I just was going to echo what the judge said. I mean, the first thing I'm going to

12:18

do if I deny it is I'm going to ask the defense to draft the reasons why I denied it just like findings of fact and conclusions of law. So I'm not sure it takes any more time for the trial judge. I don't know how it affects the work on the appellate side of it to have to analyze what the judgment is as opposed to simply have to decide without that. So I don't know about that because I haven't done that; but as far as the judge's schedule I'm going to ask the defense to draft that.

CHAIRMAN BABCOCK: Yes.

HONORABLE TOM GRAY: Chip.

CHAIRMAN BABCOCK: Yes. I'm sorry, Justice Gray.

HONORABLE TOM GRAY: There was we had a case that kept recycling through our court. It would get certified, we would bust the certification, they'd send it back; and that happened two or three times. And I don't know really how this would affect it. I would like the input of the trial judges on would it be more likely that it would not get appealed when it's denied and in effect the plaintiff tried to fix the problems with the class certification with an explanation or without an explanation. And I just don't know. I mean, how would that affect the dynamics of fixing the problems before it comes up to us on the appellate level? Any thoughts on

that?

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: One would think if somebody would try to fix it, that would make sense to me rather than going upstairs and going back down again.

HONORABLE TOM GRAY: But is the itemization going to help fixing it or is it going to simply trigger the appeal? I don't know. Any ideas?

HONORABLE JENKINS: Well, as a practical matter it would seem to narrow the issues down so that the other side could fix it, just as a practical matter. "Here's why we are denying it," which is giving you an indication of what you need to do to fix it. And if it's fixable, maybe they can fix it. It does narrow the issues.

CHAIRMAN BABCOCK: Okay. Any more comments about this proposal? I think we --

MR. ORSINGER: I'm wondering if we could get Stephen to read his amendment to the beginning of the whole section again. It went by so fast I didn't get it down. He was going to write it in such a way it applied to both granting and denial?

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: Did you get that?

CHAIRMAN BABCOCK: I didn't get it either.

Stephen.

MR. TIPPS: I think one way to do that would be to change the opening sentence to read "An order granting or denying certification under Rule 42(b)(3) must state:" And then if we wanted -- and then to deal with the fact that an order denying certification presumably would not find that common issues predominate, we could either leave the "in addition" sentence in, or we could change items (6), (7) and (8) to "why" or "why not" or "did or did not" so that they're in the disjunctive.

PROFESSOR DORSANEO: Yes. Some of that is on the paper that I threw away last night.

(LAUGHTER.)

CHAIRMAN BABCOCK: Okay. Any other comments about that? Yes. Carl and then Jeff.

MR. HAMILTON: Well, Rule (b)(3) has four subdivisions (a), (b), (c) and (d) that seem to require additional findings which we haven't included. And I'm not sure whether we ought to or whether we ought to just say "In addition to the requirements of 42(b)(3)(a), (b), (c) and (d) the order must state:"

PROFESSOR DORSANEO: If you look at 41(b)(c)(3) on page three, what Carl is talking about are the matters pertinent to the findings. And again, to make this all work, if we decided to go with this (b), I would

change (b)(3) so that it doesn't talk about findings, just so that it talks about the standards for a (b)(3) action. I would eliminate "If the Court finds that" from the beginning and just begin "The questions of law or fact
12:22 common to the members of the class predominate over any questions," et cetera, and I would say "the matters pertinent to the" -- I have "determination" here; but I don't know whether that's right. And then there are the (a), (b), (c) and (d).

12:23 I think those could be the subject of subdeterminations. And really the reason why I didn't put them over here in (d) is that, one, I wasn't sure I had to do that mechanically; and two, they are in (b)(3). And I didn't know whether that was necessary to be that
12:23 repetitive.

I'm not sure that Carl is not right, that it shouldn't be engineered to be obvious that we're talking about two things that need to work together, improving the current Rule. And I think the current Federal Rule would
12:23 be improved if they followed the same thing by separating the standards for certification from what the order needs to say about the process. So I'm open to suggestion on that. It probably could be repeated in (d), or maybe there could be just a reference considering the matters
12:24 pertinent, considering the pertinent matters as provided

in the other thing. Some sort of a reference can be worked out if people think it's necessary; but I don't know whether I can do it right this minute.

CHAIRMAN BABCOCK: Jeff.

12:24 MR. BOYD: Quickly on that point, (b)(3)(a), (b), (c) and (d) fall within the analysis of these new subsection (6) and (7).

PROFESSOR DORSANEO: That's right.

MR. BOYD: And I think that just gives the 12:24 Court -- the appellate court should expect that some analysis of those subdivisions will be there within the order under (6) and (7). I don't know that we have to force that in there since it's already in the Rule.

CHAIRMAN BABCOCK: Justice Gaultney.

12:25 HONORABLE DAVID GAULTNEY: I'm not so sure about that. I think I would urge that we try to figure out a way to make these (a), (b), (c) and (d) into the order, because you have got such things as, you know, the extended nature of any litigation already commenced. I 12:25 think the trial judge should consider whether a case pending in some other state is further along and is better suited, or I think each of these factors are necessary and ought to be in the findings.

CHAIRMAN BABCOCK: Okay.

12:25 MR. BOYD: I had a different question.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: That would be a thing to be voted on.

MR. BOYD: But are we ready to move on to my different question about this?

CHAIRMAN BABCOCK: Well, if Bill thinks we need to vote on this.

PROFESSOR DORSANEO: Well, I just need to be told whether to put them in there or not and I'll figure out a way to get them in there.

MR. BOYD: What if we just do it by reference to the number instead of by repeating the language?

PROFESSOR DORSANEO: That's what I would do. Would that be all right, Judge?

HONORABLE DAVID GAULTNEY: That's fine. I just I would like to see in the order that I'm looking at whether he or she has considered these other, specifically how these factors have been figured in.

CHAIRMAN BABCOCK: Yes. Rather than having to repeat it, why don't you just refer to the Rule. Does that work or not, Bill?

MR. ORSINGER: You could have one at the end, "and any other factors under (b)(3)" or something, because there is a little bit of overlap there. You don't

want to say "the factors in (b)(3) and the following," because there is an overlap; but you could come down to the end of that and say "any other factors listed under (b)(3)."

12:26 CHAIRMAN BABCOCK: Does that work?

PROFESSOR DORSANEO: I'm not sure that's the best way to work it, because I'm looking at (a). And I think Jeff is right. We're really basically talking about the paragraphs (6) and (7) determinations; but I'm not 12:27 sure that we're talking about that exclusively. I hope so, because it would be easier to make the cross reference if that's so. I think that's probably so.

HONORABLE DAVID GAULTNEY: But there's also, you know, the desirability of being in this particular 12:27 forum. You know, I think these are factors that should be in the order; but I agree also there is considerable overlap. I would just urge that the trial judge be advised to include this analysis in the order. We're telling him or her what to state in the order. I think we 12:27 ought to include both of those factors.

CHAIRMAN BABCOCK: Could you say "in addition to the matters referenced in 42(b)(3)"?

HONORABLE DAVID GAULTNEY: That's fine.

CHAIRMAN BABCOCK: What about that, Bill? 12:27 Say --

PROFESSOR DORSANEO: That's kind of what I had in mind. But where did you want to put that?

CHAIRMAN BABCOCK: In the introductory sentence.

12:28 MR. HAMILTON: At the top.

MR. ORSINGER: The only problem is that some of these are the same; and so it creates kind of a --

PROFESSOR DORSANEO: I have to put it in the middle before I get to (6) and (7).

12:28 CHAIRMAN BABCOCK: Yes. That's back to where you were when we started this whole thing.

PROFESSOR DORSANEO: But I need to know also whether this goes both ways. Because if it goes both ways, then it makes it a little -- I think either way. Whether

12:28 it goes both ways, I want to add something in the middle before (6) and (7).

CHAIRMAN BABCOCK: Okay. That is something we probably should vote on, whether or not it should apply to denials as well as granting. Don't you think? Because

12:28 I don't sense that there is a clear consensus on that. So everybody in favor of this Rule going both ways, that is, applying to both grant and denials raise your hand.

MR. YELENOSKY: I'm writing names down. Can we have a record vote, Mr. Chairman?

(LAUGHTER.)

CHAIRMAN BABCOCK: All those opposed? 20 to six in favor of going both ways on this. So that's fairly decisive. And Bill, what else can we vote on to give you any direction or help?

12:29 PROFESSOR DORSANEO: You can take a vote on it; but I said I'm going to add "defenses" in (a).

CHAIRMAN BABCOCK: Right. We don't need to vote on that. That's clear.

PROFESSOR DORSANEO: And then what I'm going

12:29 to do is I'm going to add (a), (b), (c) and (d) as pertinent, you know, matters before (6) and (7). I think that's how it would work without repeating them by cross reference.

CHAIRMAN BABCOCK: Yes.

12:29 PROFESSOR DORSANEO: And then what I want to do, with the Chair's permission, is to modify (b)(3) such that it doesn't talk about findings, but so that it talks about what the standard is for (b)(3). I don't think (b)(3) when it talks about findings is well worded at this

12:30 point now anyway, because they're not really findings anyway.

CHAIRMAN BABCOCK: Okay. I think that works. Lamont.

MR. JEFFERSON: My concern about it, and the

12:30 reason I voted "no" against the last, voted "no" on the

last vote is the more we put it in the order and the more we require judges to find, the more discovery that is going to be necessary before you ever get to the certification hearing. And it seems to me that in some of these things, especially the extent and nature of any litigation concerning the controversy already commenced by or against other members of the class could be the subject of a lot of discovery.

CHAIRMAN BABCOCK: But isn't that already the law in the Supreme Court cases?

MR. JEFFERSON: Sure. I mean, it's not that the Court can't already consider it; but these things it's not that it's not a consideration. It's just how much are we going to open up discovery in order to get to the position where the Court denies a class, which is the appropriate thing to do in most cases anyway, I would think. I mean, I would think it is the extraordinary case where there ought to be a class; and to have all of these findings and all of the discovery necessary to get to these findings seems a little burdensome to me.

CHAIRMAN BABCOCK: Okay. Judge Bland you get the last word before lunch.

HONORABLE JANE BLAND: Usually the defendant takes the deposition of many class reps already in the case. And I mean, I think there is already a lot of

discovery that goes on; and I don't think it's going to add to the defendant's discovery burden to depose the class because there is less discovery going toward the plaintiff usually than there is towards the claims against the defendant.

12:31

CHAIRMAN BABCOCK: Let's try to hold lunch to 45 minutes today and come back at 1:15. And Richard, I need to see you and Jane and Pam. We need to figure out our schedule.

(Lunch recess 12:31 to 1:15.)

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CERTIFICATE OF THE HEARING OF

SUPREME COURT ADVISORY COMMITTEE

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I, ANNA RENKEN, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on the 22nd day of August, 2003, and the same were thereafter reduced to computer transcription by me. I further certify that the costs for my services in the matter are $ 1143.00 charged to Charles L. Babcock.

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

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