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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

January 27, 2012

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 27th day of January, 2012, between the hours of 9:04 a.m. and 5:16 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

11-04 Ancillary Proceedings Task Force proposals

12-01 Report of Task Force on Rules for Expedited Actions (1-25-12)

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CHAIRMAN BABCOCK: Welcome to the 72nd session of the Supreme Court Advisory Committee. We now have three-year terms, as everybody knows, but that's not always been the case, so this does not neatly divide into 24 different committees, but it is 72 years, and we're still going. You want me to talk louder?

MS. SENNEFF: Yes.

CHAIRMAN BABCOCK: Angie wants me to talk louder. For everybody who is new to the committee, back there, the woman gesturing is Angie Senneff, who is my assistant and helps coordinate this and runs the SCAC website; and everybody, of course, knows Justice Hecht; and traditionally here we have opening remarks from Justice Hecht; and after he finishes, I'll announce a few things of interest perhaps.

HONORABLE NATHAN HECHT: The -- this has been a very busy fall for the rules process because we have had so many directives from the Legislature, and all of them have proceeded along well, many thanks to the extra hours that you've spent in working on them. So the Court is greatly appreciative of the extra hours that were spent in the fall, and it's resulted in a good product.

On December 30th the Court promulgated new Rules of Civil Procedure 735 and 736 for expedited

foreclosures in order to meet a legislative directive to apply those to property owners association liens, but that prompted a revision of those rules, and so they're really redone from top to bottom. There was some number of comments about those rules, and how they -- whether they enlarge or not a property owner's foreclosure rights, property owners association foreclosure rights, so we'll continue to monitor those as they're used and see -- see whether they need to be changed.

On December the 12th the Court promulgated changes in a number of Rules of Civil Procedure having to do with returns of service, so that that can be done electronically. Again, per a directive of the Legislature. Also on December the 12th, the Court adopted Rule of Judicial Administration 16, which provides for additional judicial resources in certain cases. This, again, was directed by the Legislature, and the task force that worked on this was appointed by the State Bar, and we're appreciative of their work and especially Dickie Hile for helping us with that. These, as you will recall from our discussions, set out the kinds of cases and the availability of resources when they're particularly needed. The caveat is that there are no resources, so we don't expect much action under that rule.

Also on December 12th, the Court adopted

amendments to the Rules of Civil and Appellate Procedure and the Rules of Judicial Administration regarding procedures in parental rights termination appeals. Again, this was at the behest of the Legislature, and you'll recall our discussions for the need to advance these cases, expedite them as quickly as possible to judgment, and we have -- the Court has had communications with the courts of appeals, and we hope these procedures will achieve that end. There's still a comment period running on that, and we have received several good comments already from several justices on the courts of appeals, and so I expect there will be some changes before those rules take effect March 1st and May 1st.

The Legislature abolished the small claims court, effective May 1, 2013, and directed the Court to write rules that for those kinds of cases that will more closely work them into the dockets of the justices of the peace. Their task force is working on this assiduously, and I understand they're making great progress. This project was somewhat controversial at first among the justices, but as I understand it, they now view this as a way to really restructure their work and their dockets, and I think they'll have a good report for us later this spring or perhaps in June.

The task force for rules in expedited

actions, chaired by former Chief Justice Tom Phillips, has completed its report, and we will hear that report this afternoon. Justice Phillips can't be with us today. He is involved in the redistricting case, which is being heard in San Antonio this afternoon, and so we'll have some of his surrogates -- they won't appreciate being referred to that way, but people who will take his place this afternoon to present that report to us.

There has been some discussion in this group and elsewhere that because of electronic filing in the appellate courts, limitations on the size of briefs should be measured by words or characters, not by pages, so that the pages can then take whatever form electronically they do, and work has progressed on that. A presentation was made to the Council of Chief Justices a couple of weeks ago, and they're in favor of the -- of that initiative, and we should have a rule for this committee's consideration before too long.

About a year ago the Supreme Court appointed a task force on uniform forms to determine whether it would improve access to justice by making uniform forms that are officially sanctioned available for use in the courts in cases that lend themselves to that. This has attracted some controversy. The task force reported to the Supreme Court a couple of weeks ago the State Bar has

asked for input into that process, and so I've asked Chip to take this up at the April meeting of this committee and to give audience to people who want to be heard on this project as well.

Then you know that the committee has been reconstituted, as Chip said, and we are very appreciative of your efforts here. My Court does not always speak with one voice, but I'll tell you I speak for all of them when I tell you that they are very grateful for the service. They realize that it is a significant service, but they have chosen you because they look to you for advice on rules and procedures that the -- that govern our courts and justice system, and as you have seen in the last year and in the last 10 years, increasingly the Legislature has relied on this process to achieve the same thing. So we're happy that you have agreed to serve. We always say among ourselves on the Court that we are looking for the best and brightest, most experienced people in the -- in the bar who can come and give counsel on these issues, and we believe that we have that in you.

We're especially grateful to Chip for continuing to serve as chair of this group for another term. This is a group that has only had two chairs in the last about 30 years, only had two liaisons in the last 30 years, and so it's -- is a tribute to him and his

leadership that the Court asked him to serve again, and his willingness to serve is greatly appreciated.

CHAIRMAN BABCOCK: Could you expound on that a little bit more?

HONORABLE NATHAN HECHT: We have every confidence in Chip.

CHAIRMAN BABCOCK: There we go.

HONORABLE NATHAN HECHT: I say this because it can't be used in advertising, and then just a word about the process, especially for the new members. This is a deliberative process, and so the ideas that are expressed are very important to the Court. A record is being made, and the Court always refers to that record in deciding what to do about the recommendations that the committee submits, so please be sure that your ideas are expressed and put on the record. We vote from time to time, but that's usually to give us an indication of when it's time to move on to something else, and the votes are not binding on the Court. The Court is interested in how widely shared particular views are, but the most important thing to my colleagues and me is the discussion and the ideas that are expressed.

So when the recommendations come to the Court, just to tell you how this works, our rules attorney, Marisa Secco, who can't be here today for

personal reasons but will be here tomorrow, prepares reports to the Court, and Justice Medina and I present them to our colleagues. There is usually a great deal of discussion about them. The Court has historically been very interested in the details of the work, and so they go through not only the words that are presented, but the policies as well, and try to take into account all of the materials and counsel that has been provided during this process.

Then after a decision has been made and rules have been promulgated we invite the public to comment on them, and almost always those comments result in changes in the product so that in the end it will be not only good policy for the state but also imminently workable, and I think that's one of the great virtues of this committee, is that it assures that the procedures that are set out have a very high chance of operating with the least friction and the greatest success. So the -- my letter to Chip referring the new matter is available to you, I think, and I'll be happy to try to answer any questions that you might have.

CHAIRMAN BABCOCK: Any questions from anyone? Okay. Justice Medina, do you have anything you'd like to add?

HONORABLE DAVID MEDINA: I just welcome

everybody to start a new term, those of you who have been here before, and certainly welcome to the new members. As Justice Hecht said, this is a deliberate process when we try to decide who is going to be added to this committee, and as you might imagine, there are several people across the state that would like to be part of this committee, and I agree with what Justice Hecht said, this represents the best and brightest in the state, perhaps even in the country. I'm just impressed with all this brain power that we have here, and I feel honored to be part of this group. It's an important task that we've been assigned, and we have a good leader here to keep us on course, and you know, a lot of people ask what do I do at these meetings. Well, I come here to take notes and then occasionally Justice Hecht asks me to get him a glass of water, just like we do at the courthouse. I'm here to make sure he has everything he needs so we can proceed accordingly.

CHAIRMAN BABCOCK: Okay. Thank you. Okay, a couple of important things, most of you received notice of the party. We're having a party tonight at Jackson Walker's offices which are 100 Congress, the 12th floor, I think, right?

MS. SENNEFF: 11th.

CHAIRMAN BABCOCK: 11th floor, sorry. That

will start at 6:00. As has become our custom, there will be a photograph taken of the new committee on its first day of operation, and we're going to try to do that at the front end of the cocktail party so that we don't look so sloppy toward the end of the party, so try to get there at 6:00 if you can, and we'll organize and get the picture taken and then people that need to get on their way can get on their way. The -- for the benefit of the new members, we organize ourselves into subcommittees, and each of you have been assigned to a subcommittee, and so I'm going to tell you what those subcommittee assignments are now, and when I do, if maybe you could identify yourself and just tell us a little bit about your background.

So the first subcommittee is -- our new member is Brandy Wingate, who is going to be on it, and that is Rules 1 through 14c. That subcommittee is chaired by Pam Baron, and the vice-chair is Justice Bland, and so, Brandy, could you tell us -- Brandy is down there smiling and is now going to tell us about herself.

MS. WINGATE: Well, I'm being told that this is the best subcommittee, so thank you.

CHAIRMAN BABCOCK: Well, it's the first one anyway.

MS. WINGATE: I'm from McAllen. I'm with

the Smith Law Group. I handle civil and criminal appeals down there in the Valley, and I'm very excited to be here.

CHAIRMAN BABCOCK: Great. Thank you.

HONORABLE DAVID MEDINA: Brandy is also the former briefing attorney for Chief Justice Tom Phillips, comes highly recommended.

CHAIRMAN BABCOCK: There we go. Judge Estevez from Amarillo, you are on the committee that handles Rules 15 through 165a. It is chaired by Richard Orsinger and vice-chair Frank Gilstrap, and you'll be happy to know, as will Richard, that you have drawn the assignment of doing the subcommittee work on the family law forms. So --

MR. ORSINGER: "You" meaning she?

CHAIRMAN BABCOCK: No, "you" meaning you.

MR. ORSINGER: "You" meaning me?

CHAIRMAN BABCOCK: You and your subcommittee, of which the judge is now a member.

MR. ORSINGER: That's all I have to do for the next three years, that's okay.

CHAIRMAN BABCOCK: Get it done by April, and we'll be fine. Judge, you want to tell us a little bit about yourself?

HONORABLE ANA ESTEVEZ: Yes. First of all, I'm going to get a new nametag. This is what my parents

named me. I go by Ana, so please don't try to pronounce it. If you want to know, it's Anahid, but I am a district judge in Potter and Randall Counties. That is in Amarillo, Texas. I have general jurisdiction, so I do do family law, civil, and criminal law also. I am very pleased to be here. It's such an honor. So thank you for allowing me to be here. I hope I have something to contribute. I don't know if I will, but I know I'll get a lot out of it and hopefully will be able to contribute.

HONORABLE DAVID MEDINA: We'll get a lot out of you.

HONORABLE ANA ESTEVEZ: Thank you for letting me be a part.

CHAIRMAN BABCOCK: Thank you. Sofia Adrogue is from Houston and is back here next to me. She's on the subcommittee dealing with Rules 166 and 166a, chaired by Justice Peeples and vice-chair with Richard Munzinger. Sofia, welcome, and tell us about yourself.

MS. ADROGUE: Good morning, my name is Sofia Adrogue. I'm a partner in Looper, Reed & McGraw, been practicing for about 20 years, clerked on the Fifth Circuit, but primarily have done business litigation. Thanks, I'm very excited and honored to be here.

CHAIRMAN BABCOCK: Thank you, Sofia. The Rules 171 through 205, that subcommittee is chaired by

Bobby Meadows, who is in trial and has been for at least I think a year or so, state court in California, and can't be here today, but we have no new members on his subcommittee, which is vice-chaired by Justice Christopher.

Lisa Hobbs, who is a new member, but not really, she used to be the rules attorney and spent many hours on the rules and in this committee, but now is a full-fledged member, and it's great to have you, Lisa. You're going to be on the Rule 215 subcommittee, chaired by Pete Schenkkan and vice-chaired with Judge Evans, and for those of us who don't know you, not me, but tell us about yourself.

MS. HOBBS: Well, I'm Lisa Hobbs. I'm an appellate practitioner at Vinson & Elkins here in Austin, and, like Chip said, I spent a good chunk of my career at the Texas Supreme Court, first as a law clerk for Justice Baker -- well, first as an intern for Justice Hecht in law school and then a law clerk for Justice Baker, and then I came back in 2004 to be the rules attorney and staff this committee for a little over a year before the Court asked me to serve as their general counsel, and I stayed there until 2008 and then came back here, came back to Vinson & Elkins.

CHAIRMAN BABCOCK: Okay. Nice to have you

back. Rules 216 through 299a as chaired by Elaine Carlson, vice-chaired by Justice Peeples, no new members on that subcommittee. Rules 300 through 330, chaired by Sarah Duncan, vice-chair Frank Gilstrap, no new members on that subcommittee. Rules 523 through 734, chaired by Carl Hamilton, and vice-chair was Jeff Boyd -- is that right? Jeff, are you the vice-chair of that?

MR. BOYD: I was hoping the lack of underlining meant no.

CHAIRMAN BABCOCK: I think you are, though, so tough. No new members on that. Rule 735 through 822, Judge Yelenosky, sub-chair with Dwight Jefferson -- Lamont. Sorry. Brain dead. And then the appellate subcommittee, which is our largest subcommittee, chaired by Bill Dorsaneo, vice-chaired by Sarah Duncan, and Kem Frost, who is a justice on the Houston court of appeals, who is now here. Hi, Kem. And so tell us about yourself. You're on this subcommittee, on the appellate subcommittee.

HONORABLE KEM FROST: Kem Frost. I'm on the Fourteenth Court of Appeals since 1999. Before that I had a 15-year trial and litigation appellate practice, first at what is now Locke Lord. Then it was Liddell Sapp Zivley Hill and LaBoon, and the last 12 years of my practice I was at Winstead in the Houston office.

CHAIRMAN BABCOCK: Great. Thanks, Justice. And also on that appellate subcommittee is Scott Stolly. Scott, tell us about yourself.

MR. STOLLY: Thank you. I'm Scott Stolly with Thompson & Knight in Dallas where I'm the chair of the appellate practice group.

CHAIRMAN BABCOCK: Terrific. The evidence subcommittee is chaired by Buddy Low, who is also the vice-chair of this whole committee, and the vice-chair of that subcommittee is Justice Brown, and we have a new member, Justice Moseley is on that subcommittee. Justice Moseley, you want to introduce yourself?

HONORABLE JAMES MOSELEY: I'm Jim Moseley, and I'm a justice on the Dallas court of appeals. I've been there 16 years. I started my legal career in West Texas out in Odessa. I practiced there for five years and then went to Dallas in the Eighties and went to work for the Reagan administration. After that I was at Locke Purnell before I went to the court doing business litigation and anti-trust.

CHAIRMAN BABCOCK: Great. Thanks, Justice. Nice to have you.

HONORABLE NATHAN HECHT: If I could just add --

CHAIRMAN BABCOCK: Yes.

HONORABLE NATHAN HECHT: Buddy Low, the vice-chair of the committee, is the only member who has served continuously since 1940 when it began.

CHAIRMAN BABCOCK: So all 72 years he's -- that will not be the last joke at Buddy's expense.

MR. LOW: That's why they keep me on.

CHAIRMAN BABCOCK: Also on the evidence subcommittee is Peter Kelly. Where is Peter?

MR. KELLY: Over here.

CHAIRMAN BABCOCK: Oh, there you are. Right in front of me.

MR. KELLY: Peter Kelly. I'm in the Houston office of Kelly Durham & Pitter, and we do civil appeals.

CHAIRMAN BABCOCK: All right. Great. E-filing is chaired by Richard Orsinger and vice-chair Lamont Jefferson, no new members. Judicial administration is chaired by Mike Hatchell and vice-chair with Justice Peeples, no new members; and legislative mandates is chaired by Jim Perdue and the vice-chair is Justice Bland; and, Justice Moseley, I don't know how you drew the black bean on this, but you're also on this subcommittee.

HONORABLE JAMES MOSELEY: Do I have to introduce myself twice?

CHAIRMAN BABCOCK: Oh, and Peter Levy is, too, so you both -- Robert Levy is. I'm sorry. Robert,

we haven't gotten to you yet, so tell us about yourself.

MR. LEVY: I assumed you were saving me for last.

CHAIRMAN BABCOCK: We are. We did save you for last.

MR. LEVY: I am an attorney at Exxon Mobile in Houston, and prior to that I was with Haynes & Boone, also in Houston, so it's great to see my former partners here today, and I specialize or I advise on e-discovery issues at Exxon Mobile and also records issues.

CHAIRMAN BABCOCK: Thanks. Nice to have you. A couple of other comments, and this is old hat for the old members, but we always have to keep in mind -- oh, wait a minute. I missed somebody. Marcy Greer is also a new member. Marcy, you're ex officio, appointed by the Lieutenant Governor, and we're delighted to have you. Tell us about yourself a little bit.

MS. GREER: Well, thank you so much for letting me be here. I'm very excited to be a part of this group, and I'm a partner with Fulbright & Jaworski. I do appellate and civil trial in state court and Federal courts throughout the country, which means I do the law side of the trial practice, the stuff that real trial lawyers don't like to do, but I'm kind of a rules junkie, so I just finished serving on the Western District rules

committee. So getting everybody who practices there 20 pages on dispositive motions was our claim to fame, but my biggest claim to fame is graduating from law school with Sofia Adrogue.

MS. ADROGUE: Thank you.

CHAIRMAN BABCOCK: There you go, great. Well, thank you. By the way, the boundaries on these subcommittees are not very rigid, so if there is something that you are particularly interested in and want to work on, it is frequent that people come to me and say, "Hey, this subcommittee is studying this, and I know a lot about it, and I would like to be on the subcommittee," and that's all you've got to say, you're on; and so, Marcy, even though we haven't assigned you to any particular subcommittee, anything you want to do, as much work as you want to do will be welcome. So just let me know, so I can keep track of everything.

A couple of other things for the new members. We are, as the name implies, an advisory committee. We give advice. We've all given advice to clients. Sometimes they take it, sometimes they don't. But we're not the Court. We haven't garnered a single vote in this state that I know of, except for some of the elected judges, but certainly not on a statewide basis. So our advice is sometimes accepted, sometimes rejected,

sometimes modified, and sometimes not acted upon, and nobody should have a problem with that, and it shouldn't be surprising. There are projects that the Court asks us to look into that we do look into, we spend a lot of time, and then the Court for whatever reason doesn't do anything with it, and that's okay. That doesn't mean our work is not valuable. That doesn't mean it hasn't been considered. It just means that for whatever reason it's not acted on. However, since I've been Chair almost everything that we have done has influenced the Court in some way, and this committee has been responsible for vetting a huge number of rules in the 12 years that I've been the Chair.

I did change our protocol a little bit when I took over the chairmanship. It used to be that we would study anything that anybody wanted us to study, so we spent a lot of time studying things that the bar was interested in, studying things that our individual members or just somebody that would write in with a suggestion about the rules. I consulted with the Court and wondered if that was a good use of our time because we were spending an enormous amount of time on things that the Court didn't feel needed study. So now we will only study things that the Court asks us to do, and we have a process now where Justice Hecht will send me a letter, and it will

set out what the Court wants us to study, and then in consultation with the Court I'll assign that to a subcommittee. The subcommittee will meet, come up with recommendations, and then will lead our discussion in the full committee when we try to vet the rule. So that's the process that we go through.

As Justice Hecht said, we are or we try to be collegial. I don't know how the new committee is going to be, but I know the old one it has been inspiring to work with everybody. We all get along. We don't all have the same ideas about things. Sometimes we disagree substantially on points, but we all like each other, and we all respect each other's judgment and opinions, and the discussion I've found to be of a very high caliber. Those discussions sometimes will get animated. Be respectful of our court reporter, who can't get two or three people talking at the same time, so try to raise your hand to get recognized, and I'll do the best I can, looking around the room, and that way we'll have a cleaner record. I understand that sometimes people just get talking back and forth to each other. Judge Yelenosky all the time will just engage in dialogue, and that's okay. Dee Dee can get -- Dee Dee knows that, she can get that.

We are open to the public, and our meetings are noticed on our website, and all of the materials that

we're studying are posted on our website, and the transcript of our proceedings are posted as well. I think it's correct, Justice Hecht, that we are subject to the Texas Open Records Act, but not the Open Meetings Act, right?

HONORABLE NATHAN HECHT: (Nods head.)

CHAIRMAN BABCOCK: So all of our records are subject to that act, and pretty much everything we do is on the website, and we try to be transparent. Going back to how things get considered, if anybody thinks that a particular problem or a rule needs studying, this goes not only for members of the committee but the members of the public, just talk to Justice Hecht or to me, and we'll -- we'll see if the Court wants us to study that. It's not just that the ideas are only coming from the Court.

At our meetings we don't have any fast rules about people who are not on the committee speaking. Sometimes there will be a task force, as there is with the ancillary rules that you'll hear from in a minute, that include members who are not on this committee who will take us through what their recommendations are. That will happen this afternoon with the $100,000 and less lawsuits, but beyond that, if people want to come here and have their say about something, within reason, I've always felt we should accommodate that, and we always have, and it's

never been a problem in the -- I've been on this committee I think for not as long as Buddy, but almost as long, for 25 years or so, and it's never -- that's never been a problem.

In our April meeting, Richard, there are already people who have indicated that they want to speak to us. I was told -- and I'm very honored and flattered by this, but that on this issue of the forms, that maybe there's a paid lobbyist who is involved in this, which elevates our committee to another level, if we have a paid lobbyist.

MR. ORSINGER: We can expect a lot of parties is what you're saying.

CHAIRMAN BABCOCK: That's right, and I'm looking cruises.

(Laughter)

MR. ORSINGER: And cruises, okay.

CHAIRMAN BABCOCK: At least for the subcommittee. So that's good. We meet -- we try to meet only six times a year. Last year with the Legislature giving us so much work to do we had to meet a lot more than that. We try to meet on Saturday only when absolutely necessary. Again, lately it's been necessary, and it will be tomorrow, but April, our April meeting, is a one-day meeting because of scheduling conflicts for some

people. So April is only a one-day meeting, but otherwise, it's a two-day meeting, but if I feel we can get through the agenda without meeting on Saturday we won't meet on Saturday unless we have to. Did I miss anything?

HONORABLE NATHAN HECHT: I think that covered it.

CHAIRMAN BABCOCK: Okay. Well, we are -- for the new members, we have been going through the ancillary rules, which is -- which we've spent a substantial amount of time on, and we're now working on the turnover rules, and turnover Rule 2 I think is where we stopped last time as far as I know. Mark, is that right?

MR. BLENDON: I believe that's correct.

CHAIRMAN BABCOCK: And our ancillary task force is assembled over here in the corner, maybe near the door so that they can escape quickly if they have to. That task force is chaired by Elaine Carlson, who is, deliberately perhaps, not over with her group like she usually is. I don't know what that says. But, Elaine, where do you want to take us?

PROFESSOR CARLSON: We have already covered the task force recommendations on injunctions, attachment, garnishment, sequestration, distress warrants, and trial

of right of property. We have remaining before the subcommittee review, continued review, we started on turnover and receiver as well as execution, and I'd like to just take a minute for those who are new to the committee to introduce our task force members who are here. Mark Blendon, raise your hand.

MR. BLENDON: Mark Blendon.

PROFESSOR CARLSON: Donna Brown, David Fritsche, and Dulcie Wink, all of whom have given hundreds of hours in the hopes that we are building a better mouse trap. So with that I'll punt back to you.

CHAIRMAN BABCOCK: Who is going to take it? Mark, you? Okay.

MR. BLENDON: All right. Thank you. So we are at section 7, receivers and turnovers, and in the material I believe this is pages 110 to 123 of the material, of the handouts. We started this in December, at the December meeting. I'll try to speak up, but if anyone has trouble hearing me, please raise your hand. We started turnovers and receivers at the last December meeting; and just very quickly to refresh where we're at, the turnover statute is in the Texas Civil Practice and Remedies Code and appears at page 122 of the materials; and the turnover statute, as it's referred to, is 31.002; and the title of it is "Collection of judgment through

court proceedings"; and it is -- as the title states, it's a post-judgment remedy and states when a creditor, judgment creditor, can come into court and get aid from the court to collect its judgment, and that is the purpose of the statute.

There were no Rules of Civil Procedure implementing the statute, and we have proposed seven rules, and those appear beginning at page 111, implementing the turnover statute. Rule -- excuse me, Rule 1 is application for turnover order; and we covered that at the last meeting, and we just got into Rule 2, the hearing on the application; and unless anyone has any comments on Rule 1, we'll go to Rule 2, the hearing, and understand that we're talking about turnover relief and a subset of the turnover relief that can be ordered is a receivership; so a debtor can be ordered to turn over property to a constable, for example; or one of the other alternatives is that a judgment creditor can go into court and request a receivership; and these rules apply both to the turnovers generally and more specifically to receivership.

So the application is Rule 1, and then taking up Rule 2, and we started that last time, and there was some concerns expressed about Rule 2, the conduct of the hearing and the burden of proof, and that is at page

112; and to better understand the hearing it's probably good to review one of the paragraphs in Rule 1 where it talks about the application and establishing a prima facie entitlement to relief; and that is Rule 1(e), verification; and it's talking about, again, the application; and it's stating when you establish prima facie entitlement to relief; and remember this is post-judgment; and 1(e) states, "An application does not require verification, but a verified application or an application supported by affidavits may be submitted to the court to establish prima facie entitlement to turnover relief at the hearing. A verified application and any supporting affidavits must be made by one or more persons having personal knowledge of relevant facts that are admissible in evidence. However, facts may be stated based on information and belief if the grounds for belief are specifically stated."

And at the last meeting there was concerns from several about, well, are you saying that all one need do is to go into court and state on information and belief the judgment debtor owns nonexempt property which cannot readily be levied on by ordinary legal process, and that is the -- that's the threshold, is a judgment debtor owns nonexempt property which cannot readily be levied on by ordinary legal process, and it would seem that you could

simply make an affidavit on information and belief and affirm that, but remember -- and I emphasize the last phrase of paragraph 1(e) says, "Facts may be stated on information and belief if the grounds for belief are specifically stated."

So I believe there is a -- a safety in the mechanism and that -- and that a creditor's lawyer should not be able to merely state on information and belief, "I believe the judgment debtor owns difficult to levy upon property that cannot be readily levied upon by ordinary legal process, so give me a receivership." It requires more than that. So going now to Rule 2, the hearing on the application.

PROFESSOR DORSANEO: I have one.

MR. BLENDON: Yes.

PROFESSOR DORSANEO: One minor point. In (d), an application for turnover, you don't really mean to use the word "shall," do you?

MR. BLENDON: Where are you, sir?

PROFESSOR DORSANEO: (d).

CHAIRMAN BABCOCK: Turnover Rule 1(d)? Is that what you're talking about?

PROFESSOR DORSANEO: Yeah.

CHAIRMAN BABCOCK: Page 111.

PROFESSOR DORSANEO: 1(d), 111.

CHAIRMAN BABCOCK: Okay.

MR. BLENDON: As I understand, the subcommittee did come up with these as a requirement.

PROFESSOR DORSANEO: Well, I know, but "shall" is a word of multiple meanings, so do you mean "must" or "may"?

MR. BLENDON: "Must" is my understanding.

PROFESSOR DORSANEO: Well, say "must."

CHAIRMAN BABCOCK: Is "must" stronger than "shall"?

PROFESSOR DORSANEO: Pardon me?

CHAIRMAN BABCOCK: Is "must" stronger than "shall"?

PROFESSOR DORSANEO: Yes. "Shall" is ambiguous. Supreme Court, capital S, capital C, changed the summary judgment rule back to "shall" because there was a split among the circuits as to whether it would mean "must" or "will," so in order to preserve the ambiguity they went back to "shall."

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Going back to the verification requirement, when we were studying the return of citation, I believe, we learned that the Legislature had passed, I think, an amended section 132 of the CPRC, so that now affidavits aren't required for anything. You

can use an unsworn declaration. As I recall, at the outset of this -- of your report, I think the task force said something about that, but you had decided not to talk about that in your proposals. Could you refresh my recollection on that?

CHAIRMAN BABCOCK: Dulcie.

MS. WINK: I can address that. The new -- the new process for using a sworn declaration as it's written in the rules can be applied whenever the rules call for a verification or an affidavit, so the rest of the rules haven't been written in -- the new rule was written so that the sworn declaration could apply to all of them, and we follow the same form here. So we've left the words "verification" or "affidavits" as they've been, and the sworn declaration obviously can be used pursuant to the local rules.

MR. GILSTRAP: Unsworn.

MS. WINK: Unsworn, thank you.

CHAIRMAN BABCOCK: Okay. All right. Are we agreed on "must" versus "shall"?

MR. FRITSCHE: That's a good catch because that's how we had harmonized the other sections on application.

CHAIRMAN BABCOCK: All right. So one point for Dorsaneo now? All right. You're ahead. You're

leading.

PROFESSOR DORSANEO: Probably still going to lose.

CHAIRMAN BABCOCK: You'll probably still lose, yeah. All right.

MR. BLENDON: So going now to Rule 2, conduct of the hearing. Rule 2, notice, "The court may order turnover relief only after a hearing, which may be ex parte. Notice of the hearing, if given, shall comply with Rule 21a," and there were some comments on that, but remember, this is post-judgment, and there would be no notice if a writ of execution were going to be issued. There is no notice to a judgment debtor if a garnishment is being levied on the bank until after the levy is served on the bank, does the judgment debtor learn of the garnishment in most cases. So, (b), then conduct of the hearing, burden of proof, the burden of judgment creditor is to prove that the judgment debtor owns nonexempt property that cannot readily be levied on by ordinary legal process. The judgment creditor need not prove that collection of the judgment has been attempted by other means. The burden of the judgment debtor is to establish claimed exemptions, and if the hearing was ex parte, the exemption may be established at a later hearing, and there is also provision that will cover -- there is a provision

for expedited hearing to dissolve or amend the receivership in Rule 7 that we will cover.

And then subpart (3), "The court's determination may be based on affidavits, if uncontroverted, setting forth facts admissible in evidence. Otherwise, the parties must submit oral testimony or other evidence at the hearing." And if the debtor appears and opposes without having filed a response, judgment creditor is entitled to a continuance if requested; and then costs and fees, "The judgment creditor who prevails in a turnover proceeding is entitled to recover reasonable costs, including attorney's fees incurred in the turnover proceeding," and that is out of the statute.

CHAIRMAN BABCOCK: Any comments about this turnover Rule 2, found at pages 112 and 113 of the materials? Yeah, Carl.

MR. HAMILTON: In 2(b)(1) -- I'm sorry, 2(a), "notice of a hearing, if given," why do we have that in there? If the hearing can be ex parte, it seems like we're almost suggesting to the judge that we have to give notice to the other side, and I'm not sure that that's what we want to do.

CHAIRMAN BABCOCK: Okay.

MR. BLENDON: I believe it's stated that way

because there may be advance notice and there may not be, and we're just recognizing that there's alternate ways to do it.

CHAIRMAN BABCOCK: Dulcie.

MR. BLENDON: If I'm understanding the question.

MS. WINK: And if I may add to that, in some of these exemplary processes, these extraordinary writs -- not so here in turnover -- you might have to issue citation. This is for other attorneys who may be new to the process who are looking at it and deciding if I'm going to give notice to the debtor, does it need to be in the form of citation or is Rule 21a notice sufficient, and it is 21a. Again, we're post-judgment, so we have different constitutional thresholds.

CHAIRMAN BABCOCK: Okay. Any other -- I'm sorry, Mark, did you have something else to say?

MR. BLENDON: No, I was just saying good point. I had missed that, yes.

CHAIRMAN BABCOCK: Yeah, Roger.

MR. HUGHES: Well, I think I brought this up at the last meeting, but since we're -- Rule 2 appears to be a one size fits all rule for the hearing. I think there may be more issues to resolve than just the bare outline under the statute. You know, a favorite thing of

my neck of the woods is that they apply to have causes of action on -- allegedly owned by the defendant simply summarily assigned over to the plaintiff or the judgment creditor; and, second, you know, there are a lot of other tangibles, such as stock certificates. The problem is, okay, you've taken the debtor's property. How are you going to apply that to satisfy the judgment? And it would seem to me -- and I think it's been suggested in one or two cases -- that when you're taking a piece of property like that, if you're not going to put it up for public sale you need to have some method of valuing it so that when you take the debtor's property the value of it is applied to reduce the judgment, and I would imagine that that has to be resolved in some sort of hearing. Otherwise, you're taking the judgment debtor's property, the creditor gets it, and no one knows if the judgment is being reduced and by how much.

The second thing is I see Rule 2(b)(3) says "determined based on affidavits," but they have to be facts admissible in evidence, but in the previous rule they said, well, you can state on information and belief as long as you state the basis. Well, what if the person states the basis, it's nothing more than rank speculation, which if someone were there to say, "I object," that objection would have to be sustained? That would suggest

then that we're allowing -- that the upshot is, is Rule 1 trumps Rule 2, and your evidence could be made on information and belief, which is rank speculation, but somehow that's -- will sustain the hearing. I'm not sure if that's what's intended.

CHAIRMAN BABCOCK: You give Roger two weeks to prepare and he'll tear up your rule. He's like the Bill Belichick of this committee. What's your response to that?

MR. BLENDON: All right, if I could, as to point one, I believe, as far as what we do with the property and is the judgment debtors fairly treated with regard to disposition of property, I think that's taken care of by Rule 5, and we'll cover that at page 115, disposition of receivership property, I believe, and but, in shorthand, I mean, the receiver does not have carte blanche on the property. He must go back before the court and get the court to bless what he's about to do with it before the property is disposed of. And then -- and then I -- I believe there is a tension there about "under information and belief" and facts being admissible in evidence, and you know, whether that is clearly enough stated, I don't know.

But my example that I use is that certainly a creditor's lawyer can't come into court and say, "On

information and belief judgment debtor owns difficult to levy upon property." That -- that is insufficient, but if I come into court with an affidavit saying, "Upon information and belief he owns property which is difficult to levy upon. The grounds for my belief are that three weeks ago I received a check from the judgment debtor on Bank of America, and therefore, we know he's got an open bank account or at least he did three weeks ago, and that is not leviable by ordinary legal process," and I would submit that would be a fair -- under the rules that would be a fair way to show entitlement to receivership relief under the rules.

CHAIRMAN BABCOCK: Okay. Yeah, Roger.

MR. HUGHES: Well, going back to what I said, these practices that I'm talking about is they transfer it directly to the creditor, not a receiver, and there's nothing in the proposed rule that says they can't do that, so it's kind of left up to the judge; and when you give it to the creditor, the creditor doesn't have to do what a receiver normally does, like report to the court put up a bond, et cetera, et cetera, et cetera. They just take the property, and they can sell it. Who knows how much is going to be used to reduce the judgment debtor's liability.

Now, the other thing is I understand if you

have an affidavit that states the facts upon which your conclusion is based, because that's part of the thing under Rule 701 when a lay witness expresses an opinion, but to my -- maybe I'm off base about this, but when you say "an affidavit made on information and belief," a person is stating a belief based on facts of which they have no personal knowledge. We're not talking about an inference based on things they do know about, so I'm still concerned that essentially Rule -- like I said, the verification rule is allowing you to get a turnover based on affidavits which are -- you know, would be objectionable on the basis the person doesn't have knowledge or the facts don't support the conclusions that they're expressing.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Isn't it just the opposite? Because 2 says you have to do a hearing, and 2 says it has to be based on facts admissible in evidence, and so the verification provision in 1 is superfluous to the extent it allows something less than that.

CHAIRMAN BABCOCK: Okay, Mark.

HONORABLE STEPHEN YELENOSKY: So, I mean, they aren't reconcilable.

MR. BLENDON: Well, I'm certainly no expert

on statutory and rule interpretation, but at 112, 1(e) talks in terms of a prima facie entitlement, that what is stated in (e) does establish prima facie entitlement to turnover relief at the hearing; and certainly, you know, perhaps one fair criticism is that (e) ought to be brought down to the hearing rule, but 1(e) does say that if you follow (e), you pass the bar or establish the minimum necessary in my mind because you have shown prima facie entitlement to turnover relief at the hearing. That would carry the day.

And then briefly back to the earlier comment about something being turned over directly to the creditor, and I believe that is specifically taken care of by Rule 3(a), the last phrase of Rule 3(a) at page 113. "The order must not require the turnover of property to the creditor," so property will not be turned over directly to the creditor. That's never been -- never been proper, just because of all of the problems that would come up with that.

CHAIRMAN BABCOCK: Okay. Yeah, Bill, and then Judge Yelenosky.

PROFESSOR DORSANEO: And the statute talks about turning over property to a designated sheriff or constable, so the statutory grounds would have to be read together with the rule, and probably read first.

MR. BLENDON: And that's the reason for that exclusion there in the rule, I think.

CHAIRMAN BABCOCK: Judge Yelenosky, then Justice Jennings.

HONORABLE STEPHEN YELENOSKY: What is the reason not to reconcile the two? Either you want to be able to rule based on an affidavit based upon relief that you specify or you don't, and (c) or (e) rather seems to say you can, and Rule 2(b)(3) seems to say you can't, and whether I'm right or wrong, at least I am confused, so why wouldn't we reconcile that?

MR. BLENDON: I think that's a good point, and perhaps (e) should be brought down and become a part of Rule 2(b)(3).

HONORABLE STEPHEN YELENOSKY: Well, then that raises the policy question that Roger raises, is should we be able to do that.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: Well, my concern is that more fundamental reading of this I guess third sentence of (e), you're talking about a verified application in regard to something -- someone swearing to it. Can you swear or affirm to an affirmative fact if the basis of your belief is based on something else other than personal knowledge? I mean, how can you attack someone

for perjury for saying something in an affidavit which they've sworn to or affirmed if they can later say, "Well, I really didn't know. It was just based on --"

CHAIRMAN BABCOCK: Information and belief.

HONORABLE TERRY JENNINGS: -- "information and belief."

CHAIRMAN BABCOCK: And I said so.

HONORABLE TERRY JENNINGS: So there's a logical inconsistency in that sentence, I think.

CHAIRMAN BABCOCK: Yeah, Mark.

MR. BLENDON: I understand the concern, and I think it was raised last time, and I believe Pat Dyer -- and I'll rely on the remaining members. I believe Pat Dyer stated that the "upon information and belief" is simply carried over from the other ancillary remedies. Is that --

MS. WINK: That is true.

CHAIRMAN BABCOCK: Okay. Well, yeah, Bill.

PROFESSOR DORSANEO: When the ancillary rules were revised in 1975 through 1977 -- that's when we worked on them -- Luke Soules came up for all of those ancillary rules with this formulation, that something could be on -- facts could be stated on information and belief if the grounds for belief are specifically stated, and that's been -- that's been in the rules all this time,

and it seems to have worked all right, although I'm not so sure that it works as well here in the turnover context as it has worked in the other contexts. I do see the tension, which is pretty obvious. Stephen Yelenosky points it out, and --

CHAIRMAN BABCOCK: Roger pointed it out before Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: He did. I'm just riding --

PROFESSOR DORSANEO: Well, it became more obvious the second time I heard it.

CHAIRMAN BABCOCK: A little dense.

PROFESSOR DORSANEO: Right.

MR. HUGHES: Well --

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: So I'm not sure whether the -- it's necessary in this context, and there also is this other problem about, you know, based -- the hearing is based on affidavits and the verification is a verified application or supported by affidavits, so we retain all of that current confusion that we have, what do we mean by supported by affidavit.

CHAIRMAN BABCOCK: Judge Yelenosky, and then Justice Gaultney.

HONORABLE STEPHEN YELENOSKY: I'm fine.

CHAIRMAN BABCOCK: You're good? Justice Gaultney.

HONORABLE DAVID GAULTNEY: I just wanted to restate briefly something that was said last time, and that is the concern over the ex parte hearings. I think these can occur the day after judgment is signed?

MR. BLENDON: Yes. That's the way it's set up.

HONORABLE DAVID GAULTNEY: Is there any requirement in the rule that there be some type of emergency that would justify an ex parte hearing as opposed to notice to the opposing counsel?

MR. BLENDON: No, not the way they're written currently.

HONORABLE DAVID GAULTNEY: Did the committee discuss that possibility, for example, putting in something like a TRO burden where it would be immediate and irreparable injury before you go ex parte as opposed to notice?

MR. BLENDON: I don't believe so, and I believe Donna Brown pointed this out last time, and that is the only explanation being that we are dealing post-judgment, and a judgment debtor is not going to get notice of a writ of execution before the sheriff knocks on the door and nor is he going to get notice that this bank

account is about to be frozen by a writ of garnishment until after the garnishment is served on the bank, and so that would be the only response I have there.

HONORABLE DAVID GAULTNEY: Well, I mean, but there might be other processes that are going on the day after judgment. I mean, the other attorney may be preparing a motion for new trial and yet the creditor is down there talking to the judge at an ex parte hearing, just, I mean, I --

MS. BROWN: That's usually handled in my experience, your Honor, with the judge's discretion, the ultimate discretion of the trial court judge to grant or deny the turnover relief. If -- the rare times that I've gone down on a turnover where I did not give notice was when I was concerned that the moving trailer was going to be hauled off for whatever reason, it was up for sale or whatever, and so the court is more likely to grant relief if you've given the opportunity to the other side to come in and -- and ask for mercy, ask for discretion in their way, whereas -- so it's kind of handled in that regard in the judge's discretion based on whatever is presented by the judgment creditor.

CHAIRMAN BABCOCK: Did somebody --

MR. LOW: Sarah was trying to --

CHAIRMAN BABCOCK: Sarah, you had something?

I'm sorry.

HONORABLE SARAH DUNCAN: I just have quite a few questions. In rule -- proposed Rule 1(g) on third parties, it says, "An application may be directed to a third party only if that third party has property owned by the judgment debtor." Don't we usually say the third party has possession or control over property that's owned by the judgment debtor? I'm not quite sure what "has" means, and I really question the next clause, "or subject to the judgment debtor's possession or control." If the judgment debtor has a right to control this pen but doesn't own it, my pen is not subject to turnover, because the judgment debtor doesn't own my pen. I do. So I don't understand that clause at all.

And then in Rule 2(b)(3) talking about affidavits, it says if they are uncontroverted. Well, what if I object that they're hearsay? It's a good objection, it ought to be sustained, particularly if it's hearsay within hearsay with the facts inside the affidavit, and I don't understand deciding ownership of property based on affidavits when there's a good hearsay objection and requiring -- I mean, what's bad about requiring somebody to come into court and testify and prove whatever needs to be proved rather than just doing an affidavit? That bothers me. Because this is not like

other execution processes or prejudgment processes. This is a turnover of somebody's property to satisfy a judgment, and I don't see why we would require less than whenever we change ownership of property as a result of litigation.

CHAIRMAN BABCOCK: Richard Munzinger, then Bill.

MR. MUNZINGER: I just want to make sure I understood. The turnover order can be signed on the morning after the judgment is signed? So we've had a jury trial, a jury has returned a verdict. The judge enters a judgment, and the next morning the judgment creditor can get a turnover order, notwithstanding that the 30 days or other periods post-judgment to make the judgment final have not passed.

HONORABLE SARAH DUNCAN: You can do it that afternoon.

MR. MUNZINGER: So now the judgment debtor can be deprived of the money that the judgment debtor needs to post a supersedeas bond, for example. I just recently had a case where my client posted a two million-dollar cash supersedeas bond. The turnover order would take that money away from him, and it's no notice. If I read this right, the court may order turnover relief only after a hearing, which may be ex parte. What are the

grounds for an ex parte hearing? We aren't told. It can be ex parte, and notice of a hearing, if given, the judgment debtor isn't given notice. I have some real concerns about the fundamental fairness of such a thing where a litigant who has under ordinary circumstances the right to file post-verdict, post-judgment motions, the judge made a mistake, time limits are extended and the meantime I'm taking his money. That doesn't make sense to me.

CHAIRMAN BABCOCK: Professor Dorsaneo, and then Robert.

PROFESSOR DORSANEO: It's not exactly accurate that execution can happen the day after judgment. It's got to be -- you know, ordinarily there's going to be, you know, considerable amount of time.

MR. BLENDON: No, I didn't say execution could take place.

PROFESSOR DORSANEO: Well, that was in one of the examples that one of you gave.

HONORABLE SARAH DUNCAN: No, it's --

MR. BLENDON: I didn't mean to say that if I did.

PROFESSOR DORSANEO: And then even post-judgment garnishment -- and, you know, parenthetically, Sarah, remember years ago when you were

proposing rules to not let all of that happen immediately, and --

HONORABLE SARAH DUNCAN: It still bothers me, and -- I'm sorry.

PROFESSOR DORSANEO: -- this committee passed those rules and recommended to the Court that it be done like that?

HONORABLE SARAH DUNCAN: It still bothers me that different --

PROFESSOR DORSANEO: Yeah.

HONORABLE SARAH DUNCAN: -- processes can take place at different times.

PROFESSOR DORSANEO: Yeah, it bothers me, too.

HONORABLE SARAH DUNCAN: Most people think they've got 30 days after judgment to file motion for new trial because that's when a writ of execution issues, and I was just going to say, why is this true? And I think, you know, this was legislative, whereas, execution was by rule taken from legislation in 1942, but there ought to be a principal reason for any of this. We're taking people's property.

PROFESSOR DORSANEO: I agree with the approach that more time is required or some sort of explanation as to why it needs to be at such top speed.

CHAIRMAN BABCOCK: Robert, then Elaine.

MR. LEVY: I agree with Richard's comments. The issue of a plaintiff being able to execute on a judgment that they don't -- nobody necessarily even knows when the judgment will be signed by the court, and if they happen to be down at the courthouse and find out that an order has been signed and then they take it and get a hearing, well, the defendant might not even have heard about it, and we've worked hard to try to make supersedeas bonds accessible and reasonable, and this will eliminate that and place defendants at great risk, and they're going to end up having to go down and try to file bonds immediately to avoid this potential, and some defendants, their property is well known, and so it would be easy to satisfy the provisions of this proposed rule.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: The case law on this recognizes that there is a disparity and a waiting time in getting a writ of execution versus turnover, but that -- those cases suggest that that is a legislative intent, that the judgment gives the debtor notice, "You owe money" or whatever the judgment says. They could supersede immediately. That's kind of your option to be safe from turnover or garnishment or even execution, but otherwise, I think there was some balancing because many judgment

debtors want to hide or secrete their property or destroy it. So, you know, that was the balance the Legislature worked out, and one of the difficult parts on this task force is all of the rules we worked on had to comport with the statutory provisions.

CHAIRMAN BABCOCK: Okay. Dulcie, Sarah, then Richard.

MS. WINK: One more thing to consider is this initial turnover is not going to go to immediate execution. There are provisions that we haven't reached yet in these rules that allow for the debtor, who now knows that the judgment creditor is moving against his or her property, and that debtor can move the judge to modify, stop things, change things, so it's not like everything is leaving their hands that day. We are not taking the property permanently from them immediately either, but it does -- this is what reaches that balance that the Legislature -- that the Legislature gave us, which is to protect the property that can be subject to ultimate execution and to make sure it doesn't leave or leave the state or consult.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Well, I'm not sure how much the Legislature actually thought about why turnover was going to be different from other forms of

execution, and, Richard, they can abstract the judgment as soon as the judgment is signed and bring the defendant totally to its knees because it will cause cross-defaults in all of their findings instruments. If I really thought the Legislature had made a policy decision here, I wouldn't have any choice but to accept it. I don't necessarily know that's true. I don't know that anybody knows it's true, and my plea all along since Texaco has just been let's have rational, reasonable, clear policy judgments, and we may never get them.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: My only point would be in response to the Legislature didn't speak. The Court is a coequal branch of government with a coequal obligation to the citizens to be fair and to provide them due process; and the Court, it would seem to me, would have the authority to put into Rules of Procedure to effectuate the Legislature's policies those things that would protect the judgment debtor; but to me, again, without -- I don't want to repeat myself, but to me it's very amazing, yes, you can abstract a judgment that creates a lien against property, but to go to my bank and take my money away from me without notice, no notice at all, and the rule says that it can be ex parte without any precondition for ex parte proceedings? To me that's extraordinary. How many

cases are reversed? Trial judges aren't perfect, juries aren't perfect.

CHAIRMAN BABCOCK: Present company excepted.

MR. MUNZINGER: Present company excepted, but, I mean, my goodness gracious, to me that's -- really this is quite extraordinary.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, it is shocking, and it was shocking to me as a district judge to learn about it, but it's been the law for a long time, so we're just -- I was just learning about it then and maybe some people are just learning about it now, but because it's been the law for a long time -- and I don't know all the bases, but I think Elaine was referring to court interpretations of the statute -- we're suggesting a change in the law, and I guess the Supreme Court through rule could change that, but we ought to recognize that this isn't anything new.

CHAIRMAN BABCOCK: Justice Christopher. Then Frank.

HONORABLE TRACY CHRISTOPHER: Well, and I did want to point out that the turnover statute is supposed to be for nonexempt property that cannot readily be levied on by ordinary legal process, so that's a different type of property generally, so what you'll see

is someone will come in and say, "I know that the debtor is in business with this other person. It's not something you can readily levy on. Please have him, you know, turn over his shares in the business." Okay, and they get put in the registry of the court or they get given to the constable and then we figure out what they're worth and how they get sold and things like that. So, I mean, that's what it's designed for, is those sort of assets.

CHAIRMAN BABCOCK: Okay. Robert. Did anybody else have their hand up? Robert, go ahead.

MR. LEVY: One of the concerns, though, is that you could use this type of process as a tool, as a weapon, against the defendant in their property -- like might be moving property. It could be gasoline or other gas that's moving through a pipeline and you want to use this to try to grab it, and there can be great costs and consequence to a defendant. Even though the final title isn't determined, this can be extraordinarily disruptive, and without having the opportunity to stop the process before it happens because of the ex parte nature; and if we're talking about issues about the statute then I think we should consider whether ex parte means that if you choose to go ex parte you do it or do you need a much higher threshold to do it ex parte, at least within the period that a defendant does not have the chance to seek a

supersedeas bond or within the time frame or filing or obtaining one.

CHAIRMAN BABCOCK: Frank, then Justice Gaultney.

MR. GILSTRAP: In view of our concern over the ex parte nature and yet the possibility of an ex parte proceeding, yet the creditor's concern that, well, if I tell them they're going to hide the collateral, maybe Justice Gaultney's suggestion is something we ought to think about. Maybe before you can go ex parte there maybe needs to be some hurdle, something you have to say to -- so that it's not just a question of the lawyer's discretion. It's a lawyer for the creditor. Maybe something in there that says, you know, you could go ex parte, but you have to show this, you have to say this, it seems to me, and certainly, I mean, it seems to me that due process requires that. You know, notice and opportunity to be heard, that's what I understand about due process, and this is done without notice.

CHAIRMAN BABCOCK: Justice Gaultney, and then Nina.

HONORABLE DAVID GAULTNEY: I agree with Frank.

CHAIRMAN BABCOCK: Nina, do you agree with Justice Gaultney and Frank? We can get sort of a wave

going here.

MS. CORTELL: Always, always. I just wanted to add that there is a tool available to the judgment debtor, and that is if the judgment debtor's plan is to file a supersedeas to preempt or at least try to wire around some of this by filing a motion to stay or something to advise the court that the debtor plans to post a supersedeas and that there's no need for other types of collection efforts in the interim period, so that there is a tool in the debtor's chest.

CHAIRMAN BABCOCK: Okay. Why don't we move on -- Sarah, I'm sorry. It's hard to see behind my head.

HONORABLE SARAH DUNCAN: I know, I'm sorry about that. It's my dog's fault, and the toll road authority. And, Frank, I don't want to upset -- I'm sorry, Richard, I don't want to upset you even more, but Rule 3 doesn't even require the trial court to find that the judgment debtor owns this property. We had clients who were ordered to turn over real property they didn't own, a lot of it, worth millions, and it's hard to turn over property you don't own, but that's -- that's part of the problem with the whole -- you know, whenever -- with all due respect to the Legislature, when the Legislature tries to craft procedural statutes they are sometimes less than precise, and we've dealt with the turnover statute

for, what, 30 years, almost 30 years. It's not real precise, but it was all we had, so we went with it. If we're going to try to suggest rules to the Court to adopt to implement the turnover statute, it seems to me that we can do a lot better than the Legislature did quickly in making it precise, and this is just too loosey-goosey for me.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, again, I think it's extraordinary. I don't like it, but I think it's the law, and I don't know that there's a whole lot of room -- Elaine could tell me, but didn't the Legislature amend either the turnover statute or some statute to say, contrary to a previous court ruling, that you don't have to specify exactly what the nonexempt property is, you can just get an order? It says specifically in the statute you can get an order saying to turn over nonexempt property without specifying it; is that right?

PROFESSOR CARLSON: Correct.

HONORABLE STEPHEN YELENOSKY: So there's clearly a tension and limit on what we can do there, and, sure, we ought to explore what we can do up to that limit, but I think for a lot of this, this is relatively new. It was new to me as a judge, so we're finding out things that are extraordinary and surprising and mandated by the

Legislature.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: Since we're about to move on to the next subject I wanted to return to this verification issue in Rule 1(e). I think that rather than moving the verification portion down into Rule 2 I think we ought to eliminate it. The verification requirement is a -- or rule is that an application does not require verification, and from then on we're talking about the impact of an application in the hearing.

Down in 2(b)(3) we seem to require either affidavits that would be admissible or actual testimony, and I think the problem with the language in the verification provision in Rule 1 is this concept of prima facie entitlement. Chief Justice Guittard wrote a very excellent opinion one time in which he pointed out that the term prima facie has no fixed legal meaning, and sometimes it means sufficient evidence to avoid a directed verdict, which means that you survive to the second phase of the trial where the plaintiff puts on his evidence. Sometimes it means that it creates an entitlement to victory unless the other side produces evidence to the contrary, which then defeats your prima facie showing, and I can't tell which that means, but I have noticed that over the last 20 years the Legislature has been moving

away from statutes that provide for prima facie to other ways of describing this transition, either sufficient minimum to go to the jury or whether the burden of producing evidence has shifted to the other side.

That's a difficult debate, but we don't need to engage in it because there is no verification requirement, and down in Rule 2(b)(3) we say you can use affidavits, but they must be admissible, so I don't think we need to step into the quagmire of what constitutes prima facie and what doesn't, because it doesn't contribute at all. If we have a rule that says you've got to put in affidavits at least, if not sworn testimony, then let's forget this whole idea of prima facie and you're in front of a judge, you've got evidence that's either written or it's oral, and then the judge rules. So my suggestion is not to move all of that extraneous language but just to eliminate it because it doesn't do anything but confuse.

HONORABLE SARAH DUNCAN: Chip?

CHAIRMAN BABCOCK: Yes, Sarah.

HONORABLE SARAH DUNCAN: May I just say one -- the way I described it in a paper on summary judgment proof is you can have a box that would be the vehicle for the evidence and then you'll have the contents of a box. You have the affidavit, that's the box, and

then you have facts in the affidavit, that's the contents of the box. The box of an affidavit is hearsay, and if it's objected to as hearsay, it's not admissible to prove the contents, the facts in the box, and that's why I don't understand -- we're saying if it's uncontroverted. Well, it doesn't matter whether it's uncontroverted. If it's hearsay, it's not admissible if it's inadmissible hearsay, and I just don't understand that we're going to -- I mean, we had that huge discussion on 120a on affidavits and whether you could use an affidavit to support your special appearance, and we -- the Court adopted a rule saying you could, if it wasn't objected to. If it's objected to, you've got to bring your people in.

CHAIRMAN BABCOCK: Okay. Richard, on the issue of whether the Legislature is getting away from use of the phrase prima facie --

MR. ORSINGER: Yes.

CHAIRMAN BABCOCK: -- listen to this, just added in the last Legislature. Section 27.005(c) of the CPRC, "The court may not dismiss a legal action under this section if the party bringing the legal action establishes by a clear and specific evidence a prima facie case for each essential element of the claim in question."

MR. ORSINGER: Well, that refutes my statement, with an example.

CHAIRMAN BABCOCK: But your point was still a good one.

MR. ORSINGER: I actually have written on this, and I'll be happy to send you the memo, but this has been a problem not only -- not only for the Dallas court of appeals, but also for the U.S. Supreme Court, and I think that there is kind of a universal view among the professors of evidence and others that this term "prima facie" is more trouble than it contributes.

CHAIRMAN BABCOCK: Yeah. Okay. Just a small point. Your big point, though, was a good one. Lisa. Lisa had her hand up a minute ago.

MS. HOBBS: On another topic, on the top of page 113, we allow the judgment creditor -- they are entitled to a continuance if the judgment debtor appears at the hearing and opposes, and I just wonder why we -- implicit in that is that we are precluding the judgment debtor to get a continuance if for some reason he needed a continuance, and I'm ignorant about the process, but that seems inherently unfair. It just seems that either of them could get a continuance if they need it.

MR. BLENDON: Yeah, I mean, certainly it's the judge's discretion to run the hearing, and, you know, if a debtor convinces a judge he ought to have a continuance he's going to get a continuance, but I

understand your point.

MS. HOBBS: I just don't want our language to imply that for some reason that would be improper.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: Well, I think Richard's point is well-taken in regard to removing the verification requirement, because the way I read this is the trial court under 2(a) may order the turnover, but the judgment creditor has to prove it up. Well, if the judgment creditor can prove it up with the verified application then you are getting to the point where you are getting inadmissible evidence in. Now, of course, hearsay can be competent evidence or is competent evidence, but you still have this logical inconsistency when you read that sentence in regard to verification.

"A verified application and any supporting affidavits must be made by one or more persons having personal knowledge," and then you say, "However, facts may be stated based on information and belief." Well, it either must be made on an affidavit by one with personal knowledge or not, so basically the second half of the sentence, "however," is negating the first half of the sentence; and the way I read this is, is basically you're allowing someone to prove up the turnover with evidence that otherwise wouldn't be admissible to prove up

anything.

CHAIRMAN BABCOCK: Yeah. Good point. I've got good news and bad news. The bad news, our rules attorney, Marisa Secco is not here. The good news is she ordered Justice Hecht to take copious notes of our discussion, which I see he is doing, so now we can move on to Rule 3. Mark, take us on Rule 3.

MR. BLENDON: All right. Rule 3, contents of the turnover order, and again, this order may be to order turnover or it may be to order a receivership. "Generally an order for turnover relief may do any or all of the following: Order judgment debtor to turn over nonexempt property to a sheriff, constable, receiver, or registry of the court; (2), order the judgment debtor to turn over documents and records related to property; (3), appoint a receiver; (4), grant injunctive relief; (5), authorize the sale of property by a sheriff or constable as in execution; (6), otherwise apply property to satisfy the judgment," and that is vague, but that is right out of 31.002(b)(2). That is the language of the statute, and then closing sub (a) with, "The order is not required to identify the specific property subject to turnover," and that is sub (h) that was mentioned earlier. That is an amendment to the turnover statute using that phrase. "The order must not require turnover of property to the

creditor." Do you want to comment on that or should I go on?

CHAIRMAN BABCOCK: No, comments on that? Anybody have comments on that? Yeah, Richard.

MR. MUNZINGER: "Order the judgment debtor to turn over all documents or records related to the property." Why do you have that? I can understand if there is a certificate of title, but "all documents related to the property," we go through this fight in discovery all the time. That would include an e-mail saying, "Bill, did you know I parked my car at the garage last Sunday?" That's a document related to the car. That's awfully broad it seems to me.

MR. BLENDON: That is in the statute back at page 122, 31.002(b)(1), second line, and I agree with the comment, but the statute does say "together with all documents or records related to the property." And that's 31.002(b)(1), second line.

MR. MUNZINGER: Thank you.

CHAIRMAN BABCOCK: Okay. Any other comments? Yeah, Roger.

MR. HUGHES: Actually, this may be skipping ahead to Rule 5, but I notice when it talks about contents of the order there is no requirement for a bond for a receiver; and, I mean, I can understand why when we give

property to the sheriff they already sort of have a bond and they've got immunity that protects them from here to Sunday, but I'm wondering what's the reason for not requiring a private receiver to put up some sort of bond? I mean, if they're going to sell the property or run a business, you're almost giving them carte blanche with no liability.

MR. BLENDON: The --

CHAIRMAN BABCOCK: Mark.

MR. BLENDON: The case law, it has been taken up, and the case law says that because we're dealing post-judgment, this is a post-judgment matter, so that would be the first explanation for lack of bond, and then the second would be that when we do get into Rule 5, as you mentioned, I think you'll see the protection there, at least in partial answer to your comment that the receiver -- the receiver can grab property, but he cannot distribute property, is my recollection under the rules, until he gets a court order or a writing signed by the judgment debtor.

CHAIRMAN BABCOCK: Yeah, Robert.

MR. LEVY: I think the issue about a bond is important, because, again, it's not -- in some cases receiver taking property can have damage to the property or other consequential damage that would not be reflected

in that type of situation and then the debtor would be without any relief under this provision to remedy that. I mean, you can receive a -- you know, trucks that are in transit, and you lose the sale, you had to get sued, the debtor is going to get sued by the people receiving the goods, things like that.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: Chip, that was a very --

CHAIRMAN BABCOCK: Peter. Peter, sorry.

MR. KELLY: This applies to 2 and 3. The phrase, "Necessity of reasonable costs, including attorney's fees, to the prevailing party." Costs are separate from attorney's fees, and nowhere else in the rules or the statutes am I aware of that attorney's fees are included as a cost. We have a whole set at Rules 125 and thereafter dealing with assessments and collection of costs. I think that it shouldn't include attorney's fees as a cost but as a separate item. Perhaps also include costs, fees, and expenses, so it's the three separate categories of awards can be made.

MR. BLENDON: I believe that phrase was taken from the statute at page 122, (1)(e), "The judgment creditor is entitled to recover reasonable costs including attorney's fees." That is the statutory language that we

used.

CHAIRMAN BABCOCK: Peter's right, costs and attorney's fees are different typically, but does the subcommittee feel that it's -- or the task force feel that it's bound in by the statute, obligated by the statute to keep that language?

MR. BLENDON: I think that, yes, we were -- that we were duty bound to find rules or create rules that would implement the statute.

CHAIRMAN BABCOCK: Gotcha. Dulcie.

MS. WINK: Throughout the sets of rules sometimes we were dealing with statutes that had language like this where the Legislature treated the attorney's fees as costs --

CHAIRMAN BABCOCK: Yes.

MS. WINK: -- and some rules where the Legislature spoke differently, so we felt bound by it.

CHAIRMAN BABCOCK: Okay. Sarah. No?

HONORABLE SARAH DUNCAN: No, I was shaking my head. I -- we all know there's a difference between costs and attorney's fees, so this is an example of what I was saying earlier about the imprecision of the statute.

On the bond issue, I thought you were being very gracious that maybe there would be damage in transit or something like that. What if the receiver just steals

the property? And it's later determined that actually, that was exempt property and not subject to execution, but it's too late because the receiver is in South America with the property and isn't coming back. The fact that it's post-judgment doesn't help the judgment debtor at all.

CHAIRMAN BABCOCK: Yeah, go ahead, Mark.

MR. BLENDON: As Donna pointed out, a receiver does enjoy judicial immunity, and so that needs to be factored in. Judge Hitner did an article back when the statute was passed and said that there should be no bond, and to my knowledge every case that's dealt with a receiver bond has concluded that no bond should be required.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Is this under section 64?

MR. BLENDON: No.

HONORABLE STEPHEN YELENOSKY: Okay. Because 64, contrary to a lot of the other things, actually says that you have to have a bond.

MR. BLENDON: Right. 64 is -- it talks in terms of claims. We're talking in terms of post-judgment, talking in terms of collecting judgments, and so that's the difference.

HONORABLE STEPHEN YELENOSKY: Is there statutory language at all regarding bond in this context?

MR. BLENDON: No, there is no statutory language on bond, to my knowledge.

HONORABLE SARAH DUNCAN: Chip, that's --

CHAIRMAN BABCOCK: Yeah, Sarah.

HONORABLE SARAH DUNCAN: I'm sorry. That's sort of the point of a bond, is because the receiver has judicial immunity you're never going to recover against the receiver, but you can recover against the bond if he absconds with your property, and I don't see how that's a reason not to have one.

CHAIRMAN BABCOCK: Any other comments? Yeah, Justice Gaultney.

HONORABLE DAVID GAULTNEY: Just so it's clear, this ex parte order that's without notice, without hearing, the day after judgment can include all of this?

MR. BLENDON: All of what, sir?

HONORABLE DAVID GAULTNEY: All of in (a)?

MR. BLENDON: You --

HONORABLE DAVID GAULTNEY: 3(a), that authorize the sale of property.

MR. BLENDON: Yes. "An order may do any or all of the following," and just very briefly, not to rehash, but remember that a garnishment can be done the

day after, can freeze the bank account, and I think could take the gas in the pipeline, so this is no worse than a garnishment in my mind.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: You know, I had a similar thought about the bond with regard to the possibility for injunctive relief. Normally you would have a bond with that, but --

CHAIRMAN BABCOCK: Yeah, Justice Gray.

HONORABLE TOM GRAY: Peter's comment still concerns me, and just because the statute uses the phrase "reasonable costs including attorney's fees," I don't understand why we couldn't clarify that and say something on the order of "court costs," comma, "attorney's fees," comma, "and other costs or expenses," and then you've got what the statute requires, but you're still breaking out those elements in a more distinct fashion.

CHAIRMAN BABCOCK: Yeah, Eduardo.

MR. RODRIGUEZ: Some of us haven't been here since the beginning like some of y'all.

CHAIRMAN BABCOCK: Like Buddy.

MR. RODRIGUEZ: But in listening to this conversation, it seems like around the table there is a lot of concern about this particular section, and specifically because there may -- may be occasions where

people are taking property even before an appeal is perfected, and then all of the sudden, I mean, the property is sold, the appeal is reversed, and now the person who had property is in a bad situation, and I understand that this was passed by the Legislature, so my question is has this committee ever -- ever come across issues before where the committee feels that perhaps it's -- the statute should be changed and approach the Legislature about making changes in order to improve the system of justice?

CHAIRMAN BABCOCK: Well, I can -- I think I can speak for the committee for a number of years, probably 15 or 20, and I don't think the committee has ever gone to the Legislature. I'll defer to Justice Hecht and Justice Medina on whether anything like that has ever happened.

HONORABLE NATHAN HECHT: (Shakes head.) But sometimes ideas -- sometimes the ideas circle back through the legislative process. But I think if we become convinced that there are constitutional problems here -- I'm not saying that there are -- but if we were convinced, we would rather change it than have the U.S. Supreme Court tell us to change it. Like we had to do with prejudgment garnishment.

CHAIRMAN BABCOCK: Judge Estevez.

MR. LOW: We had a --

CHAIRMAN BABCOCK: Is your name Judge? You got a name "judge" in front of your name?

MR. LOW: Well, I mean --

CHAIRMAN BABCOCK: Judge Estevez wanted to say something and then you Buddy.

MR. LOW: -- first name for a judge. I don't want to do that. We had that problem --

CHAIRMAN BABCOCK: Well, then she'll talk after you.

HONORABLE ANA ESTEVEZ: No, that's okay.

MR. LOW: I'm not used to having a good looking lady sitting beside me.

MR. BOYD: What's your point?

MR. LOW: My point is I'll go to her.

CHAIRMAN BABCOCK: You guys work it out.

MR. LOW: Go ahead.

HONORABLE ANA ESTEVEZ: I think our biggest concern, we keep thinking about a lawsuit that occurred, it was a jury trial, we have a judgment, and everybody has been angry at the other side for years, and finally there's a judgment. That is not what the real concern should be. The concern is, for me, the person who serves someone nine months ago, came in now with a default judgment. I sign that default judgment, and the next day

they go in and they start garnishing wages. There has not been an opportunity for them to even have notice that there's been a default judgment because it hasn't even made it to the clerk's office yet for them to send out the notice, and this has happened, and maybe it's not a constitutional issue yet because I do get that motion for new trial sometimes. Sometimes I don't.

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: But the way they found out about the lawsuit was when someone was taking over their property under a legal method, and, yes, there are constitutional issues, but I don't know what to do about them because we have these rules, and I'm not sure that anyone has raised them to me because what I'll do is try to tell them that they need to set aside whatever they're doing or stop or I'll grant an injunction or whatever request I have because I don't know why they didn't answer yet. They may -- I may be granting them a new trial, and usually I do. If someone shows up, most of the excuses that they have may be a little flimsy, but, you know, I'll grant them a new trial.

CHAIRMAN BABCOCK: Yeah. Yeah. Buddy.

MR. LOW: Chip, we had a similar problem, appellate Rule 25(g) says judgment shall be -- can be enforced unless certain things and then it goes back to

the bond, and in Texaco, they had a Federal suit in White Plains, New York --

CHAIRMAN BABCOCK: Right.

MR. LOW: -- about the amount of the bond. They said if such amount and you can't reach it. Why would there be any different constitutional prohibition if you don't have time even and notice? To me that would be more of a -- you know, of a constitutional prohibition without notice than just the amount and then we amended, as Justice Hecht said, we amended our bonding amounts and so forth.

CHAIRMAN BABCOCK: Yeah. Carl.

MR. HAMILTON: While we're on bonds, I still don't understand about why no receiver's bond is required. Under Chapter 64, which is the receiver statute, Civil Practice and Remedies Code, it says, "A receiver can be appointed," (a)(2), "in an action by a creditor to subject any property or fund to his claim." That's what we're doing with the turnover statute, so why are we not requiring a receiver's bond?

CHAIRMAN BABCOCK: Mark.

MR. BLENDON: Yeah, Chapter 64, the comment at page 115, the footnotes, talk about Chapter 64, and Chapter 64 preceded the turnover statute by I think 30 years or so, and there's just -- other than just very,

very minor authority, the cases consistently say that Chapter 64 has no application to a post-judgment receivership.

CHAIRMAN BABCOCK: Okay. Justice Moseley.

HONORABLE JAMES MOSELEY: Let me get back to you.

CHAIRMAN BABCOCK: Anybody else? Marcy. Just keeping you on your toes.

MS. GREER: It strikes me that if there were a bond requirement it can be waived. I mean, if it's just something that needs to be considered, there are grounds for waiving it whenever it's required. Since you asked.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, I don't have my Chapter 132, enforcement of judgments, memorized, but are any of these cases we're talking about -- you know, were any of them decided by the Supreme Court? I'm reminded of what Jack Pope said many times, that the courts of appeals cases are binding on, you know, some people, but not the Supreme Court, and that would influence me as to whether I would be paying a lot of attention to them.

HONORABLE JANE BLAND: Gee, thanks, Bill.

MR. ORSINGER: You didn't know that already?

CHAIRMAN BABCOCK: Justice Bland, would you like to respond to that?

PROFESSOR DORSANEO: Well, speaking as a member of the Supreme Court Advisory Committee.

CHAIRMAN BABCOCK: Okay. Anything more on the -- on Rule 3? If not, we'll take our morning break and then go to Rule 4. Be back at 11:00 o'clock.

(Recess from 10:45 a.m. to 11:04 a.m.)

CHAIRMAN BABCOCK: Okay, guys, let's get back to work.

MR. ORSINGER: All right. Crack the whip.

CHAIRMAN BABCOCK: Crack the whip. All right. We're starting again.

MS. BARON: I hear you, I hear you.

MR. ORSINGER: The old-timers pay attention.

CHAIRMAN BABCOCK: Yeah, it's these rookies. All right. I prematurely moved us onto Rule 4, forgetting that we hadn't talked about 3(b), (c), and (d) and (e) yet, so let's do that as expeditiously as we can.

MR. BLENDON: All right. Rule 3(b) at page 113, notice to debtor, "An order for turnover relief must include your funds or other property may be exempt under Federal or state law" and then (c), third party, "An order for turnover relief may be directed to a third party only if that third party has property owned by the judgment debtor or is subject to the judgment debtor's possession or control." And you want me to just go ahead and finish

out Rule 3?

CHAIRMAN BABCOCK: Yeah, finish those out, please.

MR. BLENDON: (d), receiverships, "An order for turnover relief that appoints a receiver must specify the powers of the receiver, which may include the authority to take possession of nonexempt property, sell it, and subject to approval of the court, deliver the proceeds to the judgment creditor." The order must require the receiver to file prior to assuming receivership duties. Note that the receiver shall perform the receivership duties faithfully. The order may also state how the receiver's fee is calculated, and then (3), costs, an order for turnover relief may tax against the judgment debtor the reasonable costs, including attorney's fees incurred by the prevailing judgment creditor in a turnover proceeding and the reasonable fees and expenses incurred by the receiver. And that concludes Rule 3.

CHAIRMAN BABCOCK: Comments about the remaining aspects of turnover Rule 3? Yeah, who is that, Tracy?

HONORABLE TRACY CHRISTOPHER: Oh, yeah, sorry. I'm sorry I don't have my other sections that we've redone. Didn't we have a size requirement on the notice on the other sections, and is there some reason why

the size requirement is not here? On the notice to debtor.

CHAIRMAN BABCOCK: Right. David.

MR. FRITSCHE: We had size requirements in the actual writ with regard to the writ of sequestration or the writ of execution. I'm not sure it was in the actual notice.

HONORABLE TRACY CHRISTOPHER: Well, but this is the order that actually gets served on somebody, so shouldn't it be the same size requirement?

CHAIRMAN BABCOCK: Yeah, Elaine.

PROFESSOR CARLSON: Yeah, this came up, and it's not statutory, but there is some Federal statutes that apparently exempt out property from even a state collection of a judgment, so we weren't bound by a size requirement in the notice, but that would be perfectly, I would think, acceptable.

HONORABLE TRACY CHRISTOPHER: I just think we can make it consistent with the other ones that it's in already, so people get used to that.

PROFESSOR CARLSON: Actually, some statutes say 12-point, some say 10. We could do 11.

CHAIRMAN BABCOCK: Some of us would like 14 or 16, but good point, Justice Christopher. Any other comments? Yeah, Richard, and then Bill.

MR. ORSINGER: The cross-paragraph seems to me to require an additional justification when you're going to assess attorney's fees and expenses in the turnover proceeding, a justification beyond just the fact that a judgment has been entered and you've already gotten your due process in the trial.

CHAIRMAN BABCOCK: What paragraph are you talking about?

MR. ORSINGER: That would be (e).

CHAIRMAN BABCOCK: (e).

MR. ORSINGER: 3(e), and I'm curious, can the ex parte turnover order contain a judgment for new fees and costs? Okay. Then --

CHAIRMAN BABCOCK: The answer is "yes."

MR. ORSINGER: That presents a due process issue that's different from the one that we discussed before because that's a new money judgment for post-judgment issues that have never been vetted by a jury, and I'm wondering if anyone has evaluated the constitutionality of a money judgment taken on an ex parte basis for matters that have never been submitted by notice?

CHAIRMAN BABCOCK: Mark, I take it that wasn't considered.

MR. BLENDON: I'm not aware of any.

MR. ORSINGER: To me the rationale that the judgment would cure the error to allow an ex parte seizure of property would only apply to what was tried in the first trial and not a monitory claim that's being tried ex parte for matters that occurred after the judgment, and so maybe we ought to consider some due process requirement regarding the new money judgment.

CHAIRMAN BABCOCK: Justice Christopher, is your hand poised to raise?

HONORABLE TRACY CHRISTOPHER: Yeah, I just had one other thing. The last sentence of (a), "The order must not require the turnover of property to the creditor." I think we should highlight that more and make it a separate section rather than just sort of at the bottom of (a) when you're not really thinking that it really has to be in there or should not be in there.

CHAIRMAN BABCOCK: Okay. Any other comments? Bill.

PROFESSOR DORSANEO: In (a)(1), just comparing the language in (a)(1) with the -- with (c) and would suggest that "owned by the judgment debtor" be added into (a)(1) such that it says "nonexempt property owned by the judgment debtor or in the judgment debtor's possession or subject to" -- "or subject to its control," et cetera. I don't guess it's much of an ambiguity as to whether it

needs to be both the judgment debtor's property and in the judgment debtor's possession or subject to its control when the language is as originally crafted, but at least it would be clearer if it indicated the -- if it was the same language that's in (c) for third parties.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: Unless there is some problems with that.

CHAIRMAN BABCOCK: I think Roger had his hand up first, Donna, and then you.

MR. HUGHES: Sort of a matter of clarification. Rule 3(e) uses the word "may tax attorney's fees and costs," yet 2(c) says, "A judgment creditor who prevails is entitled," and that rule would suggest that the judge has to award the prevailing creditor attorney's fees, whereas 3(e) implies it's discretionary. Does the statute or the case law clear that up or --

MR. BLENDON: Yes, at 122, the statute 1 -- or, excuse me, sub (e) in the middle of the page says, "The judgment creditor is entitled to recover reasonable costs, including attorney's fees.

MR. HUGHES: Well, "entitled to" is kind of different because we're used to sort of "shall" or "will" or "may," so does the case law say that means "must award"

or it's discretionary?

MR. BLENDON: I'm not aware on that.

CHAIRMAN BABCOCK: It does seem to be a contradiction between 2(c) and 3(e), doesn't it?

MR. BLENDON: Yes, I believe there is an inconsistency.

CHAIRMAN BABCOCK: Because entitlement means you get to get it, you get it.

MR. BLENDON: Right.

CHAIRMAN BABCOCK: Okay. So tell Marisa to fix that, Judge.

HONORABLE NATHAN HECHT: Uh-huh.

MR. HUGHES: I mean, I tend to be in favor of discretionary with a trial judge because the judge may feel that for whatever reason the equity does not require attorney's fees, but if the statute says what it says, you know.

CHAIRMAN BABCOCK: Yeah. Donna.

MS. BROWN: I have a problem with third party turnovers under (c) in the way this is written. The turnover statute is an order ordering the -- clearly the judgment debtor --

CHAIRMAN BABCOCK: Right.

MS. BROWN: -- to do something, and there are some cases with some loose language about third party

turnovers and in a happy world we would have third party turnovers because then you would -- could go directly to the third party and get the property and get the cooperation of the third party, but to do so I think you would have to bring them within the jurisdiction of the court, which would be citation, notice, hearing, time to answer.

CHAIRMAN BABCOCK: Right.

MS. BROWN: And so I think that this language of third party turnovers is a problem because it says "the property the third party has owned by the judgment debtor," that's one thing to go and get that or have the judgment debtor go get that property and turn it over, but the phrase "or subject to the judgment debtor's possession or control" would not seem to limit it to the judgment debtor's property. It's just subject to their control. So we've got to, I think, address the issue of third party turnovers and just either say you can do them or not. I don't think that the statute allows you to do them.

CHAIRMAN BABCOCK: Say that again.

MS. BROWN: I do not think that the statute, the clear language of the statute, allows third party turnovers.

CHAIRMAN BABCOCK: You think it prohibits

it?

MS. BROWN: I think it does not allow it. Now, I'm not saying it -- I think there's two different things here.

CHAIRMAN BABCOCK: Pam, what's she saying here? It doesn't allow it, but it doesn't prohibit it, or it does prohibit it?

MS. BROWN: I don't think it prohibits it, but I don't think it gives authority to do a third party turnover.

CHAIRMAN BABCOCK: Okay. That's fair. Okay.

MS. BROWN: So --

CHAIRMAN BABCOCK: Okay, good. All right. Any other comments? Let's move on to 4.

MR. BLENDON: Service of order, the key here in the three paragraphs is "as soon as practicable," and that phrase is repeated through (a), (b), and (c), "An order directed to judgment debtor or otherwise applying the property, the turnover order and requiring turnover of nonexempt property should be served pursuant to Rule 21a as soon as practicable after the order is signed." That's (a). (b), order appointing a receiver, is similar, "Appointing a receiver shall be served on the judgment debtor," 21a, as soon as practicable. And (b) does that,

at the end of the paragraph a requirement that an order appointing a receiver shall be delivered to the receiver promptly by the party or attorney obtaining the order.

And then (c), order including other injunctive relief, again, as soon as practicable, "If the application for turnover relief is filed as an independent action and a temporary restraining order issues it shall be served on a judgment debtor as provided for in the Texas Rules of Civil Procedure governing injunctive relief," and then (d), orders directed to financial institutions, those are per the -- governed by Texas Civil Practice and Remedies Code and the Texas Finance Code.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: What's the purpose of requiring the order be served as soon as practicable? Is it to make the judgment debtor subject to the order or to give him notice?

MR. BLENDON: I believe to give him notice, but to allow for the -- for the concern that you have in a garnishment that you don't want the debtor to know you're getting ready to go freeze his bank account.

MR. GILSTRAP: Well, then in 2 you've got this proviso saying that with regard to a receivership that it doesn't have to be served as soon as practicable, "if service of the order would prejudice the judgment

creditor's right to collect the judgment." And what's the purpose of that? Is it the same thing, that we don't want them running off with the funds?

MR. BLENDON: Right.

MR. GILSTRAP: Well, it seems to me that here we finally have a provision dealing with the ex parte problem. You know, if you're serving with a receivership order, there has to be a determination as to whether service would prejudice the judgment creditor's right to collect the judgment. If it would, then you don't have to serve it as soon as practicable. You can hold off on serving it. I have a question as to who makes that determination. I think it's probably the attorney, not the judge, but this is some type of recognition of the ex parte problem we talked about earlier, and let me ask you this, if -- well, it seems to me maybe we ought to think about taking language like this and moving it into 1 where we're talking about issuance of the order, because once the order is issued I'm not sure -- the attorney may have fairly limited remedies. I'm not sure what he could do. Okay, you know, you found out about it. Now what are you going to do about it? I guess you go back and try to get the judge to change the order.

MR. BLENDON: Rule 7 covers that, yeah.

MR. GILSTRAP: Well, it seems to me maybe we

need to think about taking language like this and moving it into 1 and having some type of standard as to when -- to at least give the judge in that case a standard for deciding whether to proceed ex parte.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: Because now there's not.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: I agree with that, but I also want to ask why -- if Rule 21 outlines when service is required, why do we say "as soon as practicable," because that in some sense might even add more time. Shouldn't it be done immediately if we know -- you know, if we're serving their attorney of record, and whose obligation is it to make this service?

MR. BLENDON: Well, I think it's the judgment creditor. At least the way it's actually done, the judgment creditor serves -- serves it on the debtor just as they would in a garnishment proceeding, and I don't think the reference to Rule 21a is as to time. I think the reference is as to manner of service.

MR. LEVY: And so you're serving the lawyer -- as Dulcie pointed out, you're serving the lawyer, their last lawyer of record, but and so this is not an obligation that the court that issues the order has to send it out, so as soon as you get it -- why not make it

immediately or within X period of days rather than, well, send it out next week, that's as soon as I get to it? Or why even put that language? Just say "serve under Rule 21a."

MR. BLENDON: Did you have something?

MR. FRITSCHE: Is the concern the "as soon as practicable" language?

MR. LEVY: Yes, because it could add more time rather -- even though that's not the intent.

MR. FRITSCHE: In the harmonization process that language was taken from attachment, sequestration, those ancillary proceedings, because there is a duty on the part of the applicant to as soon as practicable serve a copy of the writ of attachment or sequestration upon the defendant.

MR. LEVY: Is that under 21a also?

MR. FRITSCHE: No. It's in the specific ancillary proceedings. For instance, in current 598(a).

MR. LEVY: Would they be using 21a service under that provision or normal service?

MR. FRITSCHE: I think it would have to be 21a.

CHAIRMAN BABCOCK: Okay. Any more comments about this? Yeah, Carl.

MR. HAMILTON: Well, I'm troubled about the

Rule 21a service. We've got ex parte hearing with no notice, we have an order entered, and we have a 21a service. Where do you send the 21a service? How do you know where this judgment debtor is? I mean, do you just send it to his lawyer if he had one in the lawsuit? Do you send it to his -- you know, in default judgments the plaintiff has to file the last known address with attorney. So where do you send the 21a notice, and what if the green card doesn't come back? How do we know that the judgment debtor even got notice of what was going on?

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: The 21a, as I understand the operation here, the 21a notice is -- applies when the turnover proceeding is not filed as an independent action. If it's filed as an independent action then you have to have normal process served.

MR. BLENDON: Citation.

MR. ORSINGER: And what is the distinction or what is the choice when someone chooses to do it as not independent versus independent? Is there a requirement that some be independent? Is it optional with the judgment creditor, and if so, why would the judgment creditor ever file it independently?

MR. BLENDON: It is optional, is my understanding, and for example, if a judgment was taken in

Brownsville, debtor moves to Dallas, you might file it as an independent action in Dallas.

MR. ORSINGER: So the dependent or independent means filed in the court that granted the original judgment versus filed in another court that didn't grant the original judgment?

MR. BLENDON: That it can either be a post-judgment proceeding in the original lawsuit, post-judgment, or it can be an independent action in a new court, yes.

MR. ORSINGER: Okay, so that -- we had a debate previously -- I don't know if you were a part of it -- as to whether a garnishment is a separate action, could be filed in a separate court, or had to be filed in the original court, and there was a difference of opinion and then some research came back. Some old cases said that garnishment has to be filed in the court that granted the judgment, but that's not true for this remedy. This remedy you can file in any court in Texas really basically.

MR. BLENDON: I believe it was discussed last time, and I think the statute says "a court of appropriate jurisdiction." So you could file it in another court of appropriate jurisdiction, according -- that's line one of the statute at page 122.

MR. ORSINGER: Okay. And can you share any insight in the policy that's accomplished by requiring full service and notice in advance of an order when it's independent versus no notice and after the fact notice if it's dependent on the original jurisdiction?

MR. BLENDON: Right. I mean, if -- I mean, it goes back to this is simply a continuation of the lawsuit if it's filed in the same -- as a post-judgment proceeding, the defendant has already been served with citation, jurisdiction has already attached, we're just continuing on, so no citation, versus if you start a new proceeding then you need to have citation issued and obtain formal service of process.

HONORABLE ANA ESTEVEZ: I'm not going to say anything to the appropriateness of it, but I'll give you an example of one that's been filed in my court, and it had to do with real estate, and so they were stating that it was a mandatory venue provision because they're trying to get a certain piece of real estate. The lawsuit had nothing to do with my county whatsoever, but they're trying to get the property that is in my county, and so they filed another lawsuit just to get that property.

MR. ORSINGER: So they thought that they didn't have venue to go against the real estate in the county of judgment, so they filed an independent

proceeding in the county where the land was located?

HONORABLE ANA ESTEVEZ: Yes. That's --

CHAIRMAN BABCOCK: Skip Watson.

HONORABLE ANA ESTEVEZ: That's an example.

CHAIRMAN BABCOCK: From downtown.

MR. WATSON: To follow up on Richard's, my memory is, is that when we got into the garnishment context that the cases -- the rationale was not necessarily limited to garnishment, and, again, I'm fuzzy on this, but my memory is that the thinking was that it's kind of like a bill of review, that if you're going to do something to enforce or tinker with or whatever, a court's judgment, that the court of appropriate jurisdiction to do that is the court that signed the judgment and that other courts should not be involved in the enforcement of or changing in any way, not that this is changing, a court's judgment. Now, I'm not saying that that's necessarily what controls here, but I think that theory should not be dismissed because that's -- that's where much of this is grounded, that you don't fool with another court's jurisdiction, including enforcement.

CHAIRMAN BABCOCK: Okay. Yeah, Richard.

MR. ORSINGER: I'd like to hear what Mark or Donna say about the idea of the venue rules applying. Do you agree that if someone seeking enforcement against

land, that some kind of mandatory venue rule would require that the turnover be filed in the county of the real estate?

MS. BROWN: I do not. Because the order, the turnover order, is an order ordering the judgment debtor to do something, and I think it was overkill on the part of --

HONORABLE ANA ESTEVEZ: And I want to add to it, they have a fraudulent transfer part in it, too, so they had added some parties, and I don't know if that would make a difference as well.

MS. BROWN: And that is a separate lawsuit that is not something that could be determined in the course of a real turnover proceeding.

HONORABLE ANA ESTEVEZ: So it could have been -- that could have been mainly their thought.

MS. BROWN: They're throwing everything in one pot.

HONORABLE ANA ESTEVEZ: There you go.

MS. BROWN: And one of those things has to be cooked in your court, so that's what was happening there, but as far as venue, I don't think that the turnover proceeding -- there's one exception. There's some discussion that if the claim is a consumer debt, that the Federal Fair Debt Collection Practices Act may require

that the turnover proceeding be brought in an independent action that is in line with the Federal statute regarding consumer debts, and that would be when you would be governed by venue, not by the Texas venue statutes but by the Federal Collection Practices Act.

CHAIRMAN BABCOCK: Okay. Let's move to Rule 5. You don't need to -- Mark, you don't need to read all of Rule 5 because it's kind of lengthy, but just give us an overview of what the rule is about.

MR. BLENDON: All right. Receiverships, in general, and I think this is important, the receiverships under the rules are referred to as "post-judgment receiverships." Chapter 64 of the Texas Civil Practice and Remedies Code and Rule 695, 695a do not apply to post-judgment receiverships. That was referred to earlier, and then there is a comment on that, and then qualifications. Bond, no bond is required. That's been raised. Receiver's fees and expenses, that the receiver is entitled to reasonable fees and expenses; and real property, that if it involves real property that a motion to approve the agreement must be brought before the court and then disposition of receivership property -- and that is important as well -- "Unless otherwise provided in the order or subsequent orders, the receiver shall not distribute the proceeds of receivership property or pay

receiver's fees and expenses without either, (a), notice to the judgment debtor and judgment creditor, hearing, and order of the court or a written agreement filed with the court."

And then 2 is slightly inconsistent in saying "application and notice." "An application for distribution must detail the proposed distribution and must" -- and then goes on to allow a notice of submission, so to speak, "and must contain a notice that the court may grant the relief if no objection is filed within seven days," and so that is somewhat at odds with (a) at the top of the page saying there shall be a hearing, and (a) probably should be changed or these two should be reconciled, and one reconciliation would be to say, (a), change it to notice to the judgment debtor and judgment creditor, "opportunity for hearing," adding the words "opportunity for" to make it consistent with the notice of submission procedure under (2). And then that's pretty much it.

Application for receiver fees, the court -- and then order, the court must enter a written order, and if requested the order shall also state the receiver's reasonable and necessary fees, and then provision for termination in (g).

CHAIRMAN BABCOCK: Okay, good. Let's --

comments on 5? Rule 5, at pages 114, 115, and 116 of our materials. Yeah, Harvey. Justice Brown.

HONORABLE HARVEY BROWN: I just have a question, and that is what does a bond cost? I mean, if you're taking a million dollars that the receiver is overseeing, what would the bond cost? Because that's an additional expense that is eventually going to be passed on.

MR. BLENDON: I'm not certain in a -- I'm not clear on the question. I don't believe a bond would be required, but if it would, I think oftentimes it's 10 percent of the bond amount. I don't know that.

HONORABLE HARVEY BROWN: I know it's not required now, but I know there's some people talking about it.

MR. BLENDON: Right.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: I have a question. I may have missed something. This Rule 5 allows a receiver to sell property; is that correct?

MR. BLENDON: Depending on the court order, yes.

MR. MUNZINGER: I understand it has to be done with a court order and in a hearing, what have you, but up to this point in time the rules as presently

written do not require notice to the judgment debtor. The judgment -- the first of the rules that we looked at allowed an ex parte hearing, did not require a notice to the judgment debtor. We now have -- we're addressing a rule that allows property of the judgment debtor to be sold, and it says "application and notice," seven days, if no objection has been filed within seven days, but the judgment debtor doesn't know of this -- unless I've missed something, doesn't know that there is a proceeding going, doesn't know that a receiver has been appointed over his or her property, and that his or her property is now going to be sold by the receiver and all of this on a judgment that has not yet been final for 30 days.

MR. BLENDON: I think that 2 infers and maybe should specifically state that that notice goes to the judgment debtor and that he has seven days to raise his objection.

CHAIRMAN BABCOCK: Okay.

MR. MUNZINGER: Well, but the notice -- the notice is given by the party, by the court, by the receiver, by whom? To where? Again, the whole scheme here -- and I don't mean that in a bad way. I don't mean that it's a scheme. I just mean that the whole arrangement contemplates no notice to the judgment debtor throughout the point that we're now at selling his or her

property.

MR. BLENDON: No. At least the way it's really done is the receiver provides this notice, and in fact, this is the way it's being currently done in Dallas County, is that the receiver, he acquires property. He's got the property. He sends notice to the judgment creditor and the judgment debtor and requests a court order to allow him to distribute property. If no objection is raised, most of the judges will then simply sign the order, allow the receiver to pay the judgment creditor the proceeds and pay the receivership fees to the receiver.

MR. MUNZINGER: Well, I mean no disrespect, but it doesn't seem to me appropriate that property can be taken from its owner because this is the practice in Dallas as distinct from a rule enacted by government that addresses transfers of ownership of free citizens' properties. I don't understand that.

MR. BLENDON: Well, as I say, it infers, and maybe it should specifically state at this point the debtor is getting notice and an opportunity to object when we're talking about sub (2) there, application and notice.

CHAIRMAN BABCOCK: Gene, then Lamont, then Carl.

MR. STORIE: Yeah, I just had a question

also about what sort of real property cannot readily be levied on by ordinary legal process.

MR. BLENDON: Interesting, I hadn't thought about that.

MR. STORIE: Right. So I wasn't sure why there was some mention of real property. I know Justice Christopher mentioned it was typically some sort of intangible item.

MR. BLENDON: One situation where it might apply, though, is if a debtor has nonexempt property that is -- cannot be levied upon by normal legal process, the receivership order is going to be broad and would include also the assets that could be levied on by ordinary legal process, I believe. And so the receiver, once the receivership door opens and the threshold is crossed then he could also have control over easily to levy on property, is my understanding, depending on what the order says.

CHAIRMAN BABCOCK: Lamont, will you yield to David for just two seconds?

MR. FRITSCHE: Just very briefly, the only thing we could think of, perhaps, is a leasehold interest, the contract right owned by a judgment debtor. That has some value that's not readily levied upon. I think you're correct that the only way I know to levy upon real

property in execution is to endorse the real property description on the writ, file it of record, conduct a sale.

MR. STORIE: Yeah.

CHAIRMAN BABCOCK: Now Lamont.

MR. FRITSCHE: Thank you.

MR. JEFFERSON: It seems to me like everyone has the same problem with all of these provisions of the statute, and that's a problem of notice, and we're all -- at least I'm envisioning judgment taken day one, next day a turnover receiver, stuff happens under the statute, and I appreciate the task force -- the deference to the Legislature, but I don't -- it looks to me like we can fix a lot of these problems if we had rules or a rule that governed the period of time before which the judgment is final, if we -- and have some kind of a standard to get relief in that time period, including the appointment of a receiver, and I don't see anything in the statute that would prevent that.

So, I mean, this committee at least is real concerned with, and understandably so, an ex parte proceeding during a time when a judgment is not firm, and this statute and all the other provisions we've been talking about, I think, would give us a lot of comfort if we just knew that there was a period of time during which

you had to prove certain things before you could get a turnover order.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Well, the rule by tradition has said that a writ of execution can't issue for 30 days after the judgment is signed or I believe until 30 days after the motion for new trial is overruled. Is that not right?

PROFESSOR DORSANEO: That's right.

MS. BROWN: Except on affidavit.

MR. ORSINGER: For some kind of emergency.

MS. BROWN: Right.

MR. ORSINGER: So there's built into that an awareness that a district judge might grant a new trial after signing the judgment, and therefore, we don't want to be executing on property before the judgment we know is going to go up on appeal or go final, and this is a substitute for the execution process for assets that are not subject to execution, and I'm not sure that there's a big policy difference in terms of protecting the rights of the judgment debtor between property that's subject to execution and can't be taken until we know the trial court stands behind the judgment versus intangible rights and other contract rights that can be taken before the judge has even seen whether there's a motion for new trial, much

less ruled on it. So an easy fix is to just put the same 30-day requirement on here and then that gives everybody time to take stock of the situation, file a motion for new trial, get it denied. Then you file your notice of appeal and you file your supersedeas bond, and I think that's within the power of this committee or the Supreme Court, us to recommend them to do.

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

MR. HAMILTON: Yeah. On (e), this agreement for the sale of the property, who is the agreement between, the debtor and creditor or the receiver and the debtor or who?

MR. BLENDON: I believe that is a -- bringing the contract in, the proposed agreement between the receiver and the buyer of the property.

MR. HAMILTON: The receiver and the buyer?

MR. BLENDON: That the receiver would enter into, subject to approval of the court.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, it ought to say that. If that's what it is, that's a surprise to me that's who it would be between.

CHAIRMAN BABCOCK: Okay. Yeah, Richard, and then Justice Christopher.

MR. MUNZINGER: I think as Bill just said, I mean, my goodness, here's these rules that allow the judgment debtor never to be notified, but the receiver can enter into an agreement to sell his property, and he hadn't had notice of anything.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: If the Court wants to incorporate the same time limits under this -- for the turnover as for the -- or as for execution, that's fine. The only thing that I would like to argue for is that there should be an easy injunctive relief that would prevent transferring assets, selling to third parties, during that interim time period. During that 30, 60, 90, 120 days.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Go ahead.

MS. WINGATE: Well, I mean, can't the court always order the debtor not to dispose of his assets? I mean, if you really are afraid of that.

CHAIRMAN BABCOCK: Mark, I would think so, yeah.

MR. BLENDON: I'm sorry, I didn't hear the comment.

CHAIRMAN BABCOCK: Yeah, Brandy said can't a judge always order a debtor not to dispose of assets if

there's a concern about him transferring, disposing, hiding, whatever.

MR. BLENDON: Right. I've heard of judges doing that, but I'm not sure how that exactly fits in here, but I guess that would be a factor in considering the ex parte motion.

CHAIRMAN BABCOCK: Yeah. Okay.

HONORABLE STEPHEN YELENOSKY: I didn't get to speak, you called on me.

CHAIRMAN BABCOCK: Yeah, Judge Yelenosky is next, and then Peter.

HONORABLE STEPHEN YELENOSKY: I don't really -- I'm missing something here because, Richard Munzinger, you keep saying there's no notice. Unless I'm misreading this, you get the notice of -- I understand the ex parte at the front end, but once a receiver is appointed there has to be notice, right? And before there is an order allowing for sale there has to be notice, and I didn't understand because you were saying, well, maybe that should be explicit. Isn't it already explicit in the rule or am I misreading?

CHAIRMAN BABCOCK: Mark.

MR. BLENDON: When I spoke earlier about -- I think I spoke to real property, and if I didn't misunderstand the question, I mean, on real property we

were talking about that would come before the court and sub (e) does say "contingent upon notice, hearing, and order of the court"; and, yeah, I mean, other than the beginning of the receivership process, at least my understanding of these rules and the statute is that, you know, nobody is going to be running into court ex parte and getting the receiver authority to dispose of the property, pay the creditor, pay the receiver, and be done without notice to the judgment debtor.

HONORABLE STEPHEN YELENOSKY: Well, but Richard's saying your understanding of what happens in Dallas is one thing and what I'm asking you specifically is does the rule say you have to do that in 4, 5, wherever we are? And maybe I'm looking at the wrong part.

MR. LEVY: Doesn't this Rule 3(a)(5) authorize the sale of the property before -- under that ex parte order?

MR. BLENDON: Are we talking about Rule 5(2)?

MR. FRITSCHE: No. I think if -- Chip, if I may.

CHAIRMAN BABCOCK: Yeah, go ahead, David.

MR. FRITSCHE: I think where the tension is, is the difference between turnover of the intangible to the sheriff or constable for execution, in which case that

sheriff or constable cannot act without the writ of execution to authorize the sale, and the tension I think is that the receiver has situations where it appears under the rules the receiver could act within that 30-day period, and that's the problem here, so to address Richard's point, perhaps the 30-day issue should apply to the receivership aspect of this because the sheriff and constable can't act, they cannot act without the writ on what has been turned over to them.

CHAIRMAN BABCOCK: Peter had his hand up a long time ago. Peter.

MR. KELLY: Talking about what Judge Christopher said, the courts have authority to enter orders prohibiting the transfer under the Uniform Fraudulent Transfer Act, but if there's a rule adopted, it would have to be careful to not infringe upon the evidentiary and pleading requirements set forth by the Legislature in that statute.

CHAIRMAN BABCOCK: Okay. Robert, did you have your hand up a minute ago?

MR. LEVY: Well, just on that point I want to emphasize there is significant damage that can take place when property is taken over by a receiver, and so that 30 days will not remedy it if we're talking about as soon as the receiver has the property, and the other point

is, as we're talking about notice, that under the proposed Rule 3(a)(5), an original order under Rule 2 can be -- that could be issued ex parte can include the authority for the receiver to sell the property or the sheriff or constable selling the property, so they can go as far as selling the property before the judgment debtor has notice, as I understand it.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Yeah, that's clear, I think, from part (f)(1)(A). The first time it looks like the debtor is required to have notice is when the proceeds are going to be distributed. There it's clear you do have notice, you have to give notice to the debtor before they pay the money out, but I haven't seen anything in here that guarantees notice prior to that time.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Maybe it would be appropriate to change 3(a)(5) to say "authorize the sheriff or constable to take custody of the property," rather than to sell it, because you want to get it away from the debtor so that it can't be hidden or moved out of state, but we don't want it sold in 24 hours -- 24 hours after the judgment is signed without notice, so could we not build a little protection in there by saying that what they're going to do on an ex parte basis is take legal custody of

it, but then they have to go back to the court to get an order to sell it to a third party.

CHAIRMAN BABCOCK: Buddy. And then Dulcie.

MR. LOW: Chip, as I understand Elaine, the Legislature wanted some procedure where you could act before people could hide and conceal their property. Was there any question about treating land differently? It's not easy to hide land from other physical property that you can hide and so forth, and should land be treated differently than the other property? Was that any consideration of the committee? Because we treat land, we have mandatory venue on land. We treat land special in Texas always. Was there any consideration of treating land differently than other assets that were readily disposable, because if you give a deed in fraud of creditor you can set it aside anyway. Was that something --

MR. BLENDON: No, I'm not aware of a separate consideration to consider land separate from other property of the judgment debtor.

CHAIRMAN BABCOCK: Very good. All right. Dulcie, sorry, and then Elaine.

MS. WINK: I think what Richard Orsinger and others are seeing is there's some tension between Rule 3(a)(5) as currently drafted, which specifies the powers

of the receiver, and those that are specified in Rule 5 as to the receiver's right to disposition, which requires notice and hearing. So whatever they're disposing of requires notice and hearing, and I think we can do some work on this to make sure that that's clear.

CHAIRMAN BABCOCK: Okay. Good. Good. Elaine, and then Carl.

PROFESSOR CARLSON: Yeah, I hate to bring this up because it's further shocking, but --

CHAIRMAN BABCOCK: Tell Munzinger not to listen.

PROFESSOR CARLSON: There is a court of appeals opinion, and it is a court of appeals opinion --

MR. ORSINGER: Just a court of appeals opinion.

PROFESSOR CARLSON: One of those.

CHAIRMAN BABCOCK: Now, now.

PROFESSOR CARLSON: That allowed the seizure -- the turnover, I'm sorry, of property, requiring the turnover of property by a judgment debtor of property outside the United States, which, of course, would not be subject easily to levy.

CHAIRMAN BABCOCK: There you have it. Carl.

MR. HAMILTON: Did I understand you to say that the sheriff or constable has to get a writ of

execution?

CHAIRMAN BABCOCK: Dulcie says "yes."

MR. HAMILTON: In addition to this order?

MS. WINK: Yes.

MR. FRITSCHE: Yes.

MS. BROWN: And if I may speak to that, I believe that's correct, because the statute actually says not "as in execution," but "turnover to the constable for execution." There is a practice that's going on across the state where judgment creditors have been getting turnover orders ordering property turned over to the sheriff or constable, and they've -- the sheriff or constable is requiring a fee separate from the execution and is acting on the turnover order without a writ of execution in hand. I don't think that's right, but, again, it's being done.

My preferred -- I rarely -- I never use a receiver. Never. I like collecting my own judgments, but there are times when I have a writ of execution out where the judgment debtor's got rolling stock and I need them ordered to bring it to the constable for execution, you know, bring it to deputy so-and-so at the constable's office or wherever he directs, and so I use the turnover order in connection with that writ of execution. So I do believe that the constable needs to have a live writ in

hand if the turnover order is ordering the property to the sheriff or constable to sell.

CHAIRMAN BABCOCK: Okay. Let's -- okay.

MR. ORSINGER: I think there's another kind of subtext here, and that is that the -- the whole turnover process is at least theoretically only available for property that's nonexempt that cannot readily be levied upon, which means something other than land, and yet I understand now from the practitioners that if you can find a single asset that's not -- cannot be readily levied on then you can use this turnover process to substitute for the ordinary execution process, which has notice built into it. No?

CHAIRMAN BABCOCK: The task force is shaking their heads "no."

MR. ORSINGER: Then I misunderstood.

MS. BROWN: No, I think, if I may, there are some receivers who treat it that way, and there are some orders that are issued that way. I believe they overstep the original bounds of what the turnover proceeding was all about.

MR. ORSINGER: Well, then perhaps our rules should make it clear that whether it's a turnover order or a receiver appointed under these rules, they are not to be selling land. Land is subject to execution. We have 150

years of rules on executing on land, and can we make it clear that these orders are not supposed to be ordering 48 hours, no notice, sales by agreement between the receiver and a buyer? Because that's I think problematic for almost everybody.

CHAIRMAN BABCOCK: Okay. Bill, and then Richard, and then we're going to move on to contempt.

PROFESSOR DORSANEO: I think the statute is very hard to interpret, but, you know, to say execution means writ of fieri facias, you know, rather than enforcement, is -- however the enforcement is done is, you know, just a very -- very debatable interpretation of ambiguous language. So I think there are a lot of issues here, like that are related to the practice, the interpretation that people have given to the language doing the best they can, and that maybe we ought to try to make it a little clearer as to what the better interpretation actually is.

CHAIRMAN BABCOCK: Last comment on Rule 5. Richard Munzinger.

MR. MUNZINGER: I want to join Richard Orsinger's concern about execution of real property. If the statute is intended to apply only to property that is not subject to the ordinary enforcement remedies of execution, attachment, garnishment, what's the difference

between taking a bank account using this procedure as distinct from using garnishment? It doesn't seem to me to make sense. You can't garnish an account, can you, without notice to the account holder? I mean, if I have shares of stock that are in the custody of my stock broker, can you use a turnover order even though those are available to a writ of execution? And if the practice is to use the turnover order as a substitute for those time-honored writs, I think you have a problem, a serious problem.

CHAIRMAN BABCOCK: Okay. Let's go on to Rule 6 and 7 and then we can eat, so you guys will judge when we -- is there any problem with Rule 6 about punishing disobedience by contempt?

MR. GILSTRAP: Is that already in the rule or --

MS. BROWN: In the statute.

CHAIRMAN BABCOCK: It's in the statute.

MR. BLENDON: Yes, it is.

CHAIRMAN BABCOCK: Okay. Let's go to 7. Justice Hecht. I'm sorry, Justice Gray.

HONORABLE TOM GRAY: I've got a number of problems with Rule 6. I apologize for that and the delay of lunch, but that single sentence has a host of problems in it, and while it may be in the statute like that, I

think we really need to recommend to the Court clarification. I'll try to do this very quickly.

First, for comparative purposes, see Rule 692 regarding disobedience of an injunction as sort of a whole paragraph on the -- what happens in the event of a disobedience of an order. It starts off with "a court." It doesn't specify whether it has to be the court that issued the turnover order or another court and can another court enforce that. "May punish," that implies a criminal contempt, which is very different than a civil contempt. If you notice in the injunction order it talks about purging -- the person that violates it or is disobedient of it can be held in contempt until they purge themselves of the contempt.

That is a civil contempt proceeding as opposed to punishment, which is typically money or days in jail, regardless of whether or not they've already purged themselves of the contempt. Disobedience is going to be a fact question, going to have to be probably a hearing, "of a turnover order as contempt," and then the question is regardless of which court is doing the contempt proceeding, whose motion is it going to be on? Is it going to be on the party's motion or a court's motion? For how long after the disobedience can this presumably criminal contempt proceeding be started? And because it's

criminal contempt and the fine, if you will, will be going to the state as opposed to the party, who is the other party to the other side of that proceeding? How long after the violation or the order regarding the turnover can you pursue this disobedience? I mean, are we talking six months, two years, four years after the order, can you still do it, and there's I guess some discrepancy in my mind between the title of the rule and the text of the rule because it's one is termed as enforcement of the turnover order and the other is for punishment for disobedience. Enforcement is more in the line of a civil until you purge yourself of the contempt, excuse me, of the violation, and so there's just a whole lot of issues in that very short sentence that I think you could use probably Rule 692 as a pattern to flesh it out some, and with those comments I'll --

HONORABLE STEPHEN YELENOSKY: But other than that you think it's a great rule?

HONORABLE TOM GRAY: And I could not find anything wrong with the phrase "turnover order," so --

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I, frankly, question whether this is needed. It's an order of the court. It's enforceable. It's subject to the course of contempt, it's subject to criminal contempt, just under

the common law; and as Tom says, we raise a whole bunch of issues by putting it in here standing alone without any framework around it.

MS. BROWN: I can answer that.

CHAIRMAN BABCOCK: Donna or Dulcie.

MS. BROWN: Or Dulcie, and it's because so many courts say that this is an order to pay money, and therefore, I can't hold you in contempt for failure to pay money. Just to clarify and also because it's in the statute that it says it's enforceable by contempt, just to clarify that we're not imprisoning somebody for failure to pay a debt, and there has been discussion about that and dissents in the Supreme Court, is this imprisonment for debt, and so this just clarifies that --

HONORABLE STEPHEN YELENOSKY: Could you speak up? I'm sorry, we can't hear.

MS. BROWN: There's been -- there was at least in one case in the Supreme Court in a dissent a concern that enforcement of a turnover order was considered imprisonment for debt, and so this just brings along the statute's provision for enforcement by contempt and hopefully clarifies that it's -- that that's what it's for.

CHAIRMAN BABCOCK: Dulcie, final word on Rule 6.

MS. WINK: Yes, final word, and Judge Gray, not that I want you to get real comfortable with the part of the injunctive rule that you were looking at because by the brilliance of those who were in the room six or so months ago we addressed changes to that in injunctions, and what was ultimately decided at least here amongst the advisory committee was to just say that the court may punish a violation of the injunctive order by contempt. The reason that that was decided upon was because the whole issue of contempt, civil and criminal, is too broad a spectrum to cover with too many rules and case authorities to provide otherwise.

HONORABLE TOM GRAY: And can I have a final retort?

CHAIRMAN BABCOCK: I knew you would want that.

HONORABLE TOM GRAY: I will only add to what I have previously said, a lot of things have happened with regard to my research on this issue since then that I won't go into here, but that's why I was able to identify so many problems.

CHAIRMAN BABCOCK: All right. Great. Rule 7. Frank.

MR. GILSTRAP: Rule 7 has a limitation on -- it limits -- it gives you a period of time during which

you have to have the hearing after you file the motion, but is there any limit on how long when you can file the motion? Can I wait a year?

MR. BLENDON: I'm not aware of any limitation on that.

MR. GILSTRAP: Do we want one? I mean, you know, I mean, I presume the property is gone, but maybe we would be setting them up for some type of wrongful collection, you get the judge to say that "I'm going to dissolve the order." It looks like it could be done at any time.

MR. BLENDON: I mean, they're going to come in with an application to distribute, and I think those issues are going to have to be raised at that point or they're going to be waived. That's all I think.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: Does this not interface with the body of rules that we've already discussed about putting third party ownership of seized property in issue in a trial in seven days, and remember all of that process we went through that, and does it dovetail? Would that not apply to this proceeding?

MR. BLENDON: I'm not aware of specifically, but as to third party property in the hands of third parties, I mean, there is a number of cases out there, and

there is no clear distinction about when the third -- if the third party is claiming a right in the property then they don't belong in a receivership; and if it's clear, though, that I'm a judgment debtor and Donna has my vehicle, then you can go to Donna and get it through a receivership if she is not claiming an interest in it, but I don't have any --

MR. ORSINGER: But what I was saying is we've got a body of rules about a third party having an immediate trial on the right to possess. Dulcie, I don't know, you remember that, don't you?

MS. WINK: Yes. Yes. It's the trial of right of property rules, and those would still come into play, absolutely.

MR. ORSINGER: So are we -- is this provision about moving the court, is that meant to embody all of those procedures, or is this shortcut and avoid all of that -- all of those discussions we had?

CHAIRMAN BABCOCK: Buddy, will you yield to Donna?

MR. LOW: Yeah, I yield.

MS. BROWN: The whole reason that we put in a provision for dissolution or modification of the order was to give the judgment debtor an opportunity to go in and ask the court for relief at the trial court level.

This would take into consideration several things, including the fact that it might have been an ex parte hearing or that there is a change of circumstances of the debtor that in the equity of the court the court might decide to modify the writ so that -- and many of these turnover orders are interlocutory, not subject to appeal, so instead of dealing with it at a mandamus level and not being able to deal with the change of circumstances, assuming it is an ongoing order, and some of them are, this was -- this was really for debtor's rights, if y'all can believe that from a bunch of creditors lawyers, but that's what we did this for, was to have a way that the judgment debtor could come in and get relief from an order on a very fast -- in a fast approach.

CHAIRMAN BABCOCK: Okay. Great, thanks, Donna. Buddy.

MR. LOW: But my question is like arguing before a court, a lot of times I don't think I understand what I'm saying, but when I asked treating land differently, and on a receivership you do have a specific provision, 5(e), about real property. Why did you just distinguish real property there? And notice has to be given and so forth.

MR. BLENDON: My understanding was that that was put in there to -- because of the importance of real

property and title and the humbling effect all of that has on the receiver that the receiver wants the court to bless that before he carries through and concludes the sale of property.

MR. LOW: But I can get an order -- I don't have to give the notice and hearing and so forth. If I'm the person that has the judgment against someone, I can sell the property without that, but if a receiver is appointed he can't.

MR. BLENDON: Subject to approval of the court, if I'm understanding you. I'm not certain if I did.

MR. LOW: Okay.

CHAIRMAN BABCOCK: Okay, yeah, Carl.

MR. HAMILTON: I still have this problem with Rule 21a refers to serving all parties. This is after judgment. We don't know who parties are at this point, and we don't know whether the lawyers are still the same lawyers in the case, so there needs to be something about how we know where these people are to get them served.

CHAIRMAN BABCOCK: Dulcie.

MS. WINK: You raise a very important issue, and that was discussed at the task force level, and so the issue is some people do not represent the judgment debtor

post-judgment. As a matter of practice I think Donna and others, I could be wrong, are very good at providing the 21a notice not only to the attorney but also sending it by certified mail or whatever process to the defendant or the debtor just to make sure that that notice is covered.

Now, technically speaking, if there is a change in the attorney or a change in the debtor's address, that's supposed to be provided to the court either pursuant to the rules and/or pursuant to Civil Practice and Remedy statute, section 30.015, but you raise a good point, and I personally would suggest that it's a good idea to specify that until that shakes out that notice should be given to all attorneys of record as well as directly to the parties so that I, if I was trying to collect, would not violate ethical rules by sending notice to a party that until recently I know was represented.

CHAIRMAN BABCOCK: Okay. Robert.

MR. LEVY: I might misunderstand this, but it seems like there's an inconsistency between provisions (b) and -- or, I'm sorry, (a) and (c) in that you say a hearing is required, but a court can decide without a hearing. We can decide on affidavits. Is a hearing required for a modification, and if so then you should maybe clarify that the court has to hold the hearing. It can't just decide on the papers.

CHAIRMAN BABCOCK: Yeah, Roger.

MR. HUGHES: I've been a little concerned about the effect of filing a supersedeas bond, because, I mean, if the defendant is fortunate enough to be able to do it after one of these things there's still a little problem. If you have a writ of execution out or a writ of garnishment, you file a supersedeas bond, and the clerk without the intervention of the judge can just issue a writ of supersedeas to shut down the execution, but under a turnover order, that's like a mandatory injunction against the judgment debtor, and he has to perform it until ordered otherwise, and it would require a court order to relieve him of performing the obligation or face contempt, and under this rule it would appear that even if the debtor files a supersedeas bond -- and I'm just assuming for the argument that it's adequate to supersede the underlying judgment, that doesn't halt his obligations of either him or the receiver to perform the turnover order, and somebody would be required to file a motion to dissolve, which under the rule would require it be set no sooner than three days down the road, and et cetera, and all the while the debtor is risking contempt by not performing the order.

So, I mean, I'm not sure how this is handled in practice, and that may be the answer to the question,

but otherwise it might be a good idea to build into the Rule 7 some sort of safety valve that if you have one of those cases where the person manages to scrape together a supersedeas bond, they have a quick and adequate remedy to bring everything to a screeching halt and save themselves from contempt or having their property sold before the judge can modify the turnover order and set it aside.

CHAIRMAN BABCOCK: Okay. All right. After lunch at 1:00 o'clock we're going to talk about expedited actions and then tomorrow we're going to go back to the ancillary task force and talk about executions, and hopefully they won't execute all of us, but for the moment we'll stand in recess and be back at 1:00.

(Recess from 12:08 p.m. to 1:07 p.m.)

CHAIRMAN BABCOCK: All right. We have temporarily left the ancillary field, with great regret, Elaine, I'm sure, and now we're going to take up expedited actions, which are called for in House Bill 274 and the statute, which is now part of 22.004, subsection (h), of the Government Code; and the Court appointed a task force, chaired by former Chief Justice Phillips, who has submitted a report and some draft rules; and Justice Phillips, as we know, is not able to be with us because of the redistricting lawsuit in San Antonio having a hearing today, so capably in his place is Judge Alan Waldrop and

David Chamberlain, who are going to talk to us about whatever they want to talk to us about, but we're going to start with the issue that was the most contentious in the task force and which we have received some correspondence and e-mails, including one from George Christian, which came in yesterday afternoon; and Angie is distributing that to everybody. It is on the subject of voluntary versus mandatory, and George represents the Texas Civil Justice League and comes out on the side of voluntary, and so you'll see that. We've also posted this, I believe, Angie, to our website, as we have all the materials that have come in on this.

MS. SENNEFF: Not yet.

CHAIRMAN BABCOCK: So without further ado, David and Judge Waldrop, whoever wants to go first goes first, and tell us -- if you'd address yourself to the issue of mandatory versus voluntary and then we'll come back to you for other issues. Who wants to go first?

HONORABLE ALAN WALDROP: David, do you have a preference? I'm down here. And also, I don't mind kind of ham and egging it a bit.

MR. CHAMBERLAIN: Okay.

HONORABLE ALAN WALDROP: That's completely fine.

MR. CHAMBERLAIN: We're used to doing that.

HONORABLE ALAN WALDROP: Yeah. I'll just introduce the subject then. Probably the single -- the committee met four times, the task force, excuse me, met four times and had a fair amount of communication via e-mail to discuss a variety of things, and there was a consensus on nearly every component of what eventually was put in here with the one exception being whether there should be any mandatory aspect of the new rules, and that was one on which there really wasn't a clear consensus that the task force was pretty close to evenly divided on that, on that issue.

So we can start with that one, and I'll frame it. The question really came down to should whatever the court adopts to address cases below $100,000, in total, by the way, should any aspect of those rules be mandatory for the parties involved, or should it be -- should they apply only if all the parties consent to it, and I frame it that way because the -- one of the things that we would like everyone to bear in mind, and it's apparent when you look at these rules, is that the mandatory piece of the rule is mandatory only in certain ways, and it's important that everybody understand how it's mandatory and how it isn't in deciding what you think about it.

There are -- because there was not a

consensus on this piece of the process, the task force ended up reporting out basically two versions of the draft proposal, but even that's mildly confusing because a lot of it overlaps. One version that has a mandatory component to it also has the voluntary piece as well, so the folks that were in favor of that version were in favor of passing a two-prong set of rules, one that had a mandatory component and another which had a lot more -- is a lot more restrictive. Because it's consensual it can be a lot more restrictive, and you have both of them.

The folks that were not in favor of having a mandatory component and wanted a strictly consensual set of rules then are proposing for the Court to adopt just the voluntary piece alone without the mandatory component, but it's important to know that the voluntary piece is the same with respect to both proposals. It's not different. There was consensus that if you had a voluntary -- the voluntary piece of it should look like the committee -- the task force was in agreement that if there was going to be one, it should look like the one looks here.

Getting to the mandatory component, which was the piece there wasn't a consensus on, the mandatory -- the way the mandatory -- proposed mandatory rule would work, which is proposed Rule 168, is that basically the plaintiff would have the ability to plead

into or out of the rule. It would apply to cases in which the amount in controversy was no more than $100,000 and here's what's important, inclusive of attorney's fees, expenses, everything. The only thing it doesn't include is costs and fees upon appeal. So if you've got that kind of dispute, the plaintiff can basically elect to plead into it. If a party asks for the plaintiff to plead whether you affirmatively plead whether you come within this rule or not, you're required to plead one way or the other.

Now, there is a -- if the plaintiff does elect to plead into it, then a couple of things get triggered. One is if it -- if you're in it and you stay in it, the plaintiff cannot recover a judgment for more than $100,000, period. The task force thought that that would be -- that had to be part of the trade-off for forcing defendants to be in it under certain circumstances. There are a couple of escape hatches out of that mandatory rule. One is on motion by any party on a showing of good cause, so if you have an usual case and you want to -- the plaintiffs have pled you into it and you're a defendant and you want to get out of it, then your option, the way you get out of it under this proposal, would be to file a motion with the court, and the court would decide whether to let you out of this

procedure or not, and it has to be to be on showing of good cause.

The other way to get out of it is just by having any pleading come into the case between the two parties that exceeds $100,000; and so, for example, a counterclaim. A counterclaim would keep -- by defendant for more than $100,000 would kick you out of this proceeding. There is not -- this was a point that was discussed at length because it was complicated, but everybody eventually agreed we should not do this in a rule. There is not a procedure in the rule for examining the goodness or badness of a pleading that pleads outside of the rule over $100,000, so there's not a procedure for having a little mini-trial in front of the court about whether or not that pleading is, in fact, truthful or not truthful. The rule just says if you plead it, you're out of this process, and all that means is, is you're back in under the regular rules that we're all familiar with. So that's a -- that's conceptually something I think is a major piece of this and well worth everybody's thought about what you think about that one way or another.

CHAIRMAN BABCOCK: So, Judge, if I can just interrupt, so a plaintiff at the outset can plead in or out. They can plead $101,000 and they're out, or they can plead 100,000 or less and they're in, but a defendant can

also plead out of it is what I want to -- if I'm understanding you, by filing a counterclaim for $105,000.

HONORABLE ALAN WALDROP: Correct. That's the way it's set up now.

CHAIRMAN BABCOCK: Okay.

HONORABLE ALAN WALDROP: Both sides have that option. Now, if the defendant doesn't have -- this is the mandatory piece of it, and here I'll just tell you what it is, because otherwise it's not -- as a practical matter not very mandatory, but the mandatory piece is this: If you're a defendant and you don't have and cannot in good faith plead a counterclaim in excess of $100,000 and if you cannot show good cause to the satisfaction of the court to get out of it then as a defendant you are -- you are stuck in it, and so you have to participate in it unless you can meet those other requirements. That's the mandatory piece of it, and that's the piece that got the most discussion, as you can imagine, in the task force, and that was the piece that we could not get total consensus on, and there were truly very mixed views about it.

CHAIRMAN BABCOCK: What was the vote on that?

HONORABLE ALAN WALDROP: It was -- kind of depending on how you counted it, it was about six-five.

CHAIRMAN BABCOCK: I think that's what Justice Phillips's report says, isn't it?

HONORABLE ALAN WALDROP: I think that's right.

MR. GILSTRAP: Chip, one point of clarification. If I plead $65,000 and you file a counterclaim for $36,000, taking the aggregate over 100,000, am I out?

HONORABLE ALAN WALDROP: No. The amount on controversy on the claim has to be in excess of.

MR. GILSTRAP: It says "only monetary relief aggregating $100,000."

HONORABLE ALAN WALDROP: On a claim.

CHAIRMAN BABCOCK: One claim. Justice Bland.

HONORABLE JANE BLAND: Well, I read it the way Frank read it. It says "in which all claimants affirmatively plead that they seek only monetary relief aggregating a hundred or less."

CHAIRMAN BABCOCK: Okay. Well, that's --

MR. GILSTRAP: It needs to be clarified.

CHAIRMAN BABCOCK: -- something we need to talk about.

HONORABLE ALAN WALDROP: That may well need to be clarified.

CHAIRMAN BABCOCK: We'll get to that when we get to the --

HONORABLE ALAN WALDROP: The idea -- I will tell you that the idea behind it is what I stated, is that it's got to be a -- your claims have to exceed $100,000. If you both had claims of 90, say, and you both said that, that is not intended for that to fall outside of this.

CHAIRMAN BABCOCK: Okay. Yeah, Buddy.

MR. LOW: Chip, one question. There could be cases, and this is only based --

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

MR. LOW: There could be cases like a professional gets sued for malpractice, 20,000. He doesn't care about that, but I mean, it's more valuable to him, you know, that he not be found guilty of malpractice.

CHAIRMAN BABCOCK: You're stealing David's thunder here.

MR. LOW: Huh?

CHAIRMAN BABCOCK: David's going to address that, that point.

MR. LOW: Well, okay. I wasn't trying to get any thunder. I was just kind of self-interest. Okay.

HONORABLE ALAN WALDROP: That's absolutely right.

CHAIRMAN BABCOCK: Be patient, you'll hear

that.

HONORABLE ALAN WALDROP: There was recognition in the task force that there are cases where the amount of controversy is really not the thing necessarily in controversy, and it could be that that thing requires a lot more discovery than this rule would allow or a lot more due process than this rule would allow. Defamation claims certainly can fall in that kind of category. Situations where the thing being fought over does -- perhaps doesn't have a particular monetary value or ascertainable monetary value, but it has a lot of value to the parties, and the thought behind that is, number one, you -- the rule is limited to monetary claims, and so nonmonetary claims don't get covered by this rule at all. If you make a nonmonetary claim, that kicks you out.

CHAIRMAN BABCOCK: Could a defendant make a nonmonetary claim for a declaratory judgment and kick it out?

HONORABLE ALAN WALDROP: Yes. Yeah, that's the thought behind it. If you make a nonmonetary claim it's just not -- this rule is not intended to cover it. Now, even that doesn't catch all the cases like what you articulated, and the thought behind that is that those would be caught by a good cause exception.

MR. LOW: Good cause.

HONORABLE ALAN WALDROP: That's where it would be, and so if that's not sufficient then it's not sufficient.

MR. LOW: But would the defendant have the option of making that? I mean, defendant is just worried about saving his reputation. Plaintiff wants to really destroy that reputation. He doesn't care how much money he gets, but can -- how can defendant then get out of it other than good cause?

HONORABLE ALAN WALDROP: He can't other than good cause. If the plaintiff pleads into it and the defendant really wants out, his out is good cause.

MR. LOW: Okay.

CHAIRMAN BABCOCK: Bill's got a question.

PROFESSOR DORSANEO: The statute talks about claims for damages, and that's what you mean by monetary relief, right?

HONORABLE ALAN WALDROP: Yes.

PROFESSOR DORSANEO: Even though it's a lot less clear what monetary relief means.

HONORABLE ALAN WALDROP: Well, the proposed rule actually uses the term "monetary relief."

PROFESSOR DORSANEO: Well, I would suggest using the term "damages" because I know what that means. "Monetary relief," I'm not so sure.

HONORABLE ALAN WALDROP: Okay. I'll just continue outlining a little bit more and then turn the floor over to my colleague, David. There was general consensus that the discovery piece of this would need to be truncated more than level one and would need to replace level one. There was not general agreement -- although, the proposal is unanimously as to what the changes to the discovery piece of it should be, it's unanimous, but you can imagine when you're sitting and talking about whether there should be 10 interrogatories or 20 interrogatories or 25 interrogatories, that's a matter of taste, and everybody is going to have a different view about that. We eventually just kind of got to a compromise number of 15, 15 and 15, but what I wanted to point out about that is probably the most -- in my view probably the most significant change to the discovery piece is that it's really designed to rely on the disclosure mechanism for this, and what was added to the disclosure piece of this is we picked up and added to this a requirement to disclose documents much like the Federal requirement on disclosure documents that support or that support or don't support a claim or defense.

CHAIRMAN BABCOCK: That's important. Is it just that do support a claim and do support a defense, or does it include don't support a claim and don't support a

defense?

HONORABLE ALAN WALDROP: It's exactly like the Federal rule, and so it would be both. It goes both ways.

CHAIRMAN BABCOCK: Okay. I don't think that --

PROFESSOR DORSANEO: No, the Federal rule is just supporting stuff.

CHAIRMAN BABCOCK: Supporting stuff.

PROFESSOR DORSANEO: You hide the bad stuff.

HONORABLE ALAN WALDROP: It mimics the Federal rule.

CHAIRMAN BABCOCK: Okay.

HONORABLE ALAN WALDROP: There are a couple of other significant pieces to this, one that received a fair amount of discussion and was somewhat problematic is do you mandate by rule any type of expedited trial setting. There was a fair amount of discussion because doing that 254 counties wide with as many different systems as we have in Texas is a difficult thing. At the end of the day the committee or the task force opted to have as part of the rule a mandate that if a party requests it the trial court is supposed to set a trial within 90 days of the close of discovery. Now, what we -- what the task force did not propose was what happens if

the court declines to do that, and so there's not a remedy built into the rule that suggests something is going to happen if that doesn't happen. So, you know, as you can -- I can imagine in this room there are a lot of different views about what that is going to do or not do, but there is a piece in here that says, "Trial court, if somebody requests it, you're supposed to set a trial within 90 days of the close of discovery."

Discovery is set at 180 days from basically the time that somebody starts it by sending a discovery request and then it's closed. Pleading in or out is an interesting piece of this because, as I said, any pleading that comes in kicks you out, even if it comes in late. So maybe you've been in the process for a long time -- this received a fair amount of discussion as to what to do about this, and it's a hard question, but even -- where we ended up was even if you've been in the process a long time, if a pleading comes in no later than 30 days after the close of discovery that would kick you out, you're out, and you basically restart the same way you would restart under the current rules. It picks up that same type of notion, and so that's an aspect of it that I think has got some complications to it and is worth careful thought, but that's where this mandatory piece comes in. Of course, the voluntary rule doesn't have any type of

mechanism like that because it doesn't need it because it's voluntary.

A couple of other pieces that are worth noting, one is that the rule would provide that a court cannot order you to mediation, so it would cut out that cost, but you can still -- obviously you could agree to mediate, not anything that prevents that, but a court cannot order you to mediate or do any other type of AR. Another thing that we tried to do with this proposal was eliminate pretrial Daubert-Robinson motions. You can still do them, but you do them at the time of trial so that expense is kicked down the road to the trial. Obviously that -- and that received a fair amount of discussion and debate, because -- and there were people with two minds about it, that, well, does it save money or not save money to do it pretrial or not pretrial. Eventually there was a consensus that doing it all pretrial at the -- at the end of the day it tended to make these cases more expensive and we should eliminate that, so that's part of the proposal.

And then one last piece is we've put together a form affidavit to go with the rule that would provide a mechanism by affidavit to prove up medical expenses. We at first picked up the same exact language that already exists in the rules, but in looking at it we

noticed that that form affidavit does not actually track the rule of evidence, and so we tweaked our affidavit a bit and were asking the Supreme Court to look at the form of the affidavit to see if they think the other one should be changed. They should be the same. There shouldn't be two different form affidavits in the rule, but which form should they follow, the one we've attached or the other one.

Now, one thing that that affidavit form would not do, it would provide -- what it does do and what it doesn't do, one thing, what it does is it provides -- it's a means of providing prima facie proof of medical expenses. It is not designed to answer the paid or incurred question. It's designed to just get proof of medical expenses before the court, but not to presumptively answer the paid or incurred issue, which is lurking out there. That still can be fought over if the parties go out and marshal their evidence to do it.

That's essentially the outline of the mandatory rule. The thought behind the mandatory piece is that -- the basic thought is that the current level one in effect becomes -- is pretty much voluntary. Also, if you wanted to agree, if the parties wanted to agree to any type of truncated procedure, they could today, and we just don't see it much and that if we're going to start

capturing some of these lower value cases and reducing the costs and expenses of them, this -- through a rule, then the thought of the folks that were in favor of the mandatory component was some aspect of it is going to need to be mandatory, otherwise it's just not going to be very effective. That's the basic thought.

The -- my understanding is that, you know, there's -- the counter of that, of course, is if you -- as soon as you start making any aspect of this mandatory, well, then you start cutting down on the due process that our current system has for these types of cases, and those of us on the committee who were in favor of this mandatory component were of the view that, yes, that's right, it does, but if you don't -- if you don't make it some piece of it mandatory, it won't have the effect that we want, and that's just -- cutting back on the amount of process available is really what we're trying to do so that it's not as expensive, and so that was the basic thought, and with that, let me turn it over to my friend David.

CHAIRMAN BABCOCK: Okay. David Chamberlain.

MR. CHAMBERLAIN: Good afternoon, everybody, and thank you for the invitation. I think Alan did a really good job of laying it out for you. I think in your materials you also have a letter from the -- that I authored for a working group, and also I think in your

materials you have a copy of an e-mail to Chip from George Christian, who is of counsel to the Texas Civil Justice League, one of the leading tort reform associations in the state. I served with Alan on the Supreme Court task force and on expedited actions, and as Alan pointed out, one of the rules that you have before you is a purely voluntary rule, and let me just give you a little background and a little history on this that may give you kind of a better idea of how we got to where we are.

I also served on the Tex-ABOTA and TTLA/TADC HB 274 working group, and that's a mouthful. I think everybody knows, but I still need to go ahead and say it. This was comprised of representatives from each of those three groups. The Texas Trial Lawyers Association, which you know is principally composed of plaintiffs' lawyers; the Texas Association of Defense Counsel is primarily composed of defense and commercial litigation lawyers; and the Texas Chapter of the American Board of Trial Advocates, which is also known as Tex-ABOTA, is pretty much composed in equal parts of plaintiffs' and defense lawyers, and it's an invitation-only organization of lawyers who have a requisite number of jury trials to a conclusion.

We all got together in the same room, which was a feat in and of itself, and the first meeting was

mostly a scratching of eyes and hair pulling, but once we got beyond that we started having many, many hours of productive meetings and a pretty good exchange between the two groups. Ultimately after draft and redraft this working group unanimously agreed to support and support only a voluntary rule, and let me start off by saying this. Although there was hair pulling and some scratching going on amongst the working group members, the working group to a man and woman was always -- fully embraced this concept of expedited actions, fully embraced it and fully support it and to this day.

We want to see a rule, the working group does, and we want to see a rule that will work, and we think the best way to achieve that is by a voluntary rule. We think that you can do a lot more with a voluntary rule. You can limit the size of the jury to six. You can limit the number of challenges, peremptory challenges, to three. You can limit the length of the trial. We suggest that you limit it to five hours per side for everything, except bench conferences, charge conference. So, in other words, you've got to fit your voir dire, your opening, your evidence, your cross-examination, and your closing all into that five hours.

So where did we come up with five hours? Five hours, the idea there is this trial will be completed

from soup to nuts in two days. In other words, you'll go in on Monday morning, you will pick your jury, and you will be finished by Tuesday afternoon. The jury will start their -- the case will be turned over to the jury late Tuesday afternoon or sooner if you can do it. Also, we suggest that -- and Alan covered this. We suggest that mediation not be ordered. Mediation in a small case is kind of an expensive item. You've got to spend at least a half a day. You've got to pay four or five hundred dollars at a minimum. You have to get your client off of work. You have to fly your claims representative in from Hartford, Connecticut, and all for the claims representative to tell the plaintiff, "We're going to offer you a fair amount for this particular case, and that's nothing." "Well, why are you here?" Well, because the rules require it, either the judge ordered it or it's a standing order.

We think that the parties -- and, you know, mediation has become so ubiquitous. The parties are going to mediate it if it's a case that should be mediated. If it's going to be one of these cases where the claims rep is going to come in and say, "Hey, I'm just here booking time. I'm not here to offer you anything," then we should not be flying people in from Connecticut or Dallas or Atlanta, and we should not be taking plaintiffs off of

work for something like that. You know, in addition to mediation, there's other ways to do it. You can always do it .the old-fashioned way and simply pick up the phone and settle it over the phone. We think that that's an unnecessary expense that the parties can voluntarily agree to, but it should not be ordered.

And let me go back to something that's unique to the voluntary rule. There are limits on your appellate remedies as well as what you can file a motion for new trial for. Now, what's the idea behind that, you ask. Well, Chief Justice Jefferson gave a state of the judiciary speech I want to say a couple of sessions ago that said we are losing business at the courthouse to arbitration, we need to get some of that business back. Well, here's one of the ways that we think that this can be done, and that is mirror the appellate remedies to that which is available in arbitration. So, in other words, judicial misconduct, jury misconduct, fraud, corruption, you would be limited to that.

Now, these are things that I'm talking about, not mediation, but I'm talking about limiting the size of the jury, limiting the length of the trial, limiting appellate remedies, limiting the number of peremptory challenges. These are things that cannot be done in a mandatory rule. Why is that? Well, you run

into the Constitution. That's a problem. And you run into other statutes. That's a problem. But the parties could voluntarily agree to waive those rights and to come in to this voluntary procedure and expedite this case. Now, why would somebody want to give up an appellate right? Well, the reason is that under both versions of this rule it's capped at $100,000, and we're unanimously -- our task force is unanimously supportive of that. So this is designed to be a procedure to be available to the parties that just want a quick answer. In other words, they want a "yes" or a "no," and they want it in two days, and once they get their answer they're going to live with it.

So, in other words, you enter into this procedure knowing that whatever it is, either between zero and $100,000, you're going to live with it, and that's why you give up most of your rights for a motion for new trial and most of your rights for appeal, because you've agreed to live with this quick answer, much like arbitration. This is supposed to be competitive with arbitration. This is supposed to be cheaper than arbitration because your judge is already paid for and your jury is already -- well, it's paid for by your jury pool. That's what this is meant to do.

The working group of Texas ABOTA, TADC, and

TTLA opposes the cookie cutter approach that a mandatory rule would impose on every case under $100,000. We believe that it's the lawyers, after conferring with their clients, ought to decide whether a case is best suited for expedited trial procedures, and not every case is -- as Buddy pointed out, not every case is all about the money, and I'll give you some examples here in a few minutes that both the working group talked about and the task force talked about as well.

A third point is, is that the working group and the task force both took a serious look at whether House Bill 274 requires a mandatory rule, and some of you may still have that question. It does not. Many of the working group members were involved in the legislative process when 274 was going through the House and when it was going into the chambers, and to a person, none of the people that were involved in the process as it was going through both chambers were aware of any discussion whatsoever about this being required to be a mandatory rule.

To be sure, the Texas Association of Defense Counsel went out and paid a considerable sum of money to have all the transcripts of all the committee hearings in both chambers and the floor debate transcribed, and I have those with me here today, if anybody would like to do

that. In those you will see that there is no legislative intent nor is there even any discussion that this would be a mandatory rule. Now, fourth, after considerable deliberation the working group concluded -- and I do mean unanimously -- that a mandatory rule would be fundamentally unfair. A mandatory rule -- and I think Alan acknowledged this in his opening remarks --

CHAIRMAN BABCOCK: David, when you say "the working group" you're not talking about the task force. You're talking about the --

MR. CHAMBERLAIN: Tex-ABOTA group.

CHAIRMAN BABCOCK: The Texas ABOTA group.

MR. CHAMBERLAIN: Yeah. When I refer to the working group it's just a shorthand rendition for Tex-ABOTA, TTLA, and TADC working group.

CHAIRMAN BABCOCK: Okay.

MR. CHAMBERLAIN: That working group concluded that it was fundamentally -- a mandatory rule would be fundamentally fair because it's only mandatory as to the defendant.

CHAIRMAN BABCOCK: You mean unfair?

MR. CHAMBERLAIN: Unfair, yeah, fundamentally unfair because it's only mandatory as to the defendant, not the plaintiff. As Alan pointed out, the plaintiff can avoid an expedited action procedure by

simply pleading for something more than the $100,000, and frankly, there's nothing wrong with that. I mean, the plaintiff may have good legitimate reasons for pleading for something in excess of $100,000 other than the case may not be worth $100,000. There still may be good reasons. A plaintiff may decide that the discovery is too limited, it's just going to take more. The discovery period is too short and that that mandatory early trial setting just isn't going to work either with the client schedule or what's it going to take to get this thing ready, or let's face it, it just doesn't fit with the lawyer's schedule. There are a number of reasons that would cause a plaintiff to plead for excess of $101,000. That's their right to do.

Also, let's face it, a practical matter that has to be considered by a plaintiff's attorney is a matter of strategy of going into the case is the Stowers Doctrine. Now, we could spend another day talking about the Stowers Doctrine and how that will interplay with any rule, but I'm here to tell you the Stowers Doctrine has a significant interplay with this rule, and many plaintiffs are going to choose not to go into the expedited procedure that's capped at $100,000 because that takes away the weight, the gravity of a Stowers demand in certain circumstances.

Now, while the plaintiff is free to do that and should do that for good strategy reasons as long as it's in good faith and it's honest, the defendant doesn't have that option. If the plaintiff pleads for $100,000 or less, the defendant is pretty much stuck with that. There is the good cause exception, but I'm here to submit to you that in some venues, and more than just a few, that argument for the defendant is not going to necessarily have the gravity that you think it should have, and it's not reviewable, or if it is reviewable it's going to be on appeal after the end of the case because this is not going to be something that's subject to an interlocutory appeal. So the defendant is going to be stuck with this unless within the discretion of the court the defendant should not be. Another reason is, is that this is supposed to be an expedited procedure. Why are we adding another hearing? Why are we adding another motion? Why are we adding another hearing to this process? It's something that currently doesn't exist.

Five, and this is very closely related to four, certain cases are simply not suitable for expedited trial procedures, regardless of the amount in controversy. The Legislature partially recognized this in HB 274 when they exempted medical malpractice cases, family law cases, and essentially all cases involving the government, but

there are numerous other types of cases that are not suitable for expedited actions regardless of the amount in controversy, and we could go on and on about this. As a matter of fact, at one point in time in the task force we actually came up with a laundry list of cases, types of cases, causes of action that were not suitable, and it was lengthy. It was lengthy. I think I recall that it had 24 or 25 types of cases that were not suitable, but let me just give you a couple of examples of this. Other professional malpractice cases, defamation cases. When I talk about professional malpractice cases I'm talking in addition to what's already been exempted by the Legislature in med mal, what about legal malpractice cases, what about architects, what about engineers, what about veterinarians?

Other types of cases that in our view should not be part of this process or the lawyers may decide should not be part of this process are cases involving what amounts to be criminal conduct or violations of the Penal Code that can have far-reaching implications for the client; inappropriate personal conduct such as sexual harassment or invasion of privacy; discrimination cases, age, employment, a gender, disability; and also cases alleging civil fraud. Now, these cases there's really much more on the line than $99,999.99. It's -- that's

important, but the fact of the matter is, is somebody's livelihood and personal reputation or the company's reputation could very well be on the line in this particular case. Should they be limited by rule, mandatory rule, to 15, 15, and 15 on written discovery, and should they be limited to six hours of depositions total? Should they be subject to truncated, very abbreviated discovery period, and should they be subject to what amounts to be a very early trial setting?

Now, we think in small contract cases and low impact minor soft tissue injury cases this is all certainly appropriate, and we fully embrace it, but in other types of cases it is not appropriate whatsoever, and we think that it has some serious due process implications. The practicing trial bar is not the only one who has some concerns about the consequences of a mandatory rule, but as I said, there's an e-mail in your materials from the Texas Civil Justice League, which is one of the major tort reform organizations in Texas that their general counsel wrote to Chip that a mandatory -- opposing a mandatory rule in saying it was unfair and problematic for defendants and, quote, "We" -- meaning the Civil Justice League -- "therefore strongly urge the committee to adopt a purely voluntary rule." Counsel also went on to write that it is highly unlikely that the

Legislature intended this process to be mandatory as to one only party -- one party only.

I want to say that I think that the Tex-ABOTA, TADC, TTLA working group certainly thinks that a voluntary rule will work. I think that the significant part of the task force also thinks that a voluntary rule will work. We think it's just a matter of educating the bench and the bar about its benefits. I think if many of you will remember when mediation first came along nobody really thought mediation was going to turn out to be much. Now mediation is ubiquitous. I mean, you don't need a court order for mediation, quite frankly. People are mediating anyway extensively, not only at the trial court level. Mediation has become perhaps commonplace on appeal in most of our courts these days, both in the Federal appellate level and the state appellate level.

We think that once education and -- has occurred, and believe me there are several of us out there on the trail that are already doing this right now. I've done a couple of major seminars with Peter Kelly already on this committee. We think that the bar will buy into it, and we think that more cases will be tried, which certainly will benefit the clients, the insurance companies, and perhaps most of all the juries that get to participate in the system. More cases will be tried at

less expense. The time commitment is finite. You only have to be out of the office for two days tops. You are in and you are out, and it's pretty much final, a very limited appeal.

We think that the rule will provide much needed trial experience for the bar that is severely lacking in trial experience among young lawyers at the current time. We think as young lawyers gain experience they will gain confidence, they will become a better part and a better utility to the justice system, and more experienced lawyers with more confidence will help us get better results. Another by-product of this is that as our lawyers become more experienced and they become more confident, they necessarily become more civil and more professional. So I think that the benefits of the procedure overall, whether you choose mandatory or voluntary, will be there. I just think that we can accomplish more and do it more fairly with the voluntary rule. Thank you, Chip.

CHAIRMAN BABCOCK: Jeff Boyd has got a question, and I'm sure others do. Before we get to that, this Texas ABOTA, David, TADC, TTLA working group, once you-all reached consensus, did you go back to your respective organizations and get them to bless this, or is basically this just the view of the signatories of the

attachment to your letter to me?

MR. CHAMBERLAIN: Yes, we -- well, we did go back to our respective executive committees and boards for approval.

CHAIRMAN BABCOCK: Okay. And all three organizations approved it?

MR. CHAMBERLAIN: Yes, sir.

CHAIRMAN BABCOCK: Okay. Very good. Jeff, you had a question, and then Richard.

MR. BOYD: My question was for Alan. Do you and/or any of the other proponents of a mandatory rule have the opinion that in the language of HB 274 itself the Legislature required that the Court adopt a mandatory rule?

HONORABLE ALAN WALDROP: No. No, I don't.

MR. BOYD: So nobody is proposing that the legislative intent was to require a mandatory rule?

HONORABLE ALAN WALDROP: No one is proposing that. I don't think there is really disagreement about this. I think that it is -- it's as clear as it ever can be in the legislative process that what was happening is that the Legislature was saying, look, we would like a mechanism for making the process less expensive for these lower dollar cases so that they can get through it quicker and the cost of it is not prohibitive to get the dispute

to a resolution point, and we're leaving it to the Court to decide how best to go about doing that. I think that's -- I think there's pretty much agreement by everybody that was in the process that that was --

CHAIRMAN BABCOCK: Jeff, do you have a contrary view?

MR. BOYD: No. No. But the follow-up question to that, because I'm really trying to explore this mandatory, the view of those, is if that was not the intent then what does this statute and the rule that results from it do that the current rules don't already do or allow, whether it be through agreed pretrial scheduling orders or summary jury trials or all the other methods that are already in the rules?

HONORABLE ALAN WALDROP: Well, that kind of goes to the heart of the debate between -- about having a mandatory piece to this. Those of us that had the view that it needed to have a mandatory piece would -- we would argue that if it doesn't have a mandatory piece then it, in fact, is not making any kind of a change, that what -- what the voluntary piece, which we all agreed we should have this voluntary piece for the reason that as a minimum it provides a ready made template for parties to pick if you can reach an agreement you don't have to negotiate what the process is going to look like. Here is a

template. You can go agree to that template, and you can get that process.

But the group that was for a mandatory component was of the view that that wouldn't be used very often, probably not, and, I mean, you can have different views about how often it might be used. I'm skeptical personally as to how often it will be used. If it got used a lot I think that would be great, but that I would -- I would say that there needs to be some mandatory piece to it in order to really answer the legislative mandate. If you don't have a mandatory piece I would say that it's not making -- really making a change to the process for those less expensive cases, and so that's -- and then, you know, you can debate that back and forth.

CHAIRMAN BABCOCK: Okay. There are a bunch of people with their hands up. Before we leave this point, though, is there anybody like Jim or anybody else that thinks that the statute mandates mandatory or mandates voluntary? I mean mandates either way.

MR. BOYD: Because you asked me a minute ago, let me just clarify. You asked me do I have the different view, and let me just say I'm not prepared to express a different view, but I don't want to say I don't have a different view because I do think there's a real issue there.

CHAIRMAN BABCOCK: Okay. Well, that's very clear.

MR. BOYD: But I don't think it's an issue we have to go to.

MR. ORSINGER: Are you running for office?

HONORABLE NATHAN HECHT: He's got a pretty high office.

HONORABLE ALAN WALDROP: Can I also say one thing so that there's not -- I hope there is not any confusion about this in the room, but I want to make sure there's not. The limits on actual trial time of what can happen at trials and the limits on appeals, those only apply under the voluntary piece of this, and so those types of components would not be components of the mandatory piece, just so there's not any lack of understanding.

CHAIRMAN BABCOCK: Okay. Bill, on the issue of the legislative intent, do you have a different --

PROFESSOR DORSANEO: Well, of course, I need to read the legislative history, but the greatest impediment to concluding that the Legislature contemplated a voluntary process is the language of the statute itself.

CHAIRMAN BABCOCK: Well, right. So what do you think about that?

PROFESSOR DORSANEO: Well, I mean, "shall,"

as I -- "shall" is a bit on the ambiguous side, but if we're talking from a lawyer's perspective, the Code Construction Act applies to this, right, and "shall" is -- we're arguing this in a brief, we would say the Code Construction Act says, you know, "shall" means mandatory, it kind of looks like it's not voluntary to me. "The rules shall apply to civil actions in district courts, county courts at law, and statutory probate courts in which the amounts in controversy inclusive of all claims for damages of any kind," blah, blah, blah, "does not exceed $100,000." It's, you know, looking pretty mandatory to me.

MR. GILSTRAP: Does it say "all cases"?

CHAIRMAN BABCOCK: The language that I saw that could be read to argue in favor of mandatory was the part that said, "The Court will provide a procedure for ensuring these actions will be expedited in the civil justice system," and if it's voluntary, they may not be expedited, so that's one argument.

PROFESSOR DORSANEO: More of the same.

CHAIRMAN BABCOCK: Yeah, that's one argument. Does anybody else have something on this point and then we'll go around the horn? Buddy, you have something on that point?

MR. LOW: I think "The Supreme Court shall

adopt rules to promote" is the starting sentence, and either one could promote it, so I don't know -- that doesn't mean mandatory or nonmandatory to me.

CHAIRMAN BABCOCK: Yeah. Okay. Let's open it up for people that had their hands up. I think I got it in order. Orsinger and then Gilstrap and Munzinger and Judge Estevez, and somebody else over here. Buddy.

MR. LOW: I'll wait until I've heard everybody else.

CHAIRMAN BABCOCK: Okay. So you'll bat clean up.

MR. LOW: Yeah.

CHAIRMAN BABCOCK: Orsinger.

MR. ORSINGER: I'd like to come back a little bit later and ask questions relating to the Family Code, but the first question I have is if it's purely voluntary do we anticipate or can you explain what the defendant's incentive would be to opt in; and secondly, if there's insurance, then how do you resolve the tension if the -- if the defendant individually wants to opt in, but the insurance company doesn't or if the insurance company wants to opt in and the defendant doesn't?

MR. CHAMBERLAIN: Well, let me -- what's the incentive to the defendant first.

MR. ORSINGER: Yeah.

MR. CHAMBERLAIN: Okay. The incentive to the defendant is the defendant or its insurance company just wants a quick answer, and they don't think that the case is worth what the plaintiff says. The defendant thinks the case is a 50,000-dollar case, the plaintiff thinks it's 75,000-dollar case. They can't close that gap. They just want a quick answer, and a way to get to a quick answer is through this two-day jury trial that we're talking about, but perhaps the biggest incentive to a defendant to enter into an agreement to go expedited, it's capped at $100,000. So you may think that case is worth 50 grand and the plaintiff may think it's worth 75 grand, but the jury may end up thinking it's 150,000. That happens. It's certainly happened to some of us in the room. That won't happen to you. It's capped at $100,000, and that is inclusive of everything except post-judgment interest. Attorney's fees, costs, expenses, capped at a hundred grand. That's a pretty powerful incentive.

MR. ORSINGER: What about the tension between the defendant and the insurance?

MR. CHAMBERLAIN: Well, you will note that the voluntary rule requires that the insurance company agreed to this also. So the insurance company and the insurer will both have a say in whether it goes expedited.

MR. ORSINGER: And either one would have a

veto.

MR. CHAMBERLAIN: Either one would have a veto not to do it.

PROFESSOR DORSANEO: Under the policies?

MR. CHAMBERLAIN: No, under the rule.

PROFESSOR DORSANEO: Under the rule, you read that into the rule?

MR. CHAMBERLAIN: We put it into the rule.

PROFESSOR DORSANEO: Okay.

MR. ORSINGER: And is there a Stowers concept that it be --

PROFESSOR DORSANEO: Would it be --

THE REPORTER: Wait, hold on. Hold on.

CHAIRMAN BABCOCK: Don't talk over each other.

MR. ORSINGER: I'm sorry, I thought he was talking to somebody else.

CHAIRMAN BABCOCK: He probably was, but can you talk up a little bit, because if she can't hear you, they way can't hear you.

MR. TIPPS: Yeah, thank you.

MR. ORSINGER: If the individual defendant wanted to --

CHAIRMAN BABCOCK: No, no, no. You're still talking in the same tone of voice.

MR. ORSINGER: If the individual defendant wanted to opt in and the insurance company didn't opt in then there's a Stowers issue if the verdict is over 100,000?

MR. CHAMBERLAIN: I could see that there perhaps could be a Stowers issue there.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, first of all, this distinction between mandatory and voluntary strikes me as an illusory if the defendant can simply get out of it by pleading for $101,000 or asking for declaratory judgment. The defendants are going to get out if they want to get out, but aside from that, the thing that's driving this seems to me to be the same thing that drove the adoption of level one discovery, which provides the same -- which is not -- which is mandatory and which provides, you know, limitations, limitations on discovery, and which it is my impression is not widely used. I might be wrong on that. If it's thriving in some part of the state or some practice, somebody needs to speak up, but I'm under the impression level one discovery is a dead letter. Why is this going to be any better?

MR. CHAMBERLAIN: Frank, can I address that? Over the -- and we did some research and some work on this and at the working group level, and I think Alan would

agree that we certainly discussed this and many of us looked into it as well. I think the first answer is, is there's just not very many 50,000-dollar or less cases in the system right now. I mean at the courthouse. There are certainly some, and there are certainly some that end up the jury is saying they're worth less than $50,000. I mean, the plaintiff really didn't think they were worth less than $50,000, so there is just that is -- the 50,000-dollar level just doesn't net very much to begin with.

Let me answer the question in a slightly different way. What I have seen and learned is, is that, yes, it is true that in these smaller cases where some plaintiffs should be pleading level one and are not, is because they don't want to get committed to anything early on, but what we have found more often than not is that the parties to the case are handling it like it was a level one case. So, in other words, they're not taking more than six hours of depositions. They're not sending more than one set of interrogatories or request for production, and they're not sending any request for admissions, and they're going down there -- and this is true in Travis County. We've got two county -- civil county court at law -- county court at law courts in this county. They are currently trying on a regular basis two jury trials a

week. So they are doing this already. Now, they may not call it level one when they plead it, but when they're around they're doing it.

MR. GILSTRAP: Well, why don't we do this, why don't we raise level one to $100,000, put in the exclusions, and we've complied with the legislative mandate, we haven't really changed that much, and let's see if it works.

HONORABLE ALAN WALDROP: Well, that's not entirely different from what the mandatory piece of this proposed theory is.

MR. GILSTRAP: I can't hear you. I'm sorry.

HONORABLE ALAN WALDROP: That's not entirely different from what is proposed here. It's a different way of saying it, but what this basically does is it does some tweaking to the discovery piece, which is the level one piece. I think a significant one is it includes the document production aspect of it. That's a major difference, and then it goes -- what this does that's different from level one discovery, which is what the task force struggled with, is how to be different from level one discovery, which there was a consensus has not been very effective, is we tried to pick up what we thought were significant pieces of the process and tweak those. Daubert-Robinson motions, proof by affidavit, discovery

period, getting an expedited trial setting, those kinds of things, and so that's in effect what you just said, why don't we do this, that's what this proposal is, in fact, an attempt to do, is add some things to the level one process, puts it in a different rule.

MR. GILSTRAP: You're just pushing it a little bit further.

HONORABLE ALAN WALDROP: Correct.

MR. GILSTRAP: Okay. Okay.

CHAIRMAN BABCOCK: All right. Munzinger, then Judge Estevez, and then Justice Christopher.

MR. MUNZINGER: I agree with Bill Dorsaneo that the statute needs to be -- the first question facing the Court is whether or not the statute contemplates a voluntary or a mandatory choice given the Court. The gentlemen who have made their presentation have said that they reviewed the legislative records and they find that there is nothing in the legislative history of the statute that indicates that the Court intended it to be mandatory. I assume by their silence that there is nothing in those materials that suggests that the Court -- that the Legislature meant that it could be voluntary or that there was a choice to make.

That being the case, if you go back to the basic rule of statutory interpretation, you're left with

what we're always left with, the language which the Legislature chose, and to say that six other states have not made it mandatory is fine if their statutes are the same as ours. If their statutes aren't the same as ours, you're citing those cases for a point other than a statutory interpretation issue, and the really basic question and the basic question for the committee to advise the Court is whether the statute is or isn't intended to be mandatory or voluntary because clearly if that choice is left to the Court we have to write rules that recognize those distinctions because, as these gentlemen point out, you have some very basic rights that are being impacted here in this litigation, not least of which is res judicata and collateral estoppel claims. You can come in, and you can get you a 10,000-dollar lawsuit between A and B, but A and B has some other issues down the road, and all of the sudden you've got a collateral estoppel or res judicata that bars B, the loser, from doing whatever he's going to do.

This is an amazing proposition and something that any lawyer who said to his client, "Well, you can save money doing this" needs to think twice about it if it's voluntary because of these issues. I don't want to say anything else except I do think that we need to make a judgment as to whether the Legislature intended it to have

this opt-in/opt-out provision, and from the language of the statute and from the history of what they're trying to do it would appear to me that they didn't.

CHAIRMAN BABCOCK: Didn't what?

MR. MUNZINGER: Did not intend for it to be voluntary. They intended to say if you've got a 100,000-dollar lawsuit, do some rules that advance these things on the court's docket, and let them get there, and they didn't say anything about not letting motions for instructed verdict and not having no appeals and not having all of these things and making them final. They didn't say any of that stuff. They just said try and make it less expensive to litigate and to get to a judgment.

A last comment, I'm one of those who does not believe that people are using arbitration because they are worried about expense. I'm not sure that it's any less expensive to parties to arbitrate than it is to go to court. In my personal experience most of the people that choose arbitration are concerned about the fairness of the forum. They're very worried that they're going to have a judge who does not treat both parties equally. They're very worried that they have a case where jurors will not treat somebody fairly, and so they choose arbitration. That's not a problem that is cured by rules. It's a problem that's cured by something else. That's another

day's judgment, but I don't think we ought to be adopting rules because we think, oh, well, we'll get more jury trials and train young trial lawyers if we can avoid arbitration, we need different rules.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I have one question and then one I guess request, and the question would be under 262.5(c)(1) where the judge has their hands tied, they cannot order mediation. I guess I'm concerned with that and wonder why 154.002 was not sufficient to take care of that where they can object within 10 days, or even if you limited it and stated something to the effect of if one side objects to mediation then there shouldn't be a mediation, but a lot of times there are emotional cases. It's neighbors against a fence, something silly that's under $100,000 that once it hits a mediator it can get resolved because the strength of the mediator will show them whatever they need to see. I don't know what that always is, and so my question is why isn't 154.022 enough without tying our hands and giving, you know -- taking away one of our strongest tools to get cases taken off our docket.

And then my second one was more of just a request, if it does end up being a mandatory rule and everyone determines that that's what it needs to be,

prisoner suits, probably something no one here deals with except for the judges, but the judges do know that it is overwhelmingly -- they don't have anything else to do. They get to file these suits. There seems to be a stronger -- a less of a threshold of when we dismiss one for frivolousness. I don't know how to say anything except to say they would love to have this rule because they can force me to trial, if I'm reading this correctly, or at least a trial setting, 42 years before they'll ever get out. And so I am -- I know that usually the Attorney General is on the other side, and you said there was a government exception; however, I don't think that would be necessarily -- I mean, they'll draft, they'll do whatever they have to do to plead it within that if they have an extra tool. So that would just be a request, if there is exclusions please apply them to prisoner suits as well.

HONORABLE ALAN WALDROP: That last situation is a very quick answer. That would be -- you would be in control of that as the trial court under the good cause issue.

HONORABLE ANA ESTEVEZ: Okay.

HONORABLE ALAN WALDROP: Good cause exception. You can move it out.

HONORABLE ANA ESTEVEZ: So and I can do that on anything?

HONORABLE ALAN WALDROP: If there's good cause. That's both a -- that's both a positive and a negative of this rule, of this proposal. It's a -- it's because the trial court can pull cases in and out of this process at the trial court's discretion basically, and so that can be argued both ways, but we couldn't think of a way to solve for issues like you just stated and many others without having a fairly broad discretion to pull cases out of it.

CHAIRMAN BABCOCK: Justice Christopher, and then Carl.

HONORABLE TRACY CHRISTOPHER: The Tex-ABOTA/TADC group did their report in August of '11 and sent this around to a lot of people, and I'm wondering if you know of anyone who has voluntarily agreed to this process in the past six months.

MR. CHAMBERLAIN: You mean with the draft of the rule?

HONORABLE TRACY CHRISTOPHER: Yes.

MR. CHAMBERLAIN: Are you asking me if --

HONORABLE TRACY CHRISTOPHER: If you know of anybody who voluntarily agreed to it, you know, via contract, wow, this looks like a great idea, let's agree to do it.

MR. CHAMBERLAIN: Well, I have not heard of

anybody that has adopted our rule as a template, but as I was saying earlier, our county courts, there is a lot of cases that I don't know if we're all uniformly aware of that are being handled as if they were level one cases and/or would be in compliance with that, and we know that because the county courts are regularly trying two civil jury trials a week on limited discovery.

CHAIRMAN BABCOCK: Okay. Carl, and then Judge Yelenosky, and then Justice Bland.

MR. HAMILTON: If Jane has something on that same point.

CHAIRMAN BABCOCK: Okay. Well, then Justice Bland, Carl yields to you.

HONORABLE JANE BLAND: Okay. My question is one of the criticisms that I think Chief Justice Jefferson talked about arbitration in his speech and then -- and that you hear is that by losing business we lose kind of the fabric of the law because there are no recent decisions that are available to the public to review and then kind of understand the substantive law in a particular area, and the other criticism that you hear about arbitration is that the appellate review is quite limited, and so when the trial is perceived to be grossly unfair it's really not correctable by anybody, and I'm wondering why on the voluntary side the committee decided

to eliminate any rights of appeal other than those that are similar to arbitration, but on the mandatory side it looks like the committee decided to preserve those rights, and I just wondered what the thinking was and --

MR. CHAMBERLAIN: You know, Alan can speak to mandatory, but -- and that was a big subject of debate, Judge, it really was, and but the thinking was, is that we would take as -- what steps that we possibly could out of the process to make it cheaper and to provide a genuine alternative to arbitration. We also did that when we agreed that we would handle Daubert challenges the way that we're handling Daubert challenges, and that is, is that we're just going to take a step out, and we're going to take out the appeal. This is -- I think insofar as the voluntary rule is concerned is not really meant for a game changing case insofar as jurisprudence is concerned.

MR. GILSTRAP: Did you --

MR. CHAMBERLAIN: This is meant for people that want to get in and get out.

MR. GILSTRAP: Did you think about going further and providing for a general verdict?

HONORABLE ALAN WALDROP: We gave consideration to it. The task force kicked around all aspects of the trial like that, and we eventually came to the conclusion that that -- those were not the problems

that were causing small cases to be too expensive, and if that ends up being the real problem with small cases we can do that later, but the general consensus on the task force was that that was not -- that was not the primary expense driver in the system, and so that's why, but we did kick that idea around.

The reason that the mandatory piece does not contain any kind of restriction on appeal is that -- there are multiple reasons behind it. The concerns you expressed were part of it. Another part of it was what I just said, is that it's not -- there wasn't a perception in the task force that the appeal of small cases is what keeps small cases -- is what the problem is with small cases. If you get to judgment in a small case there's going to be only a very small percentage of those that are going to go up for some reason, and the task force was not of the view that that was the expense driver, and so that it -- and then also the final thing was truncating appellate rights has some constitutional questions that would go with it, and we tried to come up -- one of the reasons that this rule, the mandatory piece of it, does as little as it does is because of the constitutional concerns about due process that we ran into at every turn.

One thing I'd like to add, if it's all right, is on the statutory interpretation side. The --

let me offer in the for what it's -- for what it's worth category my view of the proper interpretation of the statute. The statute provides and the Legislature said that the Court should come up with a rule that will expedite these cases and make them less costly. That's clear. A rule that will do that. The Legislature did not say to the Court, "Here's" -- "and it must look like this," so the Legislature left to the Court to figure out what will do that, and so that ends up begging the question about mandatory versus voluntary, and the question really is one -- not one of statutory interpretation, in my view.

The question is one that's more practical and philosophical. What process will come -- should -- that the Supreme Court adopts will that -- will that process do the thing it's supposed to do, will it make these actions less costly and expedite it or will it not; and a reasonable mind could say, as half of the task force did, that they thought that a voluntary rule by itself would do that. Half the task force thought otherwise, that it would not do that, but that's where the debate lies. It doesn't -- in other words, I don't think it answers the question to look at the statute. The question is still vague, and that is what kind of process will expedite and make the cases less costly.

CHAIRMAN BABCOCK: David, let me go back to a point you made in response to Justice Bland, and that is the appellate thing. My experience is anecdotal, although Robert Levy may have a more informed basis for saying this, but in terms of arbitration versus the civil justice system, the complaint I hear from businesses over and over again is the lack of appellate review. That's the criticism, and that's why a lot of businesses are going back to the civil justice system, so to me it's counterintuitive to take the unpopular feature of arbitration and impose it on what at least in part is an effort to attract business to the civil justice system away from arbitration. And I would -- we've got a lot of hands up. Robert, if you have anything more substantive than my just talking to one of your colleagues --

MR. LEVY: I agree with you on that. There is the factor, though, that in some arbitrations the cost is also becoming an issue. It's not relatively cheaper, but the lack of appeal is the prime driver in terms of decisions.

CHAIRMAN BABCOCK: Justice Jennings had his hand up for a long time. Carl, I think you did; Buddy, you did; Judge Yelenosky did; Elaine did. So, Justice Jennings, you start.

HONORABLE TERRY JENNINGS: Two questions.

One, if you have a statutory right to appeal, can the Supreme Court by rule eliminate that statutory right? Second question would be -- well, if it's I guess voluntarily, yeah.

CHAIRMAN BABCOCK: Right.

HONORABLE TERRY JENNINGS: The second question would be in regard to a lot of your concerns that David raised, which I think are legitimate concerns, why doesn't the removal process insofar as it allows for this motion with a showing of good cause, either the plaintiff or the defendant can move to get out of the court if it can show the court a good reason why it shouldn't be in the expedited process, why doesn't that take care of a lot of those concerns?

MR. CHAMBERLAIN: Okay. You know, Judge, it certainly can; but the concern among the working group was, is that there is some venues that that just doesn't work out so well; and there was expression that it's, you know, more venues than we would like to think about; but the other reason was, and it's a secondary reason, is that's just adding in another step to something that's supposed to be streamlined and expedient.

CHAIRMAN BABCOCK: Carl.

HONORABLE ALAN WALDROP: Let me answer the right to appeal --

CHAIRMAN BABCOCK: I'm sorry.

HONORABLE ALAN WALDROP: -- because it's got a very straightforward answer here. You can't do that by rule, and none of these rules do that.

HONORABLE TERRY JENNINGS: It's voluntary.

HONORABLE ALAN WALDROP: Yeah. Bear in mind that the way this is structured in this proposal, the mandatory component doesn't restrict trial issues or appellate issues at all. Only the voluntary component does. It does it pretty radically, but the rationale behind that is you're waiving those rights, and you can do that, when you adopt -- when you agree to that.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Well, the question --

CHAIRMAN BABCOCK: Then Judge Yelenosky.

MR. HAMILTON: The question was asked earlier about can't we do all of this now anyway. I don't think we can do all of this. We can't change the appeal process by agreement. I don't think we can change the jury trial system from 12 to 6 jurors by agreement, so there are things in the voluntary plan that are changed that promote more expeditious trial, so I don't read this as -- the statute as being such that we can't have the voluntary plan that they're suggesting.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, Justice Waldrop, it's always referred to as a component because, of course, you could have both, and the Supreme Court may decide to have both. Even if the Supreme Court decides, as I understand it, that there has to be a mandatory component, it could also offer a voluntary component, and what could be in the voluntary component is infinite because it's by agreement. I mean, we could have a voluntary component that says each side will get together and they will flip a coin. I mean, you can do that by contract. So that is infinite, and it seems to me the best use of our time is to draft what would be the mandatory component if the Supreme Court decides that it's either required statutorily or as a better policy it wants it and then on the voluntary side try to figure out what that should be if it's only going to be voluntary or perhaps in addition to voluntary, and that should be governed, I think, as you said, by whether it's likely to be used.

My question about that is what do the plaintiffs' attorneys say about whether they would limit a claim to $100,000 when you've already pointed out almost all the cases in court are worth at least $50,000, and if they get a verdict over $100,000 it seems to me their client has a pretty automatic malpractice claim against

them. So did you get any response on that?

HONORABLE ALAN WALDROP: Yes. I'll take these in order. Number one, your point about they could be multiple components is exactly correct. As a matter of fact, the members of the committee that are advocating a mandatory component are advocating for both pieces of this as a package.

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE ALAN WALDROP: And so as a two-prong package, and so you're exactly right about that, and that's exactly what is being proposed. In that same regard, you're also right that when you view the voluntary piece as just a new component to the rules, our view was that it basically becomes just a template for agreeing to a dispute resolution process, and what goes into that or doesn't go into that is really far reaching. I mean, it could be a lot of different things, and so it could be just about anything. We came up with what we thought were some good items, largely based, as David says, on kind of responding to the arbitration type model, but that's the factor on that, and then the last thing --

MR. CHAMBERLAIN: Can I just add to that? Also, Judge, you're right. I mean, I think we may have even had a discussion about flipping the coin and maybe you ought to begin there, but what ended up guiding us

was, is what we thought that a really good-looking two-day trial ought to look like and what ought to lead up to it and still get a fair result, so --

HONORABLE STEPHEN YELENOSKY: And the last component of that was judging a voluntary by whether -- first whether it would even be used and, therefore, is it worthy of being in the rules as a template, did the plaintiffs' attorneys say, yeah, I might pick that knowing that my claim is -- thinking my claim is worth 70,000, I might be willing to go to trial risking a verdict for 200,000 where I have to tell the client, "You only get a hundred."

HONORABLE ALAN WALDROP: Our plaintiffs' lawyers are -- first of all, there was a difference of opinion about how much even this mandatory piece would be used, because, as has been pointed out, it is in -- there's a real voluntary aspect to it, and so the question that becomes is a good one, and we posed it to plaintiffs' lawyers that were working on the task force. Well, would this be attractive to you that you would plead into it, and the answer was, yes, there are some cases that would get pled into it, probably cases that are 60, $65,000 or less in actual controversy to make room for the attorney's fees component of it, but, yes, there were some. How many? It's hard to know. How many would this mandatory

piece capture? It's hard to know, we would have to trot it out. Some people would argue maybe not that many. Some would argue maybe enough. It's hard to know.

There was a lot of the consternation amongst the task force members that it was $100,000, all inclusive of fees, because that really makes it hard to predict, you know, well, what are the fees going to end up being, and so, but that's statutorily mandated, no way to change that. We couldn't get around that, so at the end of the day, if this process works at all and seems to be having some benefit, it might be worth going back and raising that ceiling a little bit if it turns out that it's a good thing. If it turns out it's not a good thing and basically useless then that goes out the window.

CHAIRMAN BABCOCK: Buddy, then Elaine, and then Lonny.

MR. LOW: I have some difficulty phrasing it mandatory and voluntary because as I see mandatory, you've got one side that volunteers to take advantage of it. That's voluntary. Voluntary is where both of them are voluntary. Now, why do you call it voluntary?

HONORABLE ALAN WALDROP: I agree with you. I struggled through the whole process with fighting the term "mandatory" and using of these two terms. I lost that battle, and they needed labels, so they got labeled.

MR. LOW: Well, if you file for less than 100,000, you have volunteered to take advantage of that.

HONORABLE ALAN WALDROP: I agree.

MR. LOW: You volunteered. You didn't have to.

HONORABLE ALAN WALDROP: I agree.

MR. LOW: And we have a system now that you get in certain categories, and people think, well, I'll file it in the upper category and I won't take all of these depositions, and that hadn't necessarily worked, but this rule combines it looked like to me two things. They want to lower the course and have a quick trial. This rule combines a lot of things that we can do, but you've got to flip the page to this rule where you have an agreement to do this, do that, so it puts it all in one bundle, but I don't see that it's mandatory versus voluntary. It's all voluntary.

CHAIRMAN BABCOCK: Okay. Professor Carlson.

PROFESSOR CARLSON: I had a question on what was -- well, two questions. One is if it's purely voluntary and the plaintiff doesn't opt in, so we're going under -- outside this whole new scheme, is the proposal that there would be two level ones for Rule 190.2, one for expedited actions and one for nonexpedited actions, or is the proposal to change 190.2 for every case?

HONORABLE ALAN WALDROP: For everything.

MR. CHAMBERLAIN: For everything.

PROFESSOR CARLSON: Okay. And my second question is how did the task force determine what courts this would apply to, because it looks like in the legislation it would not apply -- the expedited civil actions would not apply to JP courts and constitutional county courts.

HONORABLE ALAN WALDROP: That's correct.

PROFESSOR CARLSON: But that's not clear to me when I read it.

HONORABLE ALAN WALDROP: It's going to be the location in the rule.

PROFESSOR CARLSON: Well, a constitutional county court.

HONORABLE ALAN WALDROP: We think, at least our drafters think, that where it's located in the rules answers for that, but if it doesn't then we need to answer for it.

PROFESSOR CARLSON: I think it does for the JPs; and secondly, when you said the expedited actions don't apply to Family Code, actions under the Family Code, Property Code, Tax Code, or health claims, I notice the legislation said the Supreme Court may not adopt rules that conflict with a provision of those. Was it the task

force -- obviously it must have been your opinion that the provisions of -- there's some provision in those other codes that preclude expedited action.

HONORABLE ALAN WALDROP: That received a fair amount of discussion, and why we got to where we did is we didn't want to create a bunch of satellite litigation about whether or not one of the pieces of this rule is inconsistent with anything in those codes. That's such a huge broad exclusion and that there would just -- if you filed a case then the case would be -- the litigation of that case would be about whether you came under that process or not.

MR. CHAMBERLAIN: Can I give an example of that?

HONORABLE ALAN WALDROP: So what we decided to do was just eliminate that debate for those codes.

MR. CHAMBERLAIN: Just for an example, Professor, med mal cases are all about experts; and, I mean, that's been really all the litigation you get out of these things these days is, you know, what they've done with experts at the trial court level. Well, we tried to get out of the expert business both in the mandatory version and in the voluntary version, so that avoids conflicts.

PROFESSOR CARLSON: And I just wanted to add

that I think you've all done a very nice job with this. Interesting proposal.

CHAIRMAN BABCOCK: Professor Hoffman, and then Frank, and then Tom. By the way, we're getting ready to vote on mandatory versus voluntary. So anybody wants to talk about that issue, that's where we're headed. Professor Hoffman.

PROFESSOR HOFFMAN: And now for something completely different. Let me suggest, because nobody has asked me until now my thoughts, and I wasn't a part of --

CHAIRMAN BABCOCK: Lonny, what are your thoughts about this?

PROFESSOR HOFFMAN: -- any of the working groups, so I agree with Bill on one point, which is that the legislation says the Supreme Court's got to do something, all right, it's you challenge them; but I want to underline what may not be clear, which is that you had a whole bunch of people in a room who all thought one thing, they all thought we ought to set limits on discovery. They had some other thoughts that are also good, but the main event is setting limits on discovery; and by the way, some of those other thoughts are real good. There's good empirical evidence about setting an early trial setting and the effect that has on reducing costs, so don't get me wrong in that I think -- you know,

nor do I think that limits on discovery are necessarily a bad idea. Indeed we're dealing with a class of cases that almost have -- have very little discovery to begin with, and so there's probably not going to be a whole lot of difference as it turns out, and indeed David sort of made that point that people are doing it anyway whether they voluntary opted in.

But my point is just this, that there are other ways to adopt rules for efficiency, and all of our discussion, because all of their discussion has been about limits of discovery, but it need not be. There are a number of other ways. The Federal rule makers have done a lot of work, including work they're still thinking about. Let me highlight one, but, again, not to suggest that it's the only one. Our pretrial conference rule is a very limited rule and doesn't look anywhere near the level of detail and perhaps sophistication -- maybe that's the wrong word to use --

CHAIRMAN BABCOCK: Yeah. We're plenty sophisticated.

PROFESSOR HOFFMAN: -- the detail that Rule 16 has on the Federal side, and one thing that a lot of attention is being given to is the idea that getting people in front of a judge and talking at an earlier stage in the case, having nothing to do with pretrial limits on

discovery, is a very efficient way to do things. So I'll stop, because more is -- less is surely more. I may have crossed over, but that's the point, is we ought not to assume this is the only way to do this.

MR. JEFFERSON: If I could add onto that, that that was discussed early on, an option like that, that getting to court early is -- but it got no traction among the folks in the room.

HONORABLE ALAN WALDROP: Yeah, that was heavily considered and discussed and precisely because the very good empirical study that was done at the Federal level that showed that it -- there were only two things according to that study that really cut down the cost of litigation. One was getting in front of a court, getting people in front of the court early with the judge, and the second was getting a quick trial setting. Those were the only two things that they could conclude actually for sure would affect the process, and so we kicked those around at length, and the reason that the pretrial conference with the court was ultimately rejected was that the Federal study was not limited to small value cases. It was limited to -- it was litigation general, and there was a thought in the task force that that first -- requiring that first conference early on could be more expensive than it was worth and actually increase the costs for

small dollar cases. So that's why it was ultimately rejected, but it's a legitimate thought. It's absolutely a wonderful thought to consider and for the committee to consider.

CHAIRMAN BABCOCK: All right. Bunch of hands up. Frank, and then Tom was next, and then Hayes, and Pete had his hand up, and Justice Brown and Gaultney, and Peter Kelly, and who else? Alex has got her hand up. And Orsinger, surprise, surprise, and Gene. So why don't we just go around the table? Go ahead, Frank.

MR. GILSTRAP: Well, here's an approach. I would take the mandatory approach with the caveat that it really doesn't mean anything since the defendant can always opt out. Again, I'm not too concerned that it's mandatory, and put in everything in it that's time-saving that is consistent with due process, and I'd even go on and put in the time limit. I don't know why that's in the voluntary thing. I think you can -- consistent with due process you can limit parties to five hours in a trial, and I would say that's our mandatory rule. Then I would have another rule that I think Judge Yelenosky called a template, and I would have, "Here is a list of voluntary things the parties can agree to," and I would put them in there. You can agree to a six man jury. You can agree to limit ADR. You can agree to a medical affidavit. You can

agree to limiting limitations on challenging experts, no directed verdict, even a general verdict and no appeal. You can put those all in there, and the parties can agree to one, two, three, or four, in any case. You can agree to them in a big case and just see if it works.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: Three brief points. First of all, I don't really agree that a defendant in good faith is going to be able to opt out that often. Number two, if the concern of a plaintiff's lawyer is I may have some professional liability problems if I get a 200,000-dollar verdict, it makes no difference whether it's mandatory or voluntary, because it will never be utilized. I think there a lot of reasons why a reasonably prudent plaintiff's lawyer could make a recommendation to a client to do it because of a potential costs savings with an expedited trial, and so I think I really don't put too much weight on that issue is my point.

The third thing is it's said that if voluntary it really becomes a template. Don't undervalue a template. I suppose we've always had the right to voluntarily limit discovery, but how many people did that prior to the adoption of the discovery levels? We've got about 13 years of experience with that, and what have we seen? Most cases go to level three, but in my experience

most of the time, at least the limits on depositions and discovery and so forth, the parties agree to follow level two. Now, parties are not going to go out and say, you know what, we're free to contract to reduce the amount of discovery and do some of these other things. People that are adversaries just aren't going to go out and blaze trails most of time. So if you have some sort of template where it's there in the rules, I think there's really some value in that.

CHAIRMAN BABCOCK: Yeah. Thanks, Tom. Hayes.

MR. FULLER: I would tend to agree with Tom on that. You know, the Court's been tasked with adopting rules that promote prompt, efficient, cost-effective resolution of civil actions. That really doesn't take into account the fact that what the clients want to do is win. Okay. And they are going to adopt or utilize whichever proposal will work, or rather I should say the parties will utilize whichever proposal they choose based on whether or not they think it gives them an advantage and whether they want to win or not. And, you know, if this is mandatory, the plaintiff's attorney is going to plead in if the plaintiff's attorney thinks that gives his or her client an advantage.

I agree with Tom. I have seldom seen a

counterclaim in most of these cases that are under $100,000 that I could bring in good faith of $100,000 or more. In fact, I've never seen one. And good cause is discretionary, and discretion is too often determined by the venue you're in, so I don't think the defendant is ever going to necessarily get out of a mandatory system. If it is a voluntary system, under those circumstances at least the defendant has a chance to either opt out or bargain with the plaintiff's attorney for a fair trial.

CHAIRMAN BABCOCK: Rusty, and then Alex.

MR. HARDIN: I guess I'm just always going to be the crazy aunt in the attic that says why are we always talking about limiting the time in trial? That is not the problem. We're on Friday afternoon. For the last 72 hours there were about five jury trials going on in Harris County with 20-something courts. The time in trial is not the issue. The time and expense of discovery and how much it's going to cost the clients to get there is the issue. I understand limiting discovery. I think it's crazy, but every time I hear a judge, all due respect to all of you, talk about limiting time for jury selection and everything else, that translates to "I don't like to listen to you lawyers. When I was a lawyer I thought jury selection was important, when I was trying cases I thought cross-examination was important and being able to show

what's wrong with the witness was important, but now I really don't want to listen to y'all talk about a car wreck, so I want time limits, and I want this or that."

I think there are two distinct worlds, discovery and how much it costs that client to get there. Judges everyday run their courtroom in a proper way in which they limit what they think is a waste of time. Once we start giving the imprimatur to time limits and people sitting up there with clocks, we are just once again limiting the ability to try cases. I don't know why we are putting the emphasis there. We're not trying cases now. I hear that part of the reason for this rule is we want to get more jury trials, so what's our solution? Let's make them shorter. I don't understand that. Other than that I have no opinion.

HONORABLE ALAN WALDROP: Just so that you know, the proponents of the mandatory piece of this agreed with that line of reasoning completely.

CHAIRMAN BABCOCK: Okay. Pete, I'm getting to you. Professor Albright.

PROFESSOR ALBRIGHT: I just have a question, and you-all may have talked about it and I missed it. In the letter there is a paragraph about that everybody likes mandatory disclosure practice under the Federal rule, and so there's a paragraph that says how wonderful it is, and

I don't see it in here. I'm not saying I think it's a good idea for in here, but I'm just wondering what happened.

HONORABLE ALAN WALDROP: It's in there. It's only -- but only the document piece. It's just the document piece. There's not any other part of the Federal rule that we picked up.

PROFESSOR ALBRIGHT: So it does -- so --

HONORABLE ALAN WALDROP: It would add a document production component to the rule for request for disclosure.

PROFESSOR ALBRIGHT: Oh, okay. So it changes Rule 194.

HONORABLE ALAN WALDROP: Correct.

PROFESSOR ALBRIGHT: Okay. So it applies to all --

HONORABLE ALAN WALDROP: But it's only that piece of the Federal rule that got added.

PROFESSOR ALBRIGHT: And it applies to all cases and not just these cases?

HONORABLE ALAN WALDROP: No, no, no. It does not apply to all cases. It's not a major across the board rule change. It only applies to cases that fall within these -- the parameters of this new procedure.

PROFESSOR ALBRIGHT: So in little bitty

cases you're making everybody produce documents -- when we wrote the discovery rules the concern was is that a lot of these smaller case haves no discovery and do just fine with no discovery. Maybe that's changed, but as I recall, that's why we did not include mandatory disclosure of documents in the Texas rules.

MR. CHAMBERLAIN: Alex, I think that we did discuss this. I think certainly the idea we had was, is you wouldn't have to spend a lot of time thinking about sending written discovery to the other side. You just want to find out what they've got, what they're going to use at trial, take a look at that, do your request for disclosures and maybe a few interrogatories and request for production to find out the bad stuff they're not producing. It was really thought that it would be kind of a quick in and out procedure.

PROFESSOR ALBRIGHT: So why isn't it appropriate to do it in all cases?

MR. CHAMBERLAIN: Well, it could be. It could be.

HONORABLE ALAN WALDROP: It's just that that wasn't our mandate, to go in and propose a change to the rules for request for disclosure in all cases.

MR. CHAMBERLAIN: We think you might find some ideas in these proposals that you may want to extend

to all cases.

CHAIRMAN BABCOCK: Judge Wallace, you were out of the room. I know you had your hand up before you left the room, and we're going around the room.

HONORABLE R. H. WALLACE: I was just -- well, kind of back to where we were talking about arbitration, one thing about arbitration and trying to -- trying to fashion a rule that's somewhat I guess would take away from the arbitration business, number one, not everybody goes to arbitration because both sides want to. Sometimes one side goes kicking and screaming because they've signed a contract or an agreement that requires arbitration. We're not going to get those cases back probably, and even when you go to arbitration sometimes the parties can pick their arbitrator. Even if you do it under Triple A rules, you at least get to strike some arbitrators. You have somewhat -- some ability to know who you're going to be litigating against or who the judge is going to be or the arbitrator is going to be.

In a county with multidistrict courts, as a trial lawyer I'm going to think long and hard before I decide to opt into a deal where I have no right of appeal when I don't even know who the judge is going to be, and that's just the fact of life.

CHAIRMAN BABCOCK: Yeah.

HONORABLE R. H. WALLACE: So I think the -- I think eliminating the right of appeal, even from the voluntary, I'm not sure that will encourage people to use it.

CHAIRMAN BABCOCK: Yeah. Great minds think alike. Going around the --

MR. CHAMBERLAIN: Chip, can I just respond to that?

CHAIRMAN BABCOCK: Yeah.

MR. CHAMBERLAIN: This was -- in the working group this was a negotiative process between all aspects of the bar. The plaintiffs bar felt very strongly about this. You know, they realize that -- and they accepted the fact that they would be capped at $100,000 if they entered into this procedure, so they gave up something there. What they wanted, and I think for good reason, in return is I want it to end there. If I get my 70 grand, I don't want you taking this to the court of appeals and then I don't want you taking this to the Supreme Court of Texas. It's over with. Now, I'll give you the cap, you give me efficiency and finality. That's what the trade-off is.

CHAIRMAN BABCOCK: Yeah, good point. We're now back to over here. Pete Kelly, Peter Kelly, you had your hand up at one point.

MR. KELLY: The concern, from what I understand, about whether it should be voluntary or mandatory is that if it's voluntary nobody is going to opt in. Someone mentioned there are other states that have similar procedures. What is the success of their -- we would be the only state with a mandatory program. The states that have voluntary programs, what is the success of their procedures, and has anybody looked at the county courts at law? For instance, in Houston the county courts at law are capped at 100,000, six man juries, trials are quick. It's virtually identical to the procedures set forth in here except for formally limited discovery. The discovery is going to be self-limiting because the case is so small, and are people opting into it or choosing to file in district court to avoid those particular limitations?

And to touch on what David said about the plaintiffs bar being willing to give up the right to appeal, that varies geographically. In Houston where there is sort of a perceived hostility towards many plaintiffs' cases by the -- among the trial bench, they're not willing to give up the right of appeal, but in Dallas and Bexar County, they seem more willing to give up the right of appeal in favor of finality.

CHAIRMAN BABCOCK: Okay. Sitting next to

you is Justice Gaultney, who had his hand up a minute ago.

HONORABLE DAVID GAULTNEY: This concerns the voluntary rule.

CHAIRMAN BABCOCK: Yes.

HONORABLE DAVID GAULTNEY: And I'm sure you discussed it, but it strikes me that part of the problem with the voluntary rule and it becoming less efficient, less radical, is the ability to remove yourself from the process, and did you consider the possibility of having a voluntary rule, you would consent to it, but once you consented to it, like arbitration, you're bound to it and not have a rule process that allows you to withdraw from the process and then that same context allows the same appeal process that you would have in any other case?

MR. CHAMBERLAIN: Well, boy, we've been in so many meetings, so many discussions about this, let me try to put myself back in that place, as they say. I -- the thought was, is that you agree to this procedure in good faith, you get into this procedure, and something changes, discovery turns up something, or in the case of a plaintiff, whether it's voluntary or mandatory, you find out that physical therapy is not going to work like you originally were told, that it's going to require surgery. Plaintiff has got an opportunity to get out of there -- out of it, two different ways, can either move to remove

it or by repleading the case.

By the same token, on the defense side, if something should come up in discovery that no longer makes that consent supportable, there would be an opportunity to go back to the court to get out of it. But it -- the idea was, is we've got to be flexible to address changed circumstances.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: A couple of points. One, on the defendant opting out by a counterclaim, I do think that the provision about a defendant filing a pleading would have some type of implied good faith at least in that provision, so I think a dec action would not necessarily do it, even if you pled it at 101,000. I think a court might say that wasn't in good faith and it was struck by a trial court and, therefore, you're still in.

CHAIRMAN BABCOCK: Well, but wait a minute, they said there's no looking behind the pleadings.

HONORABLE ALAN WALDROP: No, no.

HONORABLE HARVEY BROWN: Well, I'm saying I think a court of appeals -- I think a trial court could strike it. For example, a dec action can't be brought just as a way to try to get attorney's fees in response to a PI claim, so the trial court struck that, said it wasn't

brought in good faith. I suspect there would be an argument you did not -- you were not able to remove it.

HONORABLE ALAN WALDROP: Let me clarify my comments in response to your --

CHAIRMAN BABCOCK: Yeah.

HONORABLE ALAN WALDROP: The idea on the pleading side was to not change the pleading rules at all, and it was -- and the concern was changing them to examine them for their authenticity or their accuracy. Now, it would not change things like having pleadings struck because they are, in fact, not filed in bad faith under current provisions of law, and if you get those pleadings struck and your case comes back to being within these parameters then it is in those parameters.

CHAIRMAN BABCOCK: Then it's back. Okay.

HONORABLE ALAN WALDROP: Now, the dec action piece of it is could you file a dec action that is a legitimate dec action and get -- because there is now nonmonetary relief in the case, legitimate nonmonetary relief, get out of this rule. The answer to that is yes, but if it's a dec action that's just filed to be a mirror image of the claim that's already filed so that it's not a legitimate dec action subject to attack under current law, and it might fall out of the case.

MR. CHAMBERLAIN: Can I just kind of take a

different tact on this? I think I agree with everything Alan said, but also, I don't see how this rule is going to be used in a contract dispute of any consequence, and the reason is, is that in most contract disputes one side is going to get attorney's fees. The defendant certainly ought to file a counterclaim asking for those attorney's fees. Keep in mind that attorney's fees are dynamic. They're not static, and most plaintiffs and most defendants are not going to be willing to cap themselves at $100,000. So this is not really like a 100,000-dollar cap. It may be more like a 50,000-dollar cap. I just -- I know that's not directly responsive to what you're saying, but it does have something to do with counterclaims, and it does have something to do with how often this thing is really going to be effectively used in a contract dispute.

CHAIRMAN BABCOCK: Okay. Judge Estevez.

HONORABLE ANA ESTEVEZ: I'm going to agree with the crazy old aunt back there.

CHAIRMAN BABCOCK: Sorry, that's a hard way to start in your tenure in this group.

HONORABLE ANA ESTEVEZ: We -- you've gone through an expedited discovery process. You've got parties that are there, and now you're telling the trial court that they're going to have their little clock ticker

going like a chess game, and then all of the sudden one side runs out of time, and so for the rest of time they just sit there while the other side presents its evidence? The other side gets to do a closing. You don't get to do a rebuttal. There's nothing here that says "except by leave of court" to give them that ability to go more than five hours, and I just think it actually would be such a -- I don't know how if I was a plaintiff or even if I was a defendant how I would emotionally be able to get over finally getting my day in court and my time is up. I would be embarrassed to be an American at that time. I'm sorry, but I mean, it is that high of a constitutional issue. I mean, these are the most emotional people you see.

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: I mean, I guess we're not doing a family law case because it's excluded, you know, but if you were doing some issue that had to do with family members, you know, maybe it's a will contest, I don't know. You know, there's a lot of people that can get on -- their value of their whole property may be $70,000, and I know it's voluntary, but I don't think that all attorneys calculate right. People tell me all the time, "It's a one and a half day trial, Judge." Three days later we're still in trial. You know, and I'm not

upset with them until the jurors are sighing and sleeping all the way through it, you know, and they know that. They pick that up. So --

CHAIRMAN BABCOCK: So it's a biological clock.

HONORABLE ANA ESTEVEZ: Maybe there's a lot of abuse in the Houston and Dallas area, but I don't see a lot of abuse, and they get the signals from the jury when it's really, really bad, but is this really what we want to do is just sit there and at the end of the day just say, "You've waited all this time or a short period of time because it was expedited, and now we're going to cut it off." I don't know if you want to respond to that, but I'm just concerned, and I know that my crazy old aunt will save us from this area.

MR. CHAMBERLAIN: There's no enforcement mechanism here. I mean, if you try to appeal it because the other side -- the judge let the other side go 15 minutes over, I don't think you're going to be --

HONORABLE ANA ESTEVEZ: What if the judge doesn't? What if the judge doesn't let them go 15? I mean, there are, you know, some that are really strict.

MR. CHAMBERLAIN: I mean, Judge, they do this in Federal court everyday.

HONORABLE STEPHEN YELENOSKY: Yeah. We do

that now.

HONORABLE ANA ESTEVEZ: You do? I don't.

HONORABLE STEPHEN YELENOSKY: I mean, the idea that somebody would tell me it's a day and a half and I would let them go as long as they want is not within the realm of how I operate.

HONORABLE ANA ESTEVEZ: It doesn't end up that way, but assuming that they're working on the case you're not going to just tell them and say, "No, I'm sorry, you're not" --

HONORABLE STEPHEN YELENOSKY: No, I mean, right now -- and you have a good point, Rusty has a good point. Maybe we shouldn't have the rule or whatever, but the notion that a trial judge can't put a time limit and enforce it --

HONORABLE ANA ESTEVEZ: Agreed.

HONORABLE STEPHEN YELENOSKY: -- is foreign to me, and what I would tell them is if you have two days, two days means in a jury trial at most five and a half hours a day. You each have, if it's two days, five and a half hours. I will do you the courtesy of running you a clock when you're using your time, and periodically I'll let you know how much time you've used. We do that now.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Yeah, is there any provision

where, say, for instance, you file for $105,000, and later on you meet with the other lawyer and he answers, and you say, well, he's a reasonable lawyer. He said, "Look, why don't we put this in that category?" Is there anything to keep them -- I mean, once you -- he can amend and go down to less than a hundred. Can you then get in the system?

HONORABLE ALAN WALDROP: Yes.

MR. CHAMBERLAIN: I think so.

HONORABLE ALAN WALDROP: It's an in and out.

MR. LOW: Because lawyers -- and they should be encouraged to meet early to do that, because the lawyer that files for less has got to have met with his client, say, "Look, here's the advantage, you won't have all these costs, but you won't get more than that." Just like I enter a high-low agreement during the trial, so lawyers get together and agree on things like that, so is there some mechanism to encourage people to then opt into this system with the advantage?

HONORABLE ALAN WALDROP: We kicked that around at length.

MR. LOW: Okay.

HONORABLE ALAN WALDROP: And the answer that we came up with was, from the beginning of the case up until a cutoff time it was free in and out, and you -- you can go in and out, you can go both ways. The problem was

that there had to be an end point on that.

MR. LOW: Right.

HONORABLE ALAN WALDROP: And so we put an end point in. It's in there and that there's a point at which it's not a free in and out. It has to be by leave of court.

MR. LOW: Yeah.

HONORABLE ALAN WALDROP: But up until that point, which is after the end of the discovery period, 30 days after the end of the discovery period, it's you're freely in and you're freely out.

MR. LOW: But what would be wrong with a system now that's required that you meet or talk with the lawyer before a certain motion is filed? What would be wrong with having as soon as they file answer, defendant files answer, have some meeting, certification to discuss going into this system.

HONORABLE ALAN WALDROP: Well, there's nothing wrong with that from a voluntary standpoint, but if you mandate it, if you say we're going to have a trial conference with the court or y'all are required to have a meeting then all of the sudden you're writing into the rule something that costs money.

MR. LOW: Well, I know, it's not mandated if I sue for $100,050. It's not mandated because I'm not in

it. But why -- I mean, why not, you know, require lawyers to at least consider it? It wouldn't take five minutes.

MR. CHAMBERLAIN: Buddy, I have -- but you could certainly write -- Alan's exactly right. We tried to avoid the best we could adding any steps into this thing.

MR. LOW: Yeah, I --

MR. CHAMBERLAIN: And what we tried to do was remove as many steps as we possibly could consistent with our own notions of due process. Buddy, I think that it -- this is really a product of education. I think we can do this. I think we can go out there and sell this to all parts of the bar, and I think we will make changes, and I think we can encourage people to actively explore these what I think are some pretty good options to get the case resolved pretty expeditiously.

MR. LOW: So through seminars or media and so forth educate the lawyers on it, the benefits of it and sell it.

HONORABLE ALAN WALDROP: Right.

CHAIRMAN BABCOCK: Pete Schenkkan.

MR. SCHENKKAN: I have been waiting a long time because of the notion that you should keep quiet and take the risk of being thought an ignorant fool rather than speak up and remove all doubt; and to try to further

reduce the risk now that I think I might want to say something, I want to first ask a question of Alan and David; and depending on the answer to that question, part of my comment I might still keep silent on. Am I right, David and Alan, that even though the statute says that the Supreme Court may not adopt rules under this subsection that conflict with the provision of, among other things, the Family Code, that if you had lawyers for the two parties to a Family Code case, they could, if they wanted to, voluntarily agree to the contents of your voluntary plan.

MR. CHAMBERLAIN: Yes.

HONORABLE ALAN WALDROP: That's our understanding.

MR. SCHENKKAN: Okay. Now I'm going to have to take a chance because I thought that was the answer, but it seems to me that that means that the last part that says the Supreme Court may not adopt rules under this subsection that conflict with this means that the text that the Legislature adopted does call for what Alan has been forced to call a mandatory approach, though it's not. It's a plaintiff's choice approach. Because it does not matter, as Justice Scalia said, what any one or all of the legislators intended. The only thing that matters is what words they adopted, and if the Supreme Court may not adopt

rules that conflict with a provision of these things, but may adopt with rules that conflict with provisions in other areas, they intended this to be something that the plaintiff can compel by design and choice. So I'm going to vote when it comes time to vote --

CHAIRMAN BABCOCK: Soon.

MR. SCHENKKAN: -- soon for what is going to be called mandatory, though I agree with Alan it's not.

MR. CHAMBERLAIN: Can I respond to that?

MR. SCHENKKAN: Let me just -- since I'm only going to get this one chance, let me do these other parts, which I think I'm going to lose that. I think my side is going to lose that side of the vote, so it probably doesn't matter anyway. If so, if you were to adopt a so-called mandatory, meaning plaintiff gets to invoke it, then you have to confront the concerns that are being expressed by the working group that David has ably presented the results of and by George Christian on behalf of the other of the two leading tort reform groups; and that is that there are reputational and other cases in which the dollars, the damages that are pled, are not the most important thing at stake; and for that I am firmly of the view that the good cause out is not sufficient, because of the notion that there are parts of this state where as long as we know who you represent, we don't care

how good your arguments are; and so I believe that if we are going to have a plaintiff chooses whether the rule applies rule, another approach, not the good cause approach, has to be taken towards solving the problem that there are these -- at least these reputational cases where this can do great damage. I don't have a solution, and the first thing that comes to mind is to try to carve out additional categories of cases, maybe all cases alleging professional malpractice, but at least you've got to confront that issue.

And then, finally, now this just before you respond, David, I want to say that expecting that the mandatory view will be -- so-called mandatory view will be voted down and concentrating on what I think would then be the consensus that we want to try to make the what's being called voluntary approach work better, it seems to me that the thesis of the voluntary group is what we are doing here is two things. You're sending a big symbolic statement to everybody who is in this community, lawyers and the judges, we need to work together to make it more possible to have some inexpensive trials at least for the less expensive cases, and then we're trying to help people get over the cognitive distance of that when you're taking my due process rights away or I don't know how do it or whatever by making it easier for them by giving them what

Alan keeps calling a template. If that's the approach, and that's a good idea, but why stop at one template? Why not do at least a couple more that give some of these other options. I could, for instance, see that it might be really nice to have an option in which the deal is there's no appeal, but it might be really nice also to have an option in which there is an appeal. As a lawyer who sometimes represents people in the Rio Grande Valley, I kind of want --

CHAIRMAN BABCOCK: Now, now.

MR. SCHENKKAN: -- to be able to appeal, if I have to; and so I think you can work with the voluntary notion but provide a couple more templates; and if you do that, then, of course, since it's voluntary anyway you get to think about doing voluntary options that aren't even limited to cases under 100,000. Our long time former member Steve Susman is out marketing the notion that he stopped participating in the Supreme Court Advisory Committee because it was too hard for us to ever agree on one set of rules that would apply to all the cases. He's now advertising why don't y'all learn together, lawyers to get together at the start of a case, and agree on a voluntary rule for that case that will speed it up and make it cheaper, and, "Here's my" -- Steve Susman's -- "template for that." Why not build into the more general

rule that's not limited to hundred thousand-dollar cases the lawyers in any case have to confer at the outset to decide if they can agree on a way to lower the costs in that particular case, that portion being completely. So I probably now have removed all doubt, but go ahead.

CHAIRMAN BABCOCK: Beyond a shadow.

MR. CHAMBERLAIN: Those are excellent points. The way I read the statute is, and the way I understand the legislative history is, is the Legislature basically left it up to the Court to come up with a rule, as Alan says, that will do these things that we've been talking about. We've got I think a couple of great proposals here, but the Legislature did put a restriction on it, said whatever you do, whatever you do, whether it's an -- and I'll insert this in parentheses -- voluntary or mandatory, whatever you do, don't do anything that screws with doctors, the government, or the Family Code, whatever you do. Now, you can go do anything else you want to do, and I think that's the best reading of the statute.

CHAIRMAN BABCOCK: Okay. Skip.

MR. WATSON: Just a couple of things.

CHAIRMAN BABCOCK: Speak up.

MR. WATSON: First, I think everybody in the room believes that we've got to do something to get justice in cases where the amount in controversy does not

merit hiring most of the people in this room to get them to justice. We've got to do that. Second, I applaud what Elaine said. This is one of the best thought out presentations we've ever had since I've been a member of this group, for the big issues have been contemplated and good minds in good faith have tried to come to a consensus, and I applaud you for doing that, and I mean that very sincerely.

In trying to make a decision, one question, one point. The question is on the mandatory side if we have the exclusions that are listed, the family cases, the Civil Practice and Remedy Code cases, the Property Code cases, and if you add to that the exclusion that David mentioned that I was going to bring up, that in a breach of contract case for $75,000 that you want to get to a resolution, it would be improbable to me that a defense attorney could not in good faith say that to prepare and try even an expedited trial and go to the court of appeals and go through denial of petition for review at the Supreme Court that that is not going to cost $100,000. That's going to happen, and so on all breach of contract cases there is a built-in out. You know, it's there, and it's going to happen, so my question is, of your 24 or 25 things where it's just not going to be practical, and if you accept my point that all breach of contract cases will

come out if the defendant wants them to come out, what's left? What is this going to apply to mandatorily? I really want to know that before I vote, and I can't tell.

MR. CHAMBERLAIN: I think for the most part what it's -- and I agree with that. I think a lot -- probably 90 percent of the contract disputes are going to come out if somebody wants them to come out. I think it does leave you with minor impact soft tissue cases, slip and fall cases, and you know, relatively -- other types of relatively small personal injury claims. You can, though, have other types of cases as long as they come in under $100,000; and I can tell you unless you're an equine veterinarian specializing in racehorses, pretty much all of the vet malpractice cases are going to come under this, I would think; and this is a concern among the lawyers out there that represent veterinarians around the state.

MR. WATSON: Alan, can you help?

HONORABLE ALAN WALDROP: Yeah, one of the things that we ran into early on is -- and it's kind of another way of looking at these problems, is to ask the question, well, what can you -- what can legitimately be done, and when you look at it that way, you start realizing the limitations that this -- that you are under. So, for example, we didn't -- we don't have any option about affecting cases at $100,000 all inclusive of

attorney's fees as well. I mean, that's statutorily mandated. We don't have any option to do anything other than that. So if the case legitimately because of a counterclaim has an amount in dispute in excess of that, we can't affect it, and so, yeah, it's not going to capture that, but there's nothing to be done about that.

Another aspect of it is to say, well, okay, and this is -- this is kind of where I got kind of after really sitting down and struggling with the process, okay, what are we going to do. I came to the conclusion that the claimant -- and I say "claimant" instead of "plaintiff" because it can include either side of the dispute -- that a fundamental thing that you have to start with that you just can't change is that the claimant has to be master of his pleading. He just has to be, and if you accept that principal, which I found myself having to accept, that that then dictated things about this process that affected a large part of it and just limited what could be done, and so what I would say is, yes, the point -- the points you're making are correct, and I agree with them, but what that means is, is that certain things that we cannot tinker with simply limit how much one of these rules can capture.

Now, is it going to capture enough to make a different if we accept certain limitations on what we can

do? I don't know. It might not, but it doesn't change the fact that if you start with certain fundamental premises that can't be changed, that that dictates certain things about the process; and so that's my answer to you, is that the contract case, when a defendant wants to say, I've got more -- I've potentially got more in fees here in my counterclaim and that's going to kick me out, this process won't capture that case, simply because you have to be master of your pleadings. Now, I will say as a practical matter that when we discussed this and in my own thinking through it, I'm not so sure that this won't capture some smaller contract cases that otherwise just cannot be tried, because I don't think that every defendant is going to necessarily want to try to kick it out of the process.

This is good for defendants, too, in many commercial dispute type settings, and the -- it relieves -- I will tell you this, a major factor for me in a, quote, mandatory aspect rule, is that -- and it has not been discussed -- is that such a rule relieves lawyers of professional liability questions that a voluntary rule does not relieve them of, and that's not to be -- that's not -- I think that that's a factor here that does play some role.

CHAIRMAN BABCOCK: Skip's talking behind

your back, so he wants to make a --

MR. WATSON: He does that. The point -- thank you, and I agree that many small contracts will opt in. I'm just trying to get a feel for what practically would be in. Second, the point I wanted to make is that if the vote does go voluntary, I want to echo what Pete said, that I personally think that there should be an additional exception in the waiver of appeals for clear error of law, and that is not to drum up appellate business. It is because the amount of appeals that we see where judges thinking -- and I'm not just talking about certain areas of the state and certain sides of the docket. I'm talking about judges dispensing what the U.S. Supreme Court talked in the arbitration context about just ignoring the law and dispensing industrial justice, regardless of what the law is. That happens in some courts in this state, and I am concerned that people who go in thinking that they are going to have a case tried under the rule of law don't get that, do not get a case tried under a rule of law. They in essence get a -- a binding almost mediation in which the decision is final and is not based on the rule of law. That's all I have to say.

CHAIRMAN BABCOCK: Now, Dee Dee's hands are about to fall off, so we're not going to stop the

conversation, I know other people want to say things, but we are going to take our long-promised vote. And we're going to vote on, quote, mandatory versus voluntary, and I know somebody is going to inevitably say, because I've been around this group for a while, "Well, wait a minute, if I vote for mandatory am I voting for that rule?" No, you're not voting for that rule, you're voting for a concept. We're going to talk about both. No matter how this vote goes we're going to talk about both the mandatory and the nonmandatory, the voluntary rule. So don't worry about that, and so let's try to vote just on conceptually, and this is a nonbinding vote. I don't know how the Court is going to treat it, and we're going to talk about both rules anyway, so don't get too excited about it, about winners and losers.

HONORABLE STEPHEN YELENOSKY: But there's still a question, which is are you asking us whether we think the statute requires mandatory or --

CHAIRMAN BABCOCK: No. You can have any reason.

HONORABLE STEPHEN YELENOSKY: -- and whether we think it should be.

CHAIRMAN BABCOCK: You can have any reason.

HONORABLE STEPHEN YELENOSKY: Okay.

CHAIRMAN BABCOCK: If you think the statute

requires it, then of course you're going to vote mandatory, but if you just think it's better as a policy matter that would be a reason, too, and if you think, you know, Judge Waldrop is a little cuter than the other guy then that's okay. For any reason.

HONORABLE ALAN WALDROP: That brings up your competence to vote.

CHAIRMAN BABCOCK: Well, we're not going to go behind the vote, though. So everybody who is in favor of, quote, mandatory, raise your hand.

Okay. All those in favor of voluntary, raise your hand. The vote is 18 mandatory, 26 voluntary, the Chair not voting, and let's take our break.

(Recess from 3:22 p.m. to 3:45 p.m.)

CHAIRMAN BABCOCK: Okay. Let's get back to the specifics of these rules, and, David, if you can explain to me the difference between Rule 169, expedited actions, voluntary, versus Rule 169, expedited actions, voluntary standalone rule. Where is David?

MR. WATSON: He's gone, he's the smart one.

HONORABLE ALAN WALDROP: I can tell you.

CHAIRMAN BABCOCK: Judge, you talk to us. He won and he left, is that it? It's sort of like when you win the motion, "Judge, can I be excused," and you're gone?

PROFESSOR DORSANEO: Actually, stop talking, shut your briefcase, and go.

CHAIRMAN BABCOCK: Yeah, right. Exactly.

HONORABLE ALAN WALDROP: There are only a handful of differences, and the reason -- and they are drafting differences, because the standalone it's contemplated that there will be no other rule passed. It will be the only rule that gets passed, and so it has to look a little bit different than a set of voluntary components that have to mesh with another rule, and so -- and there's a handful of drafting distinctions, but substantively they are the same. There's not any substantive difference.

CHAIRMAN BABCOCK: Okay. And what other rule -- was the idea that there would be a mandatory rule and then a companion voluntary rule?

HONORABLE ALAN WALDROP: Yes. There's an A and a B in this report proposal. The A is a mandatory component and the voluntary component. Together, they both get passed at the same time. They are both available. They both go into the rule. The B reported proposal is a standalone voluntary consensual only rule, and so those are the two proposals, and that's why I was saying it creates some confusion because part of the A -- the A proposal is itself a voluntary -- a consensual rule,

which looks exactly like --

CHAIRMAN BABCOCK: Right, okay.

HONORABLE ALAN WALDROP: -- the standalone.

CHAIRMAN BABCOCK: Well, if we focus on proposed Rule 169 standalone, we're going to pick up most of the features of the companion rule, right?

HONORABLE ALAN WALDROP: All of the substantive features.

CHAIRMAN BABCOCK: All of the features.

HONORABLE ALAN WALDROP: Yes. You can just focus on one. One voluntary rule is going to capture all of the substantive features.

CHAIRMAN BABCOCK: All right. So let's focus on Rule 169, expedited actions voluntary standalone rule, and it's in your materials, labeled what I just said.

MR. ORSINGER: Are we going to go back and pick up the jury rules later, the 262 and --

CHAIRMAN BABCOCK: Uh-huh.

MR. ORSINGER: Okay. I'll save comments.

CHAIRMAN BABCOCK: So the application we've pretty much talked about, unless somebody wants to spend some more time on it, but Richard.

MR. ORSINGER: Yes, I just wanted to be sure this was clear and in the record, that (a)(3) is an effort

to say that if it's a family law case under the Family Code then none of these expedited provisions apply no matter where they may be in the Rules of Procedure, right?

HONORABLE ALAN WALDROP: (a)(3); right.

MR. ORSINGER: Right there where it says the expedited actions do not apply to (3).

HONORABLE ALAN WALDROP: That's the wrong rule.

HONORABLE ANA ESTEVEZ: Is it five?

HONORABLE ALAN WALDROP: Keep going. The one you want is this one.

MR. ORSINGER: Okay. Yeah. So same question for that one.

HONORABLE ALAN WALDROP: Ask it again. I'm sorry.

MR. ORSINGER: Okay. Then if there is any element, any claim of which is under the Family Code, then none of the expedited rules apply, no matter where they are?

HONORABLE ALAN WALDROP: Correct.

MR. ORSINGER: Okay. And if there's a divorce case and someone joins in a tort claim for assault and battery --

HONORABLE ALAN WALDROP: Still a divorce case.

MR. ORSINGER: It's still a divorce case, and you don't try assault and battery under this separate.

HONORABLE ALAN WALDROP: No. This does not contemplate -- none of these proposals contemplate divvying up a lawsuit at all.

MR. ORSINGER: Okay.

MR. MUNZINGER: Chip, what is the document that we should be looking at to participate in their discussion?

CHAIRMAN BABCOCK: You should be looking at a --

MR. ORSINGER: Are you sure you want to tell him?

CHAIRMAN BABCOCK: Yeah, that's an idea. Go around the block a couple of times, and it's the task force for rules in expedited actions, the task force report, and attached to it -- and mine doesn't have an exhibit number on it.

HONORABLE ALAN WALDROP: It should be the very last thing in it.

MR. LEVY: Standalone version.

HONORABLE ALAN WALDROP: It should say at the top --

MR. MUNZINGER: 169, expedited actions.

HONORABLE ALAN WALDROP: Standalone,

"voluntary standalone." If it just says "voluntary" you're not there yet, keep going until you see "standalone" rule.

CHAIRMAN BABCOCK: Standalone rule. Yeah, Robert.

MR. LEVY: Question about what we were just talking about, some family courts can exercise jurisdiction over a tort claim just by virtue of the fact that some lawyers would want to bring those claims in a family case because it might be an estate as a party or something like that. Are you indicating that anything that's brought in a family court could not use these rules?

HONORABLE ALAN WALDROP: If there is -- the intention here was to say if there is a claim in the case that is under the Family Code then that case cannot -- the entire case cannot go under these rules.

MR. LEVY: But a family court could still use this rule for -- if they just exercised jurisdiction over --

HONORABLE ALAN WALDROP: I guess in theory if you had a lawsuit that was pending in a -- before a family judge, family law judge, but it had no claim in it that was under the Family Code, I'm not sure exactly how that would work, but if such a thing could exist then this

could apply.

MR. ORSINGER: Well, it could occur to me if the judge were to sever the tort claim from the divorce, not a separate trial but a true severance then you might end up --

HONORABLE ALAN WALDROP: You might.

MR. ORSINGER: -- with a tort case in a family law court that no part of that tort case anymore is under the Family Code, but I would hope they wouldn't do that because we don't want to break all of our divorces up into separate cases.

CHAIRMAN BABCOCK: So I'm sure that if you were representing one of the parties you would advocate against that.

MR. ORSINGER: Yeah, I wouldn't -- I would hope that the trial judges wouldn't be severing the courts out and running them on a rocket docket and have the divorce be handled like a lawsuit.

CHAIRMAN BABCOCK: Okay. Well, it looks like maybe there is some things to talk about in subpart (a), application, but I want to jump ahead to (c)(4) real quickly because we have a guest Mike Schless, who is here and waited patiently all during our discussions, and he just wants to make a couple of points about the ADR thing. So, Mike, you have the floor.

MR. SCHLESS: Thank you, Chip. And before I begin, I just want to make sure that we're all on the same page, and I'm going to ask Judge Waldrop and David for clarification of my understanding. If you look at either voluntary or voluntary standalone, looking under voluntary, it would be (c)(3), and looking at voluntary standalone, it would be (c)(3) as well. That language would apply if the rule comes out as being voluntary or -- I beg your pardon.

MR. LEVY: Voluntary voluntary.

MR. SCHLESS: Voluntary voluntary. If the rule comes out -- if the Supreme Court decides to adopt a mandatory rule, David, do I correctly understand that the language would then revert back to what was in the ABOTA draft under (c)(1), which is also in the packet under Rule 262.5(c)(1), "The court must not order the parties to a civil action submitted to expedited jury trial process to participate in alternative dispute resolution"?

MR. CHAMBERLAIN: I know you and I just talked about that a few minutes ago, but I don't know what the Court would do with that.

MR. SCHLESS: Well, let me explain my heartburn. Under -- if the language is as provided in the two Rule 169s, a lot of the heartburn of the ADR community -- and perhaps I should explain. I'm a former chair of

the ADR section of the State Bar. We had two other former chairs who had to leave and Don Philbin is a member of the current ADR section counsel, so we're trying to represent the interests of the ADR community, but more broadly speaking, we're trying to understand the proper place of ADR within this rule. Our heartburn under the ABOTA draft was that it would lead to the anomaly of the Court adopting a rule that says a court must not exercise the discretion that a statute gives that judge, which is the court on its own motion or on motion of either party may order the parties to an ADR procedure.

If the process is voluntary, I personally don't have as much heartburn, even though it would still have that anomaly, because one party could say, well, there are certain advantages and disadvantages to participating in the expedited process, and one of them is that we can't go to mediation, unless on the side the other side agrees to do that and make a decision accordingly. But if you have a provision, for example, that's not a tort but you've got a contract provision, whether or not the contract has a mediation clause or other dispute resolution clause, if one party wants to -- if it's -- if you have a mandatory rule and the plaintiff's pleadings clearly fit the case under the expedited jury trial parameters and one party wants to go

to mediation and the other does not, there's no mediation; and that's different from the current situation where one party wants it and the other does not the court gets to decide. Or if you have a contract that has a provision that says the parties will attempt a resolution by mediation failing that the case will go to arbitration, for example.

Then you have the anomaly, for example, in an employment case, where the employee files the lawsuit. The employer says, "Wait a minute, we have an arbitration provision," and the court says, "Sorry, employer, I can't enforce the arbitration provision in your contract because this rule says I can't order an ADR proceeding." The language that's in the voluntary and voluntary standalone would take care of that situation, but if the language -- if the mandatory rule has the language that's in the ABOTA draft, that gives heartburn for the reasons just expressed.

CHAIRMAN BABCOCK: Okay. Thanks, Mike. I think the language -- I was just looking at it. (c)(3) in each -- in the mandatory and in the voluntary, both versions, is the same, I think, and it looks to me like that takes care of your concerns, so unless the Court wanders back to the ABOTA draft, your concerns are addressed.

MR. SCHLESS: Well, I thought I had understood from David when we talked before that if it's mandatory the language reverts back to the ABOTA draft.

MR. CHAMBERLAIN: I'm sorry, Mike. I misspoke.

MR. SCHLESS: Well, in the immortal words of Emily Litella, "never mind."

CHAIRMAN BABCOCK: Okay. So let's go back to draft 169, standalone.

HONORABLE TOM GRAY: Chip, could I say one thing on that ADR paragraph --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: -- that may give him more heartburn now than he had when he sat down, is as drafted it says "unless the parties have agreed." There are a lot of cases now where the third parties to an agreement are required to go to ADR procedures that might not have to go to ADR procedures or might not be ordered to ADR procedures under that. I'm talking about the -- it's the arbitration provisions where there are a third party gets involved. In other words, they bought it for one party, but they transferred the warranty or something of that nature. I don't know if the way that's worded it would capture those nonparty persons who wind up having to do to ADR.

CHAIRMAN BABCOCK: Well, wouldn't the nonparty person be able to compel it because it's required by contract? Otherwise there's no way to compel it.

MR. ORSINGER: Well, the trial court can compel it under the Civil Practice and Remedies Code.

HONORABLE TOM GRAY: I guess I'm trying to distinguish in my mind now the parties to the contract and the parties to the lawsuit and which parties is the rule talking about.

CHAIRMAN BABCOCK: Well, if a nonparty intervenes and says, "Look, you've got to go to arbitration or mediation" for some reason, then they -- that's the only way they're going to have any standing to tell the trial judge to do anything.

HONORABLE TOM GRAY: Okay. I'll think about it some more before I open my mouth next time.

CHAIRMAN BABCOCK: Well, no, you're probably right, I'm probably wrong. I'm just asking the question.

Okay, back to subpart (a). I had a question about (a)(3). You say the consent is void if it's made before the occurrence of the claim. What are you getting at there, some sort of fraudulent agreement or something?

MR. GILSTRAP: Adhesion contract where we've got all of our employees had to sign this, and they agreed to this procedure.

CHAIRMAN BABCOCK: Is that what you're getting at?

MR. CHAMBERLAIN: Yes.

MR. GILSTRAP: I'm concerned about -- I'm not sure what "the occurrence of the claim" means. That strikes me as pretty vague.

PROFESSOR HOFFMAN: Yes.

MR. LOW: Occurrence giving rise.

HONORABLE ALAN WALDROP: That may actually be a drafting error. I think what the draft is supposed to say, "before the occurrence that gave rise to the claim occurred," I think is what it was. I think you've just found an editing issue.

MR. CHAMBERLAIN: Yeah.

CHAIRMAN BABCOCK: Richard, and then Lonny.

MR. MUNZINGER: I have a question under (a)(1)(B). The statute talks about "amount in controversy," so here you have a situation where plaintiffs one, two, and three each assert a claim against a defendant, a single defendant, having a value of less than $100,000, but their total claims amount to $150,000. Is that within the purview of the statute, and there are differing -- when I read these rules there were different definitions, but I have a jurisdictional problem here. I have a problem where the defendant is brought into a

system where the judgment against him can be greater than $100,000 because there are multiple claims asserted against him, each being worth less than a hundred, but he still is drawn into a system where he gets all the restrictions that are built into whatever rule the Court ultimately adopts, and I think that takes us back to an interpretation of the statute, what does the Supreme Court -- I mean, the Legislature mean when it says "claims in controversy having a value of 100,000."

CHAIRMAN BABCOCK: Which of you wants to take that?

HONORABLE ALAN WALDROP: That's a legitimate question, and the way the task force -- we kicked that around at length, and the way we eventually came to interpret both the statute and the mandate and then the -- what was -- the intent of what went in the rule was that it would be a per claim type of analysis, and it would be $100,000 per claim and apply -- try to get a rule that would apply that way. If the Court looks at it and says, "Well, we have a problem with the fairness of putting a defendant who might have three different 75,000-dollar claims against him and each one of those plaintiffs has, in fact, opted into this process, we have a problem with having the defendant being subject to this process when really the defendant is facing potential liability against

all of those folks of $225,000" then that's a matter of policy and fairness and should that be done or should it not be done.

Where we eventually got on the task force was that really we thought the idea was as between these two parties it would be 100,000-dollar cap, and if there were multiple parties in a case that made it more, that that didn't necessarily mean that we needed to pull out of this process. That's where we came out, that's the intent of this rule, and it's a policy difference that reasonable minds can differ on.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: With all due respect to your work, and I do appreciate your work, I don't think you've interpreted the statute correctly because the statute says the rule "shall apply to civil actions," not to claims, "to civil actions in district courts, county courts at law, and statutory probate courts in which the amount in controversy" and it continues on, so it's not a statute that focuses on the claim. It focuses on the amount in controversy, and I think it limits it to $100,000. I think you have a -- my personal belief is you have not interpreted the statute correctly.

MR. CHAMBERLAIN: I agree with that if you're looking at the voluntary standalone rule. Are we

looking at the same thing?

CHAIRMAN BABCOCK: Yeah, we're looking at voluntary standalone.

MR. CHAMBERLAIN: Okay. It's all claimants affirmatively plead that they only seek monetary relief aggregating 100,000 or less, so it's the aggregate of all the claims.

CHAIRMAN BABCOCK: Judge Yelenosky, then Pam, then Robert, then Justice Bland.

HONORABLE STEPHEN YELENOSKY: Justice Waldrop, didn't you say it's the aggregate for each claim? It's not the aggregate over different claimants, is what I thought you said, and I thought I was hearing something different from David now, but the point that I had before that is (a)(2) I think needs some work if, in fact, it's claims. I don't know that we would say "party who prosecutes a suit," because unless everybody thinks that includes counterclaims, "prosecutes a claim"; and would the judgment be limited to 100,000 if, in fact, Justice Waldrop, you can have multiple defendants? Is that a correct statement, or is it a judgment for each claim cannot exceed 100,000?

HONORABLE ALAN WALDROP: It's a judgment for each person that is limited to the $100,000. Each claimant, in my view.

HONORABLE STEPHEN YELENOSKY: Each claimant.

HONORABLE ALAN WALDROP: Yeah, each claimant, in my view, so, you know, claimant A could in theory under this draft get a judgment for 75, claimant B could get a judgment for 75, claimant C could get a judgment for 75, and that would be three different judgments in that -- in that sense of the word, and you wouldn't say -- add them all together and say that's really a judgment against the defendant for 225, but that doesn't have to read that way. It could read the other way.

HONORABLE STEPHEN YELENOSKY: Should it say "prosecutes a claim," though, because "prosecutes a suit" isn't enough to cover the counterclaims.

HONORABLE ALAN WALDROP: Perhaps.

CHAIRMAN BABCOCK: Pam.

MS. BARON: And I'll just say we have some experience with the phrase "amount in controversy equal to or less than $100,000" when we get to the county court jurisdiction. There's a big body of cases that address this, and I think in five points I can sort of summarize what those rules are. First, if you have one plaintiff asserting multiple claims against one defendant, you aggregate the amounts. If you have one plaintiff asserting separate and independent claims against multiple

defendants, you do not aggregate. If you have multiple plaintiffs asserting claims against a defendant, you aggregate under the statute, aggregation statute, Government Code 24.009, I think. I'm a little unsure about that.

PROFESSOR DORSANEO: Yes.

MS. BARON: If you have a counterclaim, it's treated separately and has its own hundred thousand-dollar limit, so you count that separate, if you have one defendant. If you have multiple defendants, you do not aggregate the counterclaims. Those are the rules.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: That's perfectly clear.

CHAIRMAN BABCOCK: I hate it when we learn what the rules are. Robert.

MR. LEVY: That actually was the issue I was going to raise. I think this point has been well-addressed by the precedent.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: If the intent of (a)(1)(B) is to require each party to seek less than $100,000 then I think you need different language, because this language here is ambiguous. I think it needs to say, "Each claimant affirmatively pleads that he or she seeks only relief of $100,000 or less," use the word "each" instead

of "all" and get rid of the word "aggregate."

In (3) we talked about that, what we don't want people agreeing to this process ahead of time like as part of some agreement they sign, but we do that in other areas. We make people agree to arbitration clauses or jury waivers, so I don't see why this is sacrosanct. I don't see why people can't agree to this ahead of time, too.

CHAIRMAN BABCOCK: Yeah, we need to get to that. Justice Bland.

HONORABLE JANE BLAND: I think they're covering it. I think the clause about aggregating claims is also confusing because I think the two authors have given us a different construction of it, and maybe the word "aggregating" is not a good word to use, maybe just "relief of."

HONORABLE ALAN WALDROP: I'm happy to say, I agree with the editing comments that were just made right over here. I agree with that.

CHAIRMAN BABCOCK: Okay. Eduardo.

MR. RODRIGUEZ: I reread this. This is voluntary, so my comments were going to be that if it were not voluntary it would be unfair to have three or four or five plaintiffs claim 75,000 each and limit the defendant to the number of --

CHAIRMAN BABCOCK: Okay. And I had Buddy was next.

MR. LOW: Yeah. Well, one thing if you don't put it where they can all go to the same suit then they could really put you to expense, each one of them file an individual suit, 75, and then expenses and everybody is run up.

CHAIRMAN BABCOCK: Right. Richard.

MR. ORSINGER: I was -- I mean, just because we had a fairly narrow vote in favor of voluntary doesn't mean the rule is going to be voluntary. Are we going to discuss the language in the mandatory rule also separately?

CHAIRMAN BABCOCK: We'll try to.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: If you'll just be quiet. No, I'm sorry, I was just kidding. Go ahead.

MR. ORSINGER: Well, I can see -- I can see perhaps a need to cap the individual -- if your rule is individual claimants can't exceed 100,000, I could see a reason for a rule to cap the collective claims added together cannot exceed some higher amount because I've seen -- I don't practice this, but I've seen where you have multiple plaintiff lawsuits that are filed in selected counties, and they'll have 30 or 40 or 50 or 75

plaintiffs all joined into one lawsuit against one or two defendants, and you could just easily plead each one of those under 100,000, and you may be trying a 500,000 or a million-dollar or a 10 million-dollar claim, and so it seems to me like there should be some concern about the aggregate dollars involved in a lawsuit if the rule is mandatory. Of course, since this is voluntary they can do anything they want.

CHAIRMAN BABCOCK: Stephen Tipps, did you have your --

MR. TIPPS: No, I was just stretching.

CHAIRMAN BABCOCK: You were stretching. Okay. It think it's Professor Hoffman, and then Judge Yelenosky, and then Judge Estevez.

PROFESSOR HOFFMAN: Chip, I wanted to go back to 3, a point you brought up, if that's okay.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR HOFFMAN: I think I like the idea -- unlike Frank, I like the idea, the policy, of not having people consent beforehand. I would throw out for consideration rather than tie it to the language you have, how about tie it to the commencement of the suit? So the consent is void if it's made before commencement of the suit, and that way we don't have to fiddle with when the occurrence that gave rise to the subject of the claim

happened or not. We just wait until the lawsuit is filed and then we ask for consent.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky. Then --

HONORABLE STEPHEN YELENOSKY: Well, if we're evaluating this as it's presented, which is a voluntary thing, I don't think it makes sense for us even to talk about (a)(1)(B) because they have just agreed to do this, and we're saying, "Well, under this rule you can't do it because I independently of the judge have figured out it's over $100,000," and they say, "Okay, we'll do it by stipulation." I mean, it just doesn't make any sense to discuss within a voluntary rule what (b) means to me except that the statute prescribes that it be for 100,000 or less, and my solution to that is we say it in some way, but does it really matter?

CHAIRMAN BABCOCK: It would mean something in a mandatory rule.

HONORABLE STEPHEN YELENOSKY: Yes, it would, but we're looking at a voluntary rule.

CHAIRMAN BABCOCK: Right, I agree. I just wanted to make that point. Judge Estevez.

HONORABLE ANA ESTEVEZ: I was actually agreeing with him, and I wasn't looking at the statute, so I was saying let's get rid of 1(b)(A) totally because why

not just let anyone engage in this if that's what they want to do?

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: We have a statute on it. We need to make it clear what they've agreed to. In other words, aggregate or what. We need it clear what they've agreed to, unless we just want to draw their own agreement.

HONORABLE STEPHEN YELENOSKY: But this is not -- this says two things have to happen, agreement and the aggregate can't be more than 100,000. My point is, well, then they can't do it under this rule, but they can still do it.

HONORABLE ANA ESTEVEZ: And the -- oh.

CHAIRMAN BABCOCK: Oh, no, go ahead.

HONORABLE ANA ESTEVEZ: Well, I think at the end they were capped at 100,000, so I guess that's where the relationship between the hundred and the hundred come in, but we could broaden that and say that you're capped at something a little more vague if you plead to something, I suppose.

CHAIRMAN BABCOCK: Uh-huh. Okay. Bill.

PROFESSOR DORSANEO: Well, I just --

CHAIRMAN BABCOCK: Then Judge Christopher.

PROFESSOR DORSANEO: Once you go to each claim rather than all claims in the aggregate, Richard

Munzinger's interpretation of the statute is the right interpretation, if it matters.

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, even if we go with just the voluntary standalone, since the statute requires us to draft a rule that deals with amount in controversy 100,000 we shouldn't take that out of the statute, and I also think we have to understand what (a)(1)(B) means in relationship to (a)(2), so that whoever is agreeing to this understands what judgment that they are going to be capped at. Because otherwise they'll just have a question at judgment time, what did I agree to by that. And then I had one question on attorney's fees, and I don't know the answer to this, and I know the statutes mentioned attorney's fees, but would an additional appellate attorney's fees be part of that 100 or just attorney's fees?

MR. CHAMBERLAIN: Yeah, we discussed that. It's part of the judgment, and it would be subject to the cap.

HONORABLE TRACY CHRISTOPHER: But you don't supersede conditional appellate fees. They're not considered for that purpose.

CHAIRMAN BABCOCK: You can't get a turnover

order on them.

HONORABLE TRACY CHRISTOPHER: Right. You can't.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: In regard to, you know, taking out (a)(1)(B), I mean, could you at least make the argument that theoretically that, you know, this is supposed to apply to certain kind of cases that are supposed to be expedited and if you let someone else utilize it, you know, you're putting someone further down the line that should be in front of the line.

CHAIRMAN BABCOCK: Yeah. Yeah. Roger.

MR. HUGHES: Yeah, I'm curious about (a)(1)(4) about requiring the defense or indemnifier to sign along with it. I mean, I think I understand the policy. The problem is -- and some of these cases get pretty complex. I mean, you may have a carrier who's coming in and defending, but their limits are less than $100,000 and then you may have a carrier who is defending only under a reservation of rights, and you may have a carrier who potentially may have to indemnify the person but may have coverage issues altogether, and I could see an insurer going, "Well, I'm not going to sign this. I'll defend you under a reservation of rights, but if I sign this consent thing I'm not -- I'm agreeing to pay a

judgment," and the same thing about a carrier who -- what if -- what if a defendant has a carrier but that carrier refuses to defend? Well, under this rule if you proceed -- if the defendant says, "Well, let's proceed without that carrier," is he giving up his claim that he's covered under the policy? I mean, I sort of understand what you're getting at. I just see problems in trying to -- in trying to make it work in practice.

CHAIRMAN BABCOCK: Good point. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Tracy, I agree it needs to be specified, but does it need to be specified in two places? In other words, if you dropped (a)(1)(B) and you just address it in (2) and tell people whether or not they can get a judgment -- or that they cannot get a judgment in excess of 100,000, it seems to me you lay it out clear enough in the beginning, although I do agree with Richard Munzinger and whoever else said it over here, that arguably what we should be talking about is not what a party gets in a judgment, but whether a judgment may be taken against somebody which in the aggregate is 100,000, but in any event the point is just that I don't know that we need to say it in (1)(a)(B). We can just say in (2) and then everybody will know very clearly at the end of the day that they can get a judgment up to $100,000 or

whatever it is or you cannot take a judgment against somebody, even multiple parties, in excess of 100,000 if that's the way we go.

CHAIRMAN BABCOCK: Marcy.

MS. GREER: I just had a question. In the package rule, the voluntary portion of the package rule, this (a)(2) is not in there, but it is in the voluntary standalone rule, and I was just trying to understand what the interplay was between that.

HONORABLE ALAN WALDROP: I can tell you why that is. The folks that did -- that were for the package of both didn't believe that the voluntary needed to be kept in any way. There was a mandatory piece that addressed the statutory mandate from 100,000 and less, and our view was that the mandatory piece didn't need to be capped, kind of a la comments that were made by Judge Yelenosky. So that's the rationale behind it, so that the non-standalone voluntary rule wouldn't be capped because anybody could look at it and agree to it if they wanted to. That was the rationale.

CHAIRMAN BABCOCK: Richard, the elder.

MR. MUNZINGER: In number (2) you have it reading, "In no event may a party who prosecutes a suit recover a judgment in excess of 100,000." Does a defendant who files a counterclaim for attorney's fees

prosecute the suit? Would it not be better to be "or prosecutes a claim" or delete it entirely so that it read "In no event may a party recover a judgment in excess of 100,000 excluding post-judgment issues" or rather "interest."

CHAIRMAN BABCOCK: Richard.

HONORABLE TOM GRAY: Slight tweak on that because "recover" denotes the actual collection to me. I suggested, along with Richard's lines, "In no event may a judgment in excess of $100,000 excluding post-judgment interest be rendered in favor of any party."

CHAIRMAN BABCOCK: Okay. Richard, the younger.

MR. ORSINGER: I may --

CHAIRMAN BABCOCK: Maybe.

MR. ORSINGER: -- misunderstand the discussion, but I thought that this was not a rule about the total claims in aggregate, but the claim against an individual party, and if it is -- has to do with a 100,000-dollar cap on a claim against an individual party then (2) is written in aggregate and should, I think, say "In no event may a party who prosecutes a suit under this judgment recover a judgment against a particular party in excess of 100,000," because if you have three defendants and the claim is under 100,000 for all three, you can --

as I understand it, you could use this process, but you should be entitled to a judgment in the aggregate up to 300,000 as long as it doesn't exceed a hundred against a particular party, is my understanding of the way that works.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Well, I thought we discussed this a while ago and decided that the statute says that it's the civil suit that can't have a judgment for more than $100,000.

HONORABLE ALAN WALDROP: The statute actually says "civil actions."

MR. HAMILTON: "Civil action."

HONORABLE ALAN WALDROP: And I can tell you what the thinking -- it's a debatable point, but I can tell you what the thinking of each side is, and y'all can decide what you think about it. The question becomes what is a civil action, is a civil action the entire lawsuit or is a civil action the claim of me against that party? And so on the task force there was a group of -- a group of us, I was in this group, that believed a civil action was the claims as between two parties, per what you just said. There was a group that believed that that's not what that's supposed to mean, that civil action is supposed to mean the entire lawsuit, and so everybody's claim in the

whole lawsuit has to come under this 100,000-dollar cap; and that's the group that was primarily responsible for the standalone rule; and so I think that, now that I look at it, this is a drafting issue that I may have overlooked when I went back and did my review. They are drafted differently. The mandatory piece and the standalone rule are drafted differently, and this standalone rule, I think the way the drafting is done is supposed to take on the interpretation that "a civil action" means the entire lawsuit, all parties included.

MR. CHAMBERLAIN: That's correct.

CHAIRMAN BABCOCK: Okay. Let's go on to (b), removal from process, because we've got to get through this this afternoon. We've talked about this a lot in the context of our general discussion, but Gene wants to talk about it some more.

MR. STORIE: I do. It seems to me whether you go voluntary or mandatory, and I think I'm endorsing Frank's comments earlier, that you would be better off if you allowed people to either agree to just some of the stuff that they thought would help the process or to have a good cause exception to this stuff that they thought would actually mess things up, so I would prefer that to an all-in or all-out process either way.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: On (b)(1)(A), the way it's written I interpret that the court could not sua sponte bust the case out of this process, and was it intended that it would require the request of at least one litigant rather than the court in the middle of the hearing saying, "Wait a minute, this is not accelerated"?

MR. CHAMBERLAIN: Yes.

MR. ORSINGER: Okay. So somebody must request it. The court doesn't have the power to do it on its own?

MR. CHAMBERLAIN: Yes.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: In (b)(1)(B) it says any party who joins the suit can -- and doesn't agree takes it out of the expedited actions process. I guess that includes a plea in intervention, and I'm wondering if we really want to do that, because, you know, collusive pleas in intervention, and maybe the person who intervenes, if he doesn't want to be under the expedited process, maybe he just shouldn't intervene. In (b)(2), we say, "A pleading, amended pleading, or supplemental pleading." I guess what about pleas in intervention? We could add "or pleas in intervention" or just say "any pleading that removes a suit from the expedited action must be filed" within a certain time, because a plea in intervention you

can file at any time subject to being stricken, and maybe that's enough safeguard, but maybe we just want to say "any pleading."

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I think we're still having a problem between voluntary and mandatory because under this all the parties could agree that they want to amend the pleading to add something other than monetary relief and they want to stay in this process, but this rule says that I must take it out of the process. That doesn't make sense.

CHAIRMAN BABCOCK: Okay. Any other comments about (b)? Yeah, Carl.

MR. HAMILTON: Well, I was going to speak to that "joins." The way it's worded it seems like "joins" is limited to a plea in intervention. If a new defendant is added by a party they ought to be under the same rule and then we don't have any mechanism for this consent. Does the additional party have to voluntarily consent somehow or another? Does somebody have to file a motion with them to see if they're going to consent? What if they just do nothing?

CHAIRMAN BABCOCK: Yeah.

MR. HAMILTON: You need a mechanism to bring that up so that they know what they have to do.

CHAIRMAN BABCOCK: Yeah, good point. Bill.

PROFESSOR DORSANEO: I agree with Carl. The "joins" suggests that, you know, by its transitive character that this is somebody who is intervening, but I think it's frankly also on the ambiguous side. Somebody has brought into the action, they join it.

CHAIRMAN BABCOCK: Rusty, are you stretching? Are you stretching, Rusty?

MR. HARDIN: Just stretching.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: The thought occurs to me about a cross-claim and a defendant brings in someone for some kind of contribution. Would we -- if the original claims a hundred and so the cross-claim is likewise a hundred or less, but the cross-defendant doesn't want part of this process, are they allowed to opt the process out, or are they required or are they bound because the claim against them is a hundred and the first two parties agreed? In other words, this "joins" is not passive. It's active, right? It's the one who voluntarily intervenes, not the one who is brought in on a cross-claim?

PROFESSOR DORSANEO: You mean a third party claimant?

MR. ORSINGER: Yeah. Well, no, I'm talking

about a claim for indemnity or contribution.

PROFESSOR DORSANEO: Yeah, third party claim.

MR. ORSINGER: Yeah.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: We also might want to think about the problem of consolidation where you consolidate a claim that's under the regime -- a case that's under the regime of a case that's not. I guess that takes it out of the process, but you might want to address it in the language of the rule.

CHAIRMAN BABCOCK: You guys are sure making this thing complicated. Okay. Anything else on (b)? All right. Let's go to -- Justice Gaultney. Sorry.

HONORABLE DAVID GAULTNEY: I would just urge we consider strengthening it by just requiring a motion and showing of good cause allowing -- requiring the court to make the decision whether the parties can get out of something that they've agreed to already, and in that context, you know, they could argue, "Well, I want to join another party who refuses to consent" or "I want to allow" -- or "I want to file an amended pleading," but, you know, once you've consented, require a motion and let the court decide whether good cause exists.

CHAIRMAN BABCOCK: Okay. Under (c)(1) it

says, "Discovery is governed by Rule 190.2," which we all know what that means, except that you guys have rewritten 190.2, correct?

HONORABLE ALAN WALDROP: Correct.

CHAIRMAN BABCOCK: So we've got to look at that, and that is somewhere in your materials, 190.2.

MR. STORIE: In the middle.

CHAIRMAN BABCOCK: Somewhere in the middle, and it's now called, "Discovery control plan, expedited actions, level one," and it says "application," and it's going to apply to this rule that we're talking about and then on limitations it says that discovery has got to be done in 180 days after the first -- measured from the first request and then there's some limits on request for production, admissions, and there's a new language on disclosures. Any comments on that? Richard.

MR. ORSINGER: Yes, it makes perfect sense to replace the existing rule if we have a mandatory rule, but if it's a voluntary rule, I think we still need to continue level one for those people who are not part of a voluntary arrangement but want the abbreviated discovery because they're a plaintiff pleading under -- and let's raise the minimum from 50 to a hundred. In other words, raise level one from 50 to a hundred and then have an expedited action rule that doesn't wipe out level one.

CHAIRMAN BABCOCK: Yeah. Good point. Frank.

MR. GILSTRAP: I agree with Richard. I also think, though, that Rule 190 needs to mention the figure $100,000. Maybe it's implicit, but we had 50,000 in the old rule. It needs to be 100,000 in the new rule.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I guess I have an overarching question. I'm having trouble on all the individual issues, and that is if all of this is by consent, other than what we're saying the court must do under certain circumstances, isn't all of this changeable by agreement? I mean, this is just -- as someone used the word earlier, template. I'm having trouble going through any one issue because it could all be changed by agreement. I guess the only thing when we say "the court must" or --

CHAIRMAN BABCOCK: I think if I heard them correctly, that what you're -- you want to know what you're consenting to.

MR. LOW: Right.

CHAIRMAN BABCOCK: So if you're going to consent --

MS. CORTELL: Couldn't you consent --

CHAIRMAN BABCOCK: -- here's what you're going to consent to.

MS. CORTELL: Well, I think you ought to be clear with people. I mean, can't you consent to some but not all? Is this an all or nothing consent deal or --

CHAIRMAN BABCOCK: Well, wouldn't you be able to -- if you could strike a deal with the other side, couldn't you say, "Hey, we're consenting to the expedited procedures, but what about doing 20 requests for admissions," and the other guy says, "Fine."

MS. CORTELL: Right.

CHAIRMAN BABCOCK: And you can do that, but you don't have to write it into a rule I don't think.

MS. CORTELL: I guess what I'm trying to understand is we can sit here and have philosophical discussions over how something ought to work or not, but at the end of the day other than the parts of the rule that say "the court must," it seems to me everything is just a suggestion for future agreement between parties.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: The problem is the judgment issue. The court cannot under this rule enter judgment over $100,000 even if the parties agree to that then you're taking it out of the requirement that the judge has to set the trial date and otherwise follow the rule.

MS. CORTELL: I agree that as to the extent the rule talks about what the court must do. I get that.

MR. LEVY: So you're talking about that.

MS. CORTELL: But if you take all of that, that's relatively little part of --

MR. LEVY: The judgment part is a big issue.

MS. CORTELL: No, no. I'm not saying it's not important, but most of these provisions don't relate to that. They're all consent.

CHAIRMAN BABCOCK: Bill, then Judge Yelenosky.

PROFESSOR DORSANEO: Well, let me make sure I understand. You want to change -- or what's proposed is to change 190.2 level, formerly level -- you know, I mean, level one cases change that to $100,000, right?

CHAIRMAN BABCOCK: That's what they're saying.

PROFESSOR DORSANEO: Yeah. And it's unnecessary to refer to Rule 168 or 169 in 190.2.

CHAIRMAN BABCOCK: That's not what they're saying. What they're saying is there needs to be a Rule 169 level one and then there needs to be a level one for everything else.

PROFESSOR DORSANEO: Why?

CHAIRMAN BABCOCK: I don't know. Ask them.

PROFESSOR DORSANEO: Why not make it a hundred? 50 is pointless. Why not make it a hundred and

see if that's also pointless?

CHAIRMAN BABCOCK: Okay. Justice Christopher. Sorry, Judge Yelenosky first, then Justice Christopher.

HONORABLE STEPHEN YELENOSKY: That's all right. Go ahead.

HONORABLE TRACY CHRISTOPHER: If you make level one $100,000 then we are back to the mandatory system that the group voted down, so, I mean --

PROFESSOR DORSANEO: No. It's only a piece of it.

HONORABLE TRACY CHRISTOPHER: Well, no, it's most of it. The discovery limitations is the major thing, and that was what was actually in the mandatory part of 168, the discovery limitations.

CHAIRMAN BABCOCK: So somebody is trying to back door this thing.

MR. CHAMBERLAIN: She's right. Richard is trying to back door this thing.

MR. ORSINGER: No. I'm not in favor of changing level one. I think level one should be with the procedures, the number of interrogatories. Let's just change the amount to 100,000 and then let's have this alternate route.

MR. CHAMBERLAIN: Well, that makes it

mandatory because level one is mandatory.

CHAIRMAN BABCOCK: If you plead level one, it's -- so you can get the judge to take you out of level one, it's level one.

PROFESSOR DORSANEO: Is it a good idea to go from a meaningless 50 to some other number?

CHAIRMAN BABCOCK: There's a good question.

PROFESSOR DORSANEO: Yeah.

CHAIRMAN BABCOCK: All right. Judge Yelenosky, did you --

HONORABLE STEPHEN YELENOSKY: Well, just a specific -- and this is what Nina is saying, I mean, I think the whole thing needs to be looked through again with an understanding, I mean, as Robert said, that the really important point is what do you get at the end. It shouldn't say things like "the parties may agree to expand up to 10 hours, but not more, except by court order." I mean, why? They want to agree. So all of that needs to come out.

CHAIRMAN BABCOCK: Jim Perdue.

MR. PERDUE: Well, I have -- was ambiguous on the concept of mandatory for a long time until this issue of keeping level one and moving it up to $100,000 was crystallized, and that makes a ton of sense, is these changes to level one seem to me to make it much more

palatable for anybody who is litigating a case under $100,000 primarily because, frankly, it reads better the way it's done, and this addition of the (b)(6), which is the request for disclosure and document provision from the Federal rule, and then you would create I guess a 190.5 that would be a corollary rule for the agreements on all the other things.

I can't get past the due process issues involved in trial, appeal, and those kinds of issues if it's a nonvoluntary situation. I think those concerns are legitimate, and I think any of those changes kind of mandate doing it on the two-tiered system proposed by the subcommittee, but when you look just solely at the issue of discovery as an expense in cases that shouldn't merit that much expense because of what is in controversy, this construct to me makes a lot of sense. I will tell you the biggest -- the biggest complaint I hear from people in the plaintiff's bar is the concern which seemed to be glossed over with this idea that if I basically plead myself into my judgment can never exceed $100,000, I as a litigator am giving up a whole lot, and so the construct of the rules for the consumer of the service, that is, the plaintiff who is going to essentially live with that limitation, has to give something back, which I think is what the committee really tried to do in fairness to both sides,

on -- you know, on all of the issues through it.

So, you know, I think you can't discount the idea that if a plaintiff or a counterclaimant is going to say, "There's no way I can get more than $100,000 in this case," you've got to get something back for that; and it's got to be cheaper, it's got to go faster, and it's got to achieve resolution with finality if you're going to give that up; and so in that construct, I think that whether it be -- whether you view it as the two-tier system or -- I know there's a lot of issues about the pleading into it or whatever; but I think that the idea of redoing level one on $100,000 or less with this construct suddenly kind of crystallized it for me; and, of course, Judge Sullivan and I have been talking about this for two years. This is at least a step forward in that process.

CHAIRMAN BABCOCK: Jim, here's the only thing I worry about with what you say, is if you make it mandatory because the plaintiff is the master of the pleading then what you say is right. You know, you plead into it because you're getting a lot for doing that, you're capping your damages at 100,000, and you're getting all these other benefits, but if you -- all of those benefits that you're getting are going to make the defendants opt out of it, so the more that you get in a voluntary system, the more likely it is that defendants

aren't going to do it.

MR. PERDUE: I agree. That's true. But the -- but, for example, why is level one discovery not used? Other than it's incomprehensible.

CHAIRMAN BABCOCK: Well, that.

MR. PERDUE: You know, and that's primarily because, you know, I think there is a margin between 50 and 100 that Judge Waldrop identified that is real, and in that regard, we may achieve capturing some things in the consumers of the civil justice system that aren't being captured because of that tweak, but you're absolutely right. I mean, I think that's the balance, and I know Chamberlain has talked about this a bunch, is the balance between the defendant, you know, being forced into this situation because the plaintiff is giving up, you know, that outside exposure, and that's a balance for everybody to take.

CHAIRMAN BABCOCK: Yeah, and it seems to me that the Court has got to consider the construction of a rule that nobody is going to use. It may be good -- it may be good because it will entice the plaintiffs to plead into it, but if it's voluntary, the more bells and whistles you put on the defendants don't like, they're going to get out of it, they're not going to consent to it, and we've wasted a lot of time.

MR. PERDUE: And that's what I've been struggling with.

CHAIRMAN BABCOCK: Yeah, I know. I'm not saying there is an answer to that, and your point is absolutely well-taken and valid, but --

HONORABLE SARAH DUNCAN: And how can a plaintiff by opting into this under mandatory system waive a defendant's constitutional right to a pleading?

CHAIRMAN BABCOCK: Well, what constitutional right are you talking about, to do discovery?

HONORABLE SARAH DUNCAN: No, the constitutional right to appeal.

CHAIRMAN BABCOCK: There is no constitutional right to appeal.

HONORABLE SARAH DUNCAN: In Texas there is, actually. *Dillingham vs. Putnam*.

HONORABLE ALAN WALDROP: Well, that's not really -- can I interject? That's really not what we're debating, because the appeal -- the lack of an appeal is only connected to the -- the consensual rule.

HONORABLE SARAH DUNCAN: Right, but --

HONORABLE ALAN WALDROP: The lack of an appeal is not part of and has never been part of any proposal that has a mandatory aspect to it, so I'm not sure that that part of the debate gets through.

HONORABLE SARAH DUNCAN: Right, right, but I'm just going on what Jim was saying. It is for me what makes the voluntary system make sense, because the defendant is giving up a constitutional right to appeal, by consenting to this. The plaintiff is giving up the right to get whatever the plaintiff's damages are without regard to the cap, and that to me is what makes this work and the reason the level one fits right into it. I'm just agreeing with what you said.

MR. PERDUE: Which would be a rare moment.

HONORABLE SARAH DUNCAN: Not at all. Not at all.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: Well, I don't want to revisit the mandatory versus voluntary, but I think Jim's comments kind of reveal at least what I perceive to be kind of a problem about who is the consumer here. The way I understand it is, is this is supposed to -- and what we're trying to do is we're trying to offer the public for the sake of public justice a more efficient dispute resolution center where we use juries.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TERRY JENNINGS: And so to me that's one of the reasons I ended up on the mandatory side. It's not just the plaintiff, it's not just the

defendant, and so to the extent that I could file a small minority report here I think we've kind of missed that point, because the fact is if this is voluntary and if the Legislature and the public have kind of perceived that lawyers and judges are part of the problem because we're either trial shy or we're foot dragging or we're part of the problem as far as adding an expense and dragging cases out that shouldn't be dragged out, voluntary is not going to cut it because everybody knows that there are lawyers in our community and there are judges who are going to drag their feet, and there are lawyers who are never going to be do this because they're either trial shy or they have a reason to drag their feet, so --

CHAIRMAN BABCOCK: Gotcha. Okay. Yeah, Richard.

MR. ORSINGER: Something that perhaps should be considered is to leave level one the way it is but increase it to 100,000, because all that does is shrink the amount of discovery. It doesn't take away anybody's constitutional right to anything and then have a separate procedure over here that fast tracks the trial process getting to trial and in trial and maybe if they want impairs the appeal, but the level one right now is only more limited discovery. It doesn't eliminate discovery, it doesn't speed up the trial setting, so far as I can

see, and it's possible that the Court could consider broadening out this level one to include an accelerated trial setting.

I mean, right now the plaintiff can opt into level one. The defendant can't opt out, but the court can move it out of level one on request. Now, maybe what we should do instead of moving it out of level one is say the court can increase -- can change the discovery limitations, increase the length of each deposition or the number of depositions or the number of interrogatories, but allow the plaintiff to trigger a level one mechanism and give the judge some oversight over it, and that may be very beneficial and doesn't require us to entertain these debates about constitutional rights.

CHAIRMAN BABCOCK: Okay. Bill, and then Roger.

PROFESSOR DORSANEO: It seems to me that you have to think in terms of commercial -- the economic loss claimant's lawyer having the incentive to decide to take this case, you know, this level one case, and just for funniness, I remember Paul Gold back in the old days saying that he didn't want to be a level one lawyer, so it's kind of a pejorative in and of itself, but maybe it won't be if it's 100,000, but you need to make it attractive enough for a plaintiff's lawyer to be able to

take this case on a standard contingent fee contract or even a big one. Otherwise, it's just not really going to happen that much. You know, so I think if you, you know, reduce the amount of discovery and provide other incentives that would let a lawyer say, yeah, I can get this case ready for trial. If I need to try it I can try it in a day, and --

CHAIRMAN BABCOCK: Or two.

PROFESSOR DORSANEO: -- I'll still come out okay if, you know, if we win.

CHAIRMAN BABCOCK: Roger, and then Judge Estevez.

MR. HUGHES: Well, I tend to favor something like the existing Rule 190.2 because, I mean, I appreciate wanting to do things by agreement and flexibility, but if we create a rule that allows the parties to go down and get the judge to increase all of this, you're just running up the expenses and thereby decreasing the value of having the 100,000-dollar cap, and the other thing of it is if you say, well, 190.2 is really going to be all done by agreement, well, then you're decreasing the incentive for people to want to do the expedited thing up front because they really don't know whether the expedited discovery schedule is going to favor them because then they're going to have to bargain out every point, argue over this and

that, and once again, increasing the amount of expense and time. I mean, having a set template in place I think is an extreme value and knowing that you can't deviate from it unless you get the other side to agree and you're going -- and I think there's a value to that.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I wanted to agree with Mr. Orsinger and also -- and I probably said that wrong. Orsinger, is that better?

MR. ORSINGER: No, the first one was better.

HONORABLE ANA ESTEVEZ: Okay. But when we go back and we look at what the Legislature asked us to do, what they wanted us to address, and the only thing they specifically stated was "The rule shall address the need for lowering discovery costs in these actions," and so if we focus on what they really wanted us to do, they wanted us to amend the discovery rules that could be just level one adding it to 100,000 changing all those discovery parts, making it mandatory, and then don't touch the appeal process. They didn't ask us to -- no one was complaining about the appeal process here. No one said that that was part of the problem. No one said that part of the problem was how much time you spend once you hit trial. The problem was getting to trial. The problem was the expense of getting there with the discovery costs, and

so I think we're taking a hammer and just clobbering the problem when there's this easier solution that they've already come up with a brilliant idea, and the reason I voted mandatory had nothing to do with what I want to do but what I believed that the Legislature was saying. I think they instructed us to have a rule that would be mandatory. I guess he left, so I'll just keep talking until --

MR. ORSINGER: See, you can keep on talking if you want to.

HONORABLE ANA ESTEVEZ: Yeah, I get to keep on talking.

MR. CHAMBERLAIN: He had to take a call.

HONORABLE NATHAN HECHT: Where are we on the --

MR. ORSINGER: We're on (c)(1), expedited process, discovery.

PROFESSOR DORSANEO: Paying close attention over there.

HONORABLE NATHAN HECHT: Well, I couldn't believe we hadn't got past that. I thought we were at least to (c)(3).

MR. ORSINGER: I've got a comment on (c)(2).

HONORABLE NATHAN HECHT: All right. Richard Orsinger.

MR. ORSINGER: Okay. On (c)(2), on the trial setting, I've calculated this, and I think the quickest this could be is if the plaintiff serves the defendant with discovery, and so there's a six-month clock that starts on the day the discovery is served, and then the trial judge must set the case within the following 90 days, so that's a nine-month trial setting after the defendant is served, but that there's no requirement that the court actually try the case, so they can reset it a dozen times, and the case will drag out two years, and what the plaintiff is bargaining for, a quick resolution, is gone. Now, we just went through the process on the termination cases of setting outside limits on the number of extensions. What about saying that the trial courts must dispose of these cases within 12 months?

HONORABLE ANA ESTEVEZ: And then we get mandamused.

HONORABLE NATHAN HECHT: All right. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: The Rules of Judicial Administration already tell us to dispose of them within 12 months.

MR. ORSINGER: I'm talking about, though, that it's required, so that if you can't get a trial setting you get a mandamus. Not you, but them, they.

HONORABLE NATHAN HECHT: Roger.

MR. HUGHES: Mega double ditto on that. I think --

MR. ORSINGER: Thanks, Roger.

MR. HUGHES: I think this is the guts of the quid pro quo, this and the hundred thousand-dollar cap. If you can't -- if you aren't rock solid guaranteed to go to trial in 9 to 12 months, I don't know why the plaintiffs would even be interested in that because it's the same old same old. I would suggest that you put in the rule, you know, a continuance -- you know, that you can only grant one continuance of so many days, and it's mandatory, and, yes, it should be mandamused, so that would be the only thing I would add to that.

MR. CHAMBERLAIN: Chip, can I just --

CHAIRMAN BABCOCK: Yeah.

MR. CHAMBERLAIN: We really did -- Alan and I and the entire task force really thoroughly debated this issue, and just to tell you how we got to where we got was, is that we're sensitive to everything you just said, Richard and Roger, but in all of the 254 counties there are some counties that are multidistrict counties and like one up in the Panhandle runs from Childress to Pampa, correct? In the Panhandle. And the judge doesn't come by every month, and they have criminal cases, and they have

child protective service cases, and they have other cases that have deadlines on them. We thought the attraction of the two-day trial and telling the court to get it done within nine months would be a reasonable compromise, but there are some counties where they may have difficulty actually reaching -- reaching a civil case for trial in something less than nine months.

CHAIRMAN BABCOCK: Okay. Yeah, Richard.

MR. ORSINGER: I feel sorry for the people that live in those areas, but I think that a great percentage of the cases are in large metropolitan areas that could comply with this if this was a requirement, and so percentagewise it may be some courts will feel burdened and maybe just have to be in violation of the rule, but if we can get 90 percent of the cases tried and out within a year, even if 10 percent are in a limbo area there, it's probably worth it.

CHAIRMAN BABCOCK: Okay. Levi.

HONORABLE LEVI BENTON: Yeah, this language, as someone has already pointed out, is really meaningless. "Cases set for trial," you've heard the term battleground state, well, maybe it's a judge in a battleground county, and it's set the week before election day. "Guys, you got a setting. Good luck. I'll see you next week or next month." You know, so maybe you might want to by footnote

reference the rule in the Rules of Judicial Administration that has the aspirational goal or the mandatory statement of disposing of it, but this language is meaningless, and really there's no language you can put -- there's no language you can put in there that's going to compel a judge, "Okay, I'll put off my honeymoon so I can comply with a rule." You know, it's -- it's always going to be aspirational and nothing more.

CHAIRMAN BABCOCK: You put off your honeymoon so you could try a case.

HONORABLE LEVI BENTON: No, I didn't.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, you know, and of course, this isn't the only time that we tell a judge to expedite a proceeding. My impression is there are a number of statutes --

HONORABLE LEVI BENTON: Oh, right.

MR. GILSTRAP: -- they've all been passed in isolation and say, "We want to get this kind of case tried," and there may be some other kind of case such as, you know, something involving child abuse that really needs to be tried quicker, and the only solution I see to that is for somebody to sit down and look at all of these statutes and try to rationalize them, because my impression is they don't mean anything right now.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: It just seems to me in those counties that Alan was talking about where the -- or I guess it was David was talking about that their judge may not get there every month, riding the circuit, in those counties there are probably a fewer number of cases I would hazard to guess, and there's always visiting judges, and if the Supreme Court of Texas says these cases will be disposed of within this number of months, even if that requires the court to get a visiting judge, I just don't think there are many judges in the state that are going to thumb their noses at that. I think they're going to try to comply.

CHAIRMAN BABCOCK: How do we feel about this expert rule? You can only challenge experts in a summary judgment or at trial. That okay? Levi.

HONORABLE LEVI BENTON: Yeah, that's fine. That's a good rule.

MR. GILSTRAP: No gatekeeper or anything like that, right?

HONORABLE LEVI BENTON: It's a good rule for these sorts of cases.

CHAIRMAN BABCOCK: Anybody -- did the task force --

HONORABLE ALAN WALDROP: I'm sorry.

CHAIRMAN BABCOCK: Did the task force consider more Draconian measures of no experts unless they're required to prove or disprove a case?

HONORABLE ALAN WALDROP: We did, and we also considered knocking out, for example, no evidence summary judgments and that sort of thing. Ultimately we found reasons not to strip those things out of the process, but we did. We kicked around about every idea we could imagine of pulling something out of the process and then ended up with just these few because we found legitimate reasons, and I will say this: Rather than go down and try to list them, I'll say there was a clear consensus on the entire task force about what was not stripped out.

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM GRAY: Could we make sure what the first introductory phrase of that is supposed to accomplish, "unless requested by the party sponsoring the expert"? We've had a little conversation down here about it and so --

MR. CHAMBERLAIN: Well, the idea is somebody might want to know before they go to trial if that expert is going to --

HONORABLE ALAN WALDROP: Be excluded or testify.

MR. CHAMBERLAIN: -- testify.

HONORABLE ALAN WALDROP: And you may -- you know, as the party sponsoring the expert you've got the option here under this formulation to avoid the cost of that Robinson hearing pretrial, but we -- there was -- there were cases that we could all imagine where you didn't want to take the risk that you would lose your critical expert at trial and you were willing to engage in the expense of that hearing, and if you were, well, that's okay.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Does "during the trial on the merits" mean that I have to pick a jury, start the trial, before I can have this expert qualification, or can I do it before the jury gets in the box?

HONORABLE ALAN WALDROP: My own interpretation of that is you can do it before the jury gets in the box. My guess is that that's going to have to require some case law to be sure of what that is, but my opinion of it is and at least the intention of the folks that I'm familiar with on the task force was that the day you're set for trial and everybody shows up you can start this process and handle it during the course of that however is appropriate, whether it be pretrial in the sense of before you actually get your jury there and start

or otherwise, but it just needs to be done at the time of trial.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: This was really one sentence I just could not read. I read it several times. Let me suggest some wording. I would delete "requested by," consider "unless the party sponsoring the expert agrees otherwise" and then all the same "a challenge" and then instead of "as" on the next line say "through." I'm not wedded to that wording, but I'm just saying I could not understand what you-all meant until you just explained it.

HONORABLE ALAN WALDROP: Could you give those editing marks again?

MS. CORTELL: "Unless" -- delete "requested by" -- "the party sponsoring the expert agrees otherwise," comma, and then the only other change is on the next line where it says "as an objection," change the word "as" to "through."

HONORABLE ALAN WALDROP: "Prove"?

MS. CORTELL: "Through," t-h-r-o-u-g-h, or maybe "by" or I don't know. It's just I didn't know what you meant.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: On the summary judgment part, it's my practice if there's a -- I'm sorry,

were you done?

MS. CORTELL: That's okay.

CHAIRMAN BABCOCK: Oh, I'm sorry, Nina. Were you not done?

MS. CORTELL: No, that's all right. That's all right. Go ahead.

HONORABLE STEPHEN YELENOSKY: It's my practice if there's an objection in summary judgment based on expert testimony that's a decent claim typically to tell them you need to do a Robinson hearing because the proof is different, and there's some case law on that. Would this -- is this intended to address that, preclude it or allow it? In other words, can I do a Robinson hearing before trial if there's an objection in the summary judgment?

HONORABLE ALAN WALDROP: Yeah, it's not supposed to change the gatekeeping Robinson aspect of Robinson. It's just supposed to put it off until trial rather than having it pretrial. That was the idea. You don't change the law with respect to Robinson.

HONORABLE STEPHEN YELENOSKY: Well, but if I get to summary judgment, it has an objection, and my inclination is, well, you need to have a Robinson hearing where we can have live testimony, what would I do?

HONORABLE ALAN WALDROP: That was supposed

to be -- that's supposed to be addressed as part of that rule. You can do it then.

HONORABLE STEPHEN YELENOSKY: Oh, okay. So I can do it then because summary judgment has triggered it?

HONORABLE ALAN WALDROP: Correct.

HONORABLE STEPHEN YELENOSKY: Okay. I thought it only meant I could just rule on the objection, but I couldn't hold the Robinson.

HONORABLE ALAN WALDROP: No, you can't rule on it. I don't see how you could rule on the objection without the hearing.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I'm trying to understand my experience --

THE REPORTER: Speak up. I can't hear you.

CHAIRMAN BABCOCK: Dee Dee can't hear you, and that means they can't.

HONORABLE SARAH DUNCAN: In my experience, and it may just be because of the kinds of cases I've done, summary judgment practice is enormously -- has been enormously time-consuming and expensive, so can you help me understand why the task force so unanimously agreed that they would continue -- summary judgment motions would continue to be available in these expedited proceedings?

MR. CHAMBERLAIN: Well, this is something the defense bar felt very strongly about and that to take away summary judgment motions, particularly on -- you know, some were relatively simple, like statute of limitations, that to take that away would take away an opportunity to terminate the case early.

HONORABLE SARAH DUNCAN: But the defendant has to consent to this, right?

MR. CHAMBERLAIN: Consent to this practice.

HONORABLE SARAH DUNCAN: Right.

MR. CHAMBERLAIN: I mean, consent to this procedure.

HONORABLE SARAH DUNCAN: Expedited process. So part of -- if summary judgments were not available in the expedited proceeding then part of what the defendant would be agreeing to is I won't go through the expensive time-consuming summary judgment practice, but I will get a trial in four months, and that will be the equivalent of my summary judgment.

MR. CHAMBERLAIN: Well, and some things do -- you're not -- do not really get developed until you do have some discovery. You know, one of the things we discussed, at least one of things we discussed in the task force was, is that in many construction site premises liability cases, perhaps as much as 50 percent of those

cases are disposed of on summary judgment. So it is a device that can still save a lot of money and do so early.

CHAIRMAN BABCOCK: Pete.

HONORABLE ALAN WALDROP: There's two different ways to view it. The question of whether summary judgments are available or not in the mandatory thing is a completely different inquiry from whether they're available or not under the voluntary. In my view the question of whether they're available or not under the voluntary goes back to partly the discussion that was had earlier with Jim, and that is decide what element -- in a voluntary system you're picking a template for a dispute resolution. It's a question of deciding which ones you want to throw in and which ones you don't and not a question of rights and due process and all of that, and that comes down to how are you developing these trade-offs and what elements are you putting in or taking out, you know, that will encourage -- that will still allow -- encourage people to agree to it, and that's more of a practical issue rather than one of should you be allowed to do this or should you not be allowed to do it. It's a practical one of what will people agree to.

HONORABLE SARAH DUNCAN: I've never been very practical. Sorry.

CHAIRMAN BABCOCK: Pete was before you,

Richard.

MR. SCHENKKAN: On the summary judgment issue, distinguishing between the voluntary and the plaintiff option, which is what I regard the mandatory one as being, in the voluntary one the template ought to be multiple templates, and the rule ought to encourage the lawyers who are truly voluntarily bilateral agreeing on what their template is with their particular case to consider in this case are we going to have summary judgment or not. I can imagine cases where the lawyers to the two sides say, "No summary judgment in this case, we're going to trial in six months." Or I can imagine a case in which the lawyer for one side, after hearing from David it's likely to be the defendant's lawyers and maybe always the construction liability cases saying, "No, I'll do a voluntary agreement with you and we can cut all the rest of this stuff down in the following ways, but only if I get my shot at summary judgment because I think I'm going to win this case on summary judgment."

So for voluntary one size does not fit all, voluntary rule is really just a template that we do some of the work for the lawyers who are going to negotiate these things, and we really need to give them a checklist. In your particular deal do you want to check the box that says "no summary judgments" or the box that says "one

round of dispositive motions." For the mandatory rule, the so-called mandatory rule, the plaintiff option rule, I think we need to recognize the point David just made on behalf of the other side of the bar, that there were a bunch of defense lawyers who say in a bunch of cases I've got to have my shot at summary disposition, and there are a lot of cases that really ought to be I ought to win on summary disposition, and then we've got to respond to Sarah's point that you can spend an awful lot of money on summary disposition motions.

I don't know the full solution, but one thing I would suggest out of my own experience is require in our so-called mandatory rule there will be one and only one dispositive motion hearing date. If you've got a dispositive motion of any type, they all have to be on file by more than 21 days before the one date that is set for that and only going to do this once, no serial summary disposition deal in which I try this one and this partial one and then that one.

CHAIRMAN BABCOCK: No motion to dismiss.

MR. SCHENKKAN: Apparently no motion to dismiss, which I guess --

CHAIRMAN BABCOCK: Richard and Peter and Bill and Justice Jennings, see if you could turn your considerable intellect to (c)(5), proof of medical

expenses. Any comments on that?

MR. ORSINGER: My comment was on (4).

CHAIRMAN BABCOCK: I know that, but now I'm asking you to comment on (5).

MR. ORSINGER: This is a subtle way of shutting off debate, isn't it?

CHAIRMAN BABCOCK: Not so subtle, I didn't think. Peter, you got anything on (c)(5)?

MR. KELLY: Well, there needs to be an affidavit that complies with 18.001 and with Escobedo, and it seems that the form affidavit proposed does that.

CHAIRMAN BABCOCK: Okay. Justice Jennings. (c)(5)?

HONORABLE TERRY JENNINGS: No, I've got a question, though, about the other one, a quick question.

CHAIRMAN BABCOCK: Hold that for a minute. Frank.

MR. GILSTRAP: I've got a problem with the affidavit.

CHAIRMAN BABCOCK: Hold it forever.

MR. GILSTRAP: This all depends on a medical records affidavit, which is in the material, and the problem I've got with it is the next to last sentence, which says, "In which the custodian of the records says the services provided were necessary and the amount

charged for the services were reasonable." Well, I can see how a custodian of the records can testify that the amounts charged are reasonable. I'm not sure I see how a custodian of the records, who is maybe not a doctor, can testify that the services are necessary; and under the larger question, necessary for what? Necessary for the health of the defendant or necessitated by the injury that the defendant suffered? If it's that then this is evidence of causation, and is that really what we want?

PROFESSOR DORSANEO: Well --

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I know this is going to probably sound crazy to you, but I think that is what we want. It needs to be the law generally that causation is covered by these affidavits. Otherwise, you're just kind of -- you know, kind of get up to it a little, we're going to do it, but we're not going to do it. We didn't have summary judgment from 1836 to 1959, and it wasn't worth a damn for a considerable period of time after that. You want to make this go faster, do -- don't do the things that make it go slow, and that includes Robinson-Daubert activity during the pretrial phase of the litigation. We have a lot of things that we're doing to finish cases faster that make them take a lot longer.

MR. GILSTRAP: Well, I agree, but if that's

what we're doing we need to understand it, and it may not make any difference. If you take way the judge's right to grant a directed verdict anyway, then, you know, if the jury says that the person was injured and the damages were so many dollars, that stands. I mean, you know, you basically, you know, "I was sick, and I got treated, and it was caused by the plaintiff," and sits down. It goes to the jury, and the jury says $100,000, and that's it.

CHAIRMAN BABCOCK: Munzinger, and then Riney.

MR. MUNZINGER: Well, to say that medical service was necessary is a medical opinion. I would attack the rule on the grounds that it has violated Chapter 74 of the Civil Practice and Remedies Code. We may want to do things cheap, but I don't know that we want to affect substantive rights in the guise of an affidavit designed to cut down the time of a trial.

CHAIRMAN BABCOCK: Riney, then Judge Christopher. Tom.

MR. RINEY: Oh.

CHAIRMAN BABCOCK: Riney.

MR. RINEY: I don't think the causation aspect is much different than the current statute. The only change in this affidavit is to deal with the paid/incurred issue. It's currently the law that that is

enough. All it really proves is that the services were necessary and that the charges were reasonable. You can still dispute causation in connection with that affidavit. I think there's some case law that if you challenge causation there may not -- plaintiff may not have sufficient evidence of causation to get to the jury, but I don't think -- I don't know, does anybody else have a different opinion? I don't think that really changes the law on causation.

PROFESSOR DORSANEO: But it should.

MR. GILSTRAP: Well, is it evidence of causation? That's what I'm saying, is if this is all that's in the record, that affidavit, have you proved causation?

MR. CHAMBERLAIN: I don't want to cause this to blow up, but there is conflict between the Civil Practice and Remedies Code and the Haygood decision, so we had to deal with that, and we did the very best we could, understanding that there is conflict between the two. The custodian under existing law can testify as to reasonableness and necessity, just like Tom said; and we tried to bring in and incorporate Haygood as best we can; but, actually, in order to get all of this resolved it's really outside our power to do so because the Legislature has to address the Civil Practice and Remedies Code when

it comes to proof of medical expenses. It's something we can't do. This is the best we can do with what we've got.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE ALAN WALDROP: In answer to your question over there, I think it would be. The idea is that it is prima facie evidence, so if it's the only thing in the record it is evidence not of causation necessarily, maybe you would argue it, but it is evidence of the necessity and reasonableness of the costs, and that's what it is.

MR. GILSTRAP: So if I got injured and I have evidence that I also had my acne treated, that's evidence that that was necessitated by my acne.

CHAIRMAN BABCOCK: Well, we're not talking about your acne at 5:00 o'clock. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, if y'all remember we had a very, very long discussion on these affidavits a long time ago with the evidence subcommittee that came in, they wanted to redo them, we had this big fight, and case law says that this affidavit can be sufficient for causation if the injury is the type that's normally associated with a car wreck.

CHAIRMAN BABCOCK: How do people feel about having only six jurors, three peremptories, verdict with five, which is (c)(6)? Roger.

MR. HUGHES: The only change that I saw was that there are -- there is no provision for an alternate juror.

CHAIRMAN BABCOCK: Right.

MR. HUGHES: And I realize the whole idea is we're supposed to have a real short quick trial, and we'd like to think that in two days jurors won't get sick, they won't have personal emergencies, but they do. And the second, I don't want to get off on a long list about this, is, I'm sorry, iPhones, iPads, et cetera, are ubiquitous. I don't care how the jurors get instructed, the risk that some juror, even in a six-juror trial, is going to want to check up on something on their iPhone or their iPad, about do some little research, I think there's just too many risks these days that one juror is going to get -- is going to get disqualified or disappear or something, so I would suggest at least having one alternate, but we still keep the number of peremptories the same.

CHAIRMAN BABCOCK: Any other -- Levi. Oh, scratching your head? Jeff.

MR. BOYD: How does having 6 jurors instead of 12 promote the prompt and efficient resolution of a case?

MR. CHAMBERLAIN: Well, we talked about that, and the idea being that typically in county courts

they are able to conduct a quicker voir dire. It is efficient because you are putting less people out, and there's economy as well to that, and overall it shortens the time of a trial. We're dealing -- Jeff, we're only dealing with five hours per side, so every little bit helps.

MR. BOYD: I'm just thinking constitutional right. I mean, why change the system any more than -- we're saving $36 a day, but other than that I'm not sure. I guess maybe voir dire could be shorter, but not necessarily. That's up to the judge.

MR. CHAMBERLAIN: Well, I mean, we're dealing with five hours total, and we do have to carve voir dire out of that.

MR. PERDUE: And that is to me, as a plaintiff's lawyer, that's why it makes sense. I mean, I have tried cases on a chess clock, and if you had to bring in a panel of 40 to get 12, that's a completely different proposition than bringing in 24 to get to 6.

CHAIRMAN BABCOCK: Yeah. I had hoped that we could finish this today, but there's still a lot of important things to talk about. We didn't even get to the mandatory rule, so we're going to have to spill this over until tomorrow, if you two guys can come back, and I hope you can.

HONORABLE TOM GRAY: We could get through it quicker if they weren't here.

CHAIRMAN BABCOCK: You know, I hadn't even thought about that.

HONORABLE ALAN WALDROP: I may expedite that process by not showing up.

CHAIRMAN BABCOCK: All right. David, can you be here?

MR. CHAMBERLAIN: I think so, Chip. I'll find out, and I'll let you know pretty quick.

CHAIRMAN BABCOCK: All right. Well, if you're not here, we'll just shoulder on without you, but so we'll -- I know the ancillary guys are going to be really upset about this, but --

PROFESSOR CARLSON: Do you want to not do ancillary then?

CHAIRMAN BABCOCK: What?

PROFESSOR CARLSON: Do you want to take it off the table tomorrow?

CHAIRMAN BABCOCK: No. No.

PROFESSOR DORSANEO: You want to let them sleep another hour?

MR. ORSINGER: Well, you could let them come to the party, and let's just get them drunk, and they'll be hung over.

CHAIRMAN BABCOCK: That's an idea. Before anybody goes, by the way, we set a record today. 48 of our members were here today.

(Applause)

CHAIRMAN BABCOCK: Angie wants to say something.

MS. SENNEFF: I put maps from here to the office on the receptionist desk out there if you need one. It's just straight down Congress, 100 Congress. It's at the corner of First and Congress. If you're staying at the Four Seasons, it's walking distance from there, two blocks away. If you are parking there, just take a parking ticket and bring it with you up to the reception, and we'll validate it.

CHAIRMAN BABCOCK: How do they get to parking?

MS. SENNEFF: It's on the map, but if you take a right on First Street, it's --

CHAIRMAN BABCOCK: Cesar Chavez.

MS. SENNEFF: Well, Cesar Chavez, First Street, it's just past the building. It's on the right.

CHAIRMAN BABCOCK: But it's just past the building, just like at the corner of the building.

(Adjourned at 5:16 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 27th day of January, 2012, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $1,949.50.

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 20th day of February, 2012.

D'Lois L. Jones

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