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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

June 22, 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 22nd day of June, 2012, between the hours of 9:00 a.m. and 5:06 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

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CHAIRMAN BABCOCK: All right, everybody, let's get going. Welcome to this addition of the Supreme Court Advisory Committee. Lots of things to accomplish. I know there are people here who are interested in speaking about the various rules that we are going to consider today and tomorrow, and there will be a public comment period regarding the small claims JP rules right after lunch, so we'll break for lunch between 12:00 and 12:30 for an hour, so that means sometime between 1:00 and 1:30 we'll discuss the rules. I see people are standing, and maybe we can get some chairs or -- we've got every chair we can get, sorry. So but we start as always with the report from Justice Hecht.

HONORABLE NATHAN HECHT: At the last meeting the committee approved the protective order kit revisions, and the Court has looked at those and approved those with a couple of changes, and they are back out in the field. We've also approved electronic filing for the Thirteenth Court of Appeals, and mandatory electronic filing for the Fifth Court of Appeals. So today, to give you the score card, five courts of appeals have adopted mandatory electronic filing, the First, Third, Seventh, Fifth, and Fourteenth; and six courts have voluntary electronic filing but don't require it, Second, Fourth, Sixth, Ninth,

Eleventh, and Thirteenth; and three don't have rules at all, the Eighth, Tenth, and Twelfth.

And the Court is working very hard on replacing the electronic filing system in the trial courts. The contract with the provider who allows for that to happen is expiring, and we're taking this opportunity not only to do something to keep electronic filing going in the meantime, but to see if we can't get a more comprehensive statewide electronic filing system in the trial courts in place after, I hope, the next session. It probably requires funding to be -- to work as well as we want it to, and so we'll have to get our bid in with all of the others who will be competing in what promises to be a tight legislative session, so but that's kind of in the offing and the Court is working on that.

The Court also has under advisement the comments made at the last meeting on the family law forms, and we're working on those. And I think that's it, except that tomorrow is Chip Babcock's birthday.

CHAIRMAN BABCOCK: Oh, stop it. Yep, 49 once again. All right, but we'll go into the TRAP Rule 9, the proposed amendments, and Marisa will take us through that.

MS. SECCO: So I just wanted to give a little bit of background. The impetus for these rules

came from the Court. The Chief specifically wanted to change to word limits, and there are three reasons behind the change. One is to allow appellate courts to require briefs and petitions to be printed in 14-point font rather than 13-point font, which is currently in the rule, without altering the lengths of the briefs and petitions; and the second is to enable parties to include pictures and charts without limiting the amount of text in the brief, so now if you had a chart it wouldn't count against the length of your brief; and the third is to encourage uniform length and discourage the use of formatting tricks, footnotes, and block quotes to maximize the length of briefs and petitions.

PROFESSOR DORSANEO: Darn.

MS. SECCO: So there's a subcommittee of the State Bar Appellate Section Rules Committee. That was composed of Doug Alexander, Todd Smith, and David Johnson, and they did a little preliminary work on the rule. They worked with Blake, and their preliminary draft was submitted to the Court back in January. The draft implemented word limits as alternatives to page limits, so it retained page limits for all briefs and petitions, and it did not alter the font size. The draft suggested a word limit of 15,500 words for 50-page documents and 4,650 words for 15-page documents. The numbers in the

subcommittee draft were derived from what Doug Alexander called a quasi-scientific review of some briefs, so the Council of Chief Justices discussed the proposal just generally to implement word limits at their meeting on January 19th, and they unanimously supported imposing a word limit.

So the proposed rules, just some of the key features, for computer-generated documents the font must be no smaller than 14 points, except for footnotes which must be no smaller than 12 points. The current rule is 13-point for text and 10-point for footnotes. 50-page documents must be 15,000 words, and 15-page documents must be 4,500 words. Eight-page documents must be 2,400 words. The numbers are a little lower than the ones proposed by the subcommittee, and they're roughly based on some word counts that Blake performed, the clerk of the Court, Blake Hawthorne. They afford more words to litigants than the Federal rule, Rule 32, which imposes a 14,000-word limit for what was formerly a 50-page brief. The word limits are mandatory for documents generated on a computer. For noncomputer-generated documents the page limits are retained. All of the length limits are included in TRAP 9, and this was done to save space and avoid repetition of provisions on length throughout the Rules of Appellate Procedure, and all computer-generated documents must

include a certification that the document complies with the word limits.

Just another -- just as for background, the Federal rules, again, they impose a 14,000-word limit for 50-page briefs. The Supreme Court of the United States in Rule 33.1 has word limits, but they aren't exactly analogous because of the booklet format. The pages are different, but they impose a 9,000-word limit for 30-page petitions, which is 300 words per page. That's the same as what's been proposed in the appellate rules, 300 words per page. The general rules of appellate procedure in Federal courts is 280 words per page. I also have some statistics on other state courts if anyone is interested, and I also have -- I don't know if Marcy is here yet, Marcy Greer. I know that she wants to comment on these rules, so she also did some independent word counts, which I can go over if she does not show up in the next few minutes, but I guess we'll open it up for comment.

CHAIRMAN BABCOCK: Marisa, I noticed that the briefs in the Court of Criminal Appeals are affected by this rule.

MS. SECCO: Yes.

CHAIRMAN BABCOCK: Have they had input into this?

MS. SECCO: Yes. The Court of Criminal

Appeals has been contacted, and Judge Womack had -- I think he contacted Justice Hecht, and so I think they're on board.

CHAIRMAN BABCOCK: They're on board with this, okay, great. Perfect. All right. Why don't we start with 9.4(e) and that effects the change? Does anybody have any comments about that?

MR. GILSTRAP: 9.4(e)?

CHAIRMAN BABCOCK: 9.4(e), the typeface. Frank, I know you want to comment extensively on this rule.

MR. GILSTRAP: I do, but not the typeface.

CHAIRMAN BABCOCK: Okay, we're okay on typeface.

HONORABLE TOM GRAY: Can we step back to the introductory two lines? I've got some questions about that.

CHAIRMAN BABCOCK: Sure.

HONORABLE TOM GRAY: And that may be in the current rules, but since we're tinkering with this, one of the things that we get fairly frequently at the court of appeals is a document that is a copy of an original exhibit or something of the nature of -- in other words, it derived from some other source, and they're trying to show jurisdiction or something of that nature that we

have, and we can use something that is not in the clerk's record or reporter's record, and so what I had thought about adding in the intro is "except for the record and original exhibits or copies created for presentation to the appellate court clerk for filing," because there's just some other documents that you're not preparing that go into a motion or brief.

The -- it also then it says "a document," and I'm not sure why it's not "every document," and then this is kind of one of those things that maybe only Tom Gray, you know, focuses on, but it's the clerk that files stuff; and it is documents are presented for filing, so if it is a document presented for filing to an appellate court clerk must be in the format of presented. As far as typeface, the new language, it says, "A document produced on the computer must be printed." I've got a problem there with "print" even though, Justice Hecht, we're one of the courts that don't have electronic filing and we do the printed word, we're still waiting for the uniform Supreme Court rules on that, by the way.

CHAIRMAN BABCOCK: So the ball has just been hit back over the net.

HONORABLE TOM GRAY: I think it would be best if the word there, "printed," is changed to the word "presented," and then that covers your electronic filing

since we need to be looking that direction rather than towards the written word. And that's all I have as far as through typeface.

CHAIRMAN BABCOCK: Okay. Any other comments about the introductory language or typeface in 9.4(e)?

MR. LEVY: You think it should include the word "font" just to make clear?

CHAIRMAN BABCOCK: Where, Robert?

MR. LEVY: After "14-point." I'm not --

CHAIRMAN BABCOCK: "14-point font."

MR. LEVY: Is that -- right?

CHAIRMAN BABCOCK: Okay. Any other comments about that? Going once. All right. Let's go to length, 9.4, little (i). How about the new language in little (i), (i)(1)? Yeah, Frank.

MR. GILSTRAP: I don't think you can talk about (i)(1) without talking about (i)(2) because they go together. They result in -- they decide how long the brief is, and when the Fifth Circuit went to -- from 50 pages to 14,000 words, in my opinion they increased the length of the briefs. Here we're going to 15,000 words, and we're going to increase it further. Remember, the -- in the Federal rules, Federal Rule 32(a)(7)(b)(iii), they have the carve outs, and they're the corporate disclosure statement, table of contents, table of citations. They

don't exclude statement of jurisdiction or statement of the case. In this rule, which is the rule we've always had in Texas, we exclude statement of the case, statement of the issue, statement of the jurisdiction, something called statement of procedural history, which I'm not familiar with. So basically we carve out more than the Fifth Circuit, and we've added another thousand words.

I think this is a mistake. When the -- the way they approach this, they say, well, if you take an average page of 14-point type and you count the words on it, it's 280 words. That's right. And 280 words times -- 280 words times 50 comes out I believe to 14,000, the Fifth Circuit level. We've gone to 300 words, but briefs aren't that way. If you read your brief, every page is not wall-to-wall 14-point type. There's -- there's spaces, there are headings, there are indentations, and so when you take your normal brief and you count the words in the old 50-page format you come out with a whole lot less than 14,000. I know when we all get in a tight we wish we had more pages, and I think that may be what's driving this, but our opponent is going to have more pages, and I think we're expanding the length of the brief, and I think we need to scrutinize this and maybe do some more word counts.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I rarely disagree with Frank, but I --

CHAIRMAN BABCOCK: That's not true.

MR. ORSINGER: -- handle appeals that have multiple issues. They're not single issue, one error in the jury charge, and I spend almost as much time shortening my brief as I do writing it, and maybe everyone feels that way when they write, but we're spending a tremendous amount of time to try to get complex cases presented clearly within the page limit we have, and if the courts of appeals and the Supreme Court are willing to give us a little more latitude, I think we should encourage that. We should be appreciative. We ought to have a cake here tomorrow for your birthday as well as for the people on the Court that have this initiative, and so I can't imagine that if the practitioners offered this gift that we would criticize the Court for being too generous and allowing us this opportunity to advocate our clients' positions more effectively.

CHAIRMAN BABCOCK: Well, Frank may be a maverick on this, who knows. Any other comments about that? Justice Moseley.

HONORABLE JAMES MOSELEY: I don't know what the exact length ought to be, but, Richard, part of your reputation for brilliance as an appellate lawyer is the

fact that you shorten those briefs, and for the rest of the appellate judges in the court, we all appreciate it.

CHAIRMAN BABCOCK: There you go. Any other comments on the -- yeah, Pam.

MS. BARON: Well, I think we're starting with a premise that a 50-page brief and a 15-page brief and an 8-page brief are all the same creatures, and they're not. So in a 50-page brief you're not trying to do as much shortening, as Richard's talking about, to fit what you have to say in a very limited amount of pages, and so if you do word counts for 50-page briefs and see what an average there is it's going to be different than if you do a word count average for a 15-page brief, and I think Marcy's study does that. I wish she were here, but I think she showed that, you know, at least 40 to 50 percent of 15-page filings for petitions for review, for example, will definitely exceed 300 pages -- 300 words a page, and I think I probably average, you know, 325, so under the new rule in a petition for review I'm going to lose two pages of my brief. It's getting shorter. It's not staying the same, and it's definitely not getting longer. So I think that the Court needs to look carefully at how this impacts some of the shorter filings, because 300 words in a 15-page brief is not the same as 300 words in a 50-page brief.

CHAIRMAN BABCOCK: Justice Bland, and then Justice Christopher.

HONORABLE JANE BLAND: Marisa, what was the thinking behind the departure from the Fifth Circuit word limit, the thousand words?

MS. SECCO: Sure.

HONORABLE JANE BLAND: Because why we would we want to have a different word limit for us, and why longer?

MS. SECCO: I'll try to explain that. I think I'll go ahead and play devil's advocate a little bit, too, and talk about Marcy's position since she's not here, but originally, because the numbers we originally had were from the appellate subcommittee, so we at least looked at those numbers as sort of a starting point. They told us that they reviewed briefs and that's where the numbers came from. I was concerned because of the departure from the Federal rule, but it was also a concern because the Federal rule currently has a 30-page limit if you do not meet the word limits as a safe harbor, so I looked back at the Federal rule's history, and that's actually meant to be punitive. So if you can't comply with the word limits you only get 30 pages, and essentially the Federal rule was meant to curb abuses of the page limits. That's really not the intent here. We

were looking more to reflect what an actual brief was, so I'll go into why we chose 15,000 words. Blake did a very limited study, admittedly limited.

HONORABLE JANE BLAND: Wait, wait. I see the 30-page being punitive. Are you saying that the 14,000 words was also punitive on their part, or did they believe that was a fair representation of what a brief should look like?

MS. SECCO: They believed that was a representation of what a brief should look like, but that didn't necessarily reflect the number of words in the briefs as they stood at the time the rules were revised in 1997. The thought was that people were using formatting such as smaller margins or spacing or using a particular type of font to squeeze more words onto the page than the Fifth Circuit thought or than the Federal rules committee thought was necessary and really reflected what the 50-page limit was intended to encompass.

And so Blake did look at briefs that were submitted to the Court, small samples, as I mentioned, four of each petitions and briefs that were maxed out on the page limits. For the petitions, the word counts including footnotes were in the range of 42,000 -- or 4,253 to 4,960 for petitions. The median was 4,422 words. Without footnotes it was a smaller range of 4,018 to

4,398, and so the Court was slightly generous, in our opinion, giving 4,500 words on petitions, but it is close to the median of that small sample that Blake looked at, and it was 150 words less than was suggested by the appellate subcommittee. They suggested 310 words per page across the board for all briefs and petitions. For briefs that were looked at by Blake the word counts were 13,875 to 15,200. Without footnotes that dropped to 12,824 to 13,236. So again, the median from the with footnotes word counts was around 14,000, and so that is why the Court went with -- or it was around 15,000, and that was why the Court went with 15,000.

Again, it was a very small sample, and the smallest or the shortest brief was closer to 14,000 words, but, again, we were also trying to reflect, you know, the idea that the appellate subcommittee had looked at some briefs, and they come up with much higher numbers from those briefs. And so Marcy's -- and I'll go ahead and go through Marcy's numbers because I think those were longer. She looked at 64 petitions, responses, and replies, so she only looked at 15-page briefs and 8-page or 15-page documents and 8-page documents. 38 percent of those reviewed, 24 of those documents, would be over the proposed word limits, so about 40 percent were over 14 -- or were over 4,500 words for 15-page documents. So by her

count, you know, she thought that 40 percent of people would be limited by this rule. They would be getting less space than they currently have under the proposed rule, and so I think Marcy was going to advocate that the Court should stick with the proposed limits from the appellate subcommittee. So those are the numbers that we have, and that's why we departed from the Federal rule.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I just had a -- just some kind of funny questions about word counts. I mean, I know I'm familiar with, you know, you can go up to the top of your Word document and, you know, see what the word count is, but I don't know what they're actually counting, and is there a difference between different programs in terms of what they're actually counting. Like is a hyphenated document two words or one, is a hyperlink one word, because it's all -- you know, it shows up sort of as one word, and so it seems to me we create a little uncertainty with this, you know, "I'm certifying that," you know, "I meet the computer word count," but perhaps it's simpler than I know.

CHAIRMAN BABCOCK: Does anybody check -- does the clerk check to see if the word count is accurate, or does the opposing party have the burden of challenging the word count?

MS. SECCO: The clerk could check. I don't know that we -- you know, that the clerk would be required to check every brief.

CHAIRMAN BABCOCK: The word count police.

MS. SECCO: I think that it will be easier for the clerk to check the word count than it is to check things like the margins or the size of the font or the type of the font that's being used, and so the thought is that this will encourage people to write -- or print their briefs in a way that's clear, and there's no incentive to print in a way that just extends the length of the brief.

CHAIRMAN BABCOCK: Frank, and then Judge Estevez.

MR. GILSTRAP: Well, in response to what Pam says, Pam writes a lot of petitions for review, and, you know, she writes more than I do, but when I try to write them, of course, that's when it taxes your ability to fudge the page limit to the maximum and you go in and you put all this stuff in the statement of case and the statement of jurisdiction because that doesn't count to argue your case. The Court of Criminal Appeals has something called a statement of procedural history, and that's in this rule, and I can see practitioners saying, "Okay, well, now when I do a petition for review I can also put a statement of procedural history to also escape

the limitations." Maybe we need to look at maybe a longer limit for petition for review and put everything. If you want to put a jurisdictional argument, put it in the argument and not in the statement of jurisdiction. Maybe that's the answer there, but I -- you know, the petitions for review that I see, the people are very, very artful at dodging the page limit, and maybe we need to get away from that.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I just have a question. If 40 percent of the people needed the extra numbers per page then why not use that limit? I mean, if everyone else was under, you're not going to get anybody going longer. What was wrong with using the -- was it 310, is that what you said was the appellate -- the appellate section had recommended?

MS. SECCO: Right.

HONORABLE ANA ESTEVEZ: Why wouldn't you go with what they recommended? I just didn't understand what the harm was.

MS. SECCO: That it effectively was an extension for most people, that currently the briefs are closer to the numbers that the Court proposed.

HONORABLE ANA ESTEVEZ: Is it an extension if that's what 40 percent of the briefs are using right

now?

MS. SECCO: No, it's an extension for the other 60 percent because the idea is that most people will write to the maximum amount of length that they are given, so if 60 percent of current petitions for review are 15,000 words and we give everyone 15,500 words then everyone will write a petition that is 15,500 words and that is 500 extra words per petition for the Court to read every year.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Okay. Well, just to counteract what Marisa just said, of Marcy's study, I went back through all of my petitions and replies, so all my 15- and 8-page briefs that I filed within the last five years, only in two cases did I actually bump right up to the maximum page. So in most cases, I have a couple of lines in those petitions, so it's not true that those who go over are going to exponentially increase the number of words that the Court has to read, because, let me think, I think it was nine cases and only two of my cases were right up to where I could look at those cases to see what was my word count, if I am maxing out completely on these short documents; and I was with Pam in that mine were well over -- not well over, but mine were over the 300 words per page. I'm going to guess this is somewhere about 320

is about what mine on average was; and I guess from my position, these are -- I mean, it is hard work, and I agree with what Richard said. I spend more time getting my petition down to -- maybe not more time on a petition because that's really a skill in and of itself to sell the Court on why your case is important, but there is a lot of my client's time spent trying to max -- trying to keep this within the page limits, and it costs our client a lot of money to do it, and we're talking about 150 words here.

It's not a significant amount of words that the bar is asking for here, and it will, I promise you, cost our clients a lot of money to try to get it down, and so I just would encourage the court to just, you know, be responsive to Marcy's study. I thought it was a good cross-section, and then I would also -- I would also go on record saying I would rather you knock off some of the words on the briefs, on the 50-page documents, than not go with our proposal on the shorter documents that are the hardest ones to edit; and so my position was I would give up my 150 words or more, 14,000 words even on the briefs, if I could have the slightly more words on the shorter documents because those are the harder ones.

CHAIRMAN BABCOCK: Okay. Roger.

MR. HUGHES: I just want to make three points. Whether it's 4,500 or 5,000 or 6,000, there's

always going to be a case that taxes that limit, and I just want to point out the reason we went over -- at least the reason that we were told we went over to this was that with a shorter petition for review they would then be read by all of the justices, and I pretty much assume that's going on, and when we start talking about increasing the page length we're essentially talking about how much judicial time is put into reading your petition. So I'm indifferent as to whether it's 4,500 or 5,000.

The question that was raised earlier about how are words counted, I have read but I do not know that there is a difference between Word and WordPerfect on how they count words, and I'm a WordPerfect fan, and I'm sure there's a lot of Word fans, but some thought might be given to that, and one of the things the Fifth Circuit does is they have a form certificate, and that's part of the rule, so it tells you exactly what your certificate is supposed to say, and one of the things it does is to require you to state before you converted it to Word, I counted -- I mean to PDF format, which is how it gets filed electronically. It requires you to state which word processing program you used and what word count it gave you, which is some hedge against using different programs to get different results.

The second -- the third thing is, the one

thing I don't note is a word or page limit for motions for rehearing, and I know the Fifth Circuit has one, and they're very strict about it, just like they're all strict, and I -- I think we've all learned that motions for rehearing, especially when it's from a denial of the petition for review, can be equally important and equally painstaking in how they're written in approach, and therefore, it might be -- some thought might be given to applying the same limits to that as to, say, the petition for review, but since it didn't occur to the people who drafted it, maybe there's a reason not to apply it.

MS. SECCO: It is included on line --

MR. HUGHES: Is it?

MS. SECCO: -- 35 of the draft, the second page. It's in link (i)(d), (i)(2)(d). And just to correct myself earlier, I said there would be 500 extra --

MR. HUGHES: Oh, I see, yes.

MS. SECCO: -- words for each petition, but I meant 150. It would be 500 extra words for each brief.

CHAIRMAN BABCOCK: Marisa, you mentioned that you looked at other states.

MS. SECCO: Yes.

CHAIRMAN BABCOCK: Justice Christopher is an aficionado of California, so we would be particularly interested in that.

MS. SECCO: California has 14,000 words for 50-page briefs, so they have the same limits as the Federal rule. They do not seem to have any 15-page documents that have word limits, so that was the only statistic I could find from California. Oregon, also 14,000 words for 50-page briefs, 4,000 words for 15-page reply briefs. That's actually a different word per page than the Federal rule, two hundred sixty-six and two-thirds words per page. I don't know what the reasoning was with that. Missouri has 15,500 words per page for 50-page briefs, so they actually have the same limit that was proposed by the appellate subcommittee, and 5,115 words for 15-page replies. That is actually 341 words per page in Missouri. That was the longest one that I could find. South Dakota has the shortest that I could find, 10,000 words for 40-page briefs, 250 words per page; and Iowa, 14,000 words for 50-page briefs, 280 words per page.

CHAIRMAN BABCOCK: Okay. Nina.

MS. CORTELL: I just want to say my experience parallels that of Lisa. I completely agree with what she said, and I will go one step forward and say you're probably doing the appellate bar a favor to go with the lower number for briefs, not petitions, increase for petitions, and I'm fine with the Federal rule for briefs.

CHAIRMAN BABCOCK: Okay. Yeah, Richard.

MR. ORSINGER: I would like to talk about the exclusions, and I have a question and then a couple of comments. I've never tried to do a word count where I didn't count the entire document. Is there a way in the word processing software to specify that I want to exclude things and then count just what's left?

MS. SECCO: Yes. You can just highlight whatever portion of the brief you want to do the word count on, so just use the cursor to highlight everything that needs to be counted and then press "word count" --

MR. ORSINGER: Okay.

MS. SECCO: -- and it will only count that, and you can also take off the footnotes by unchecking a box in Word and probably WordPerfect as well.

MR. ORSINGER: Okay. As far as the specific exclusions in -- this is line 17, which would be 9.4(e)(1)(i) -- (e)(i) -- no, I guess I'm not -- it goes from (e) to (i)?

HONORABLE NATHAN HECHT: We left out (g).

MR. ORSINGER: Yes, we did. We left out the intervene. Okay. So on line 21 there is an exclusion for the statement of issues presented, and this could be just that I'm -- my technique is idiosyncratic, but often for clarity I repeat the issue presented in the argument and

authorities part of my brief, so there is a part up at the front called the "Statement of issues presented" which is just a listing at the front of the brief and then I repeat that sometimes for clarity so that the appellate judge is reminded of what the issue is. If you only exclude the statement of issues presented then those of us who brief by repeating the issues presented in the argument and authorities will be using up our word count, and I think it's going to encourage people not to restate the issues presented, and instead you're just going to have a long outline of text, and you could change that if you wanted to by taking out the word "statement of," and instead you could just have an exclusion for issues presented, and that would be in the list at the beginning of the brief, and it would also be if you have it as a marker down in the argument and authorities, and I think that's a clearer way of briefing, personally.

The next item is in the statement of jurisdiction, which is important in the Supreme Court and probably only, in my experience anyway, when someone is trying to tell the Supreme Court they have conflicts jurisdiction, not just significant to the jurisprudence of the state; and, you know, one of the grounds for the Supreme Court jurisdiction is that there's a conflict between different court of appeals decisions; and I have

noticed that some people in briefing that will spend a page or a page and a half trying to impress the Supreme Court with the importance of the case, because of the nature of the conflict; and they do that in the jurisdictional paragraph; and I know the jurisdictional paragraph often is just three lines long; but I've found it helpful, although I'm not a justice, when I'm reading someone else's petition and they're trying to emphasize to the Court the significance of the case because of the conflict, then they put a little bit of that argument and analysis in the statement of jurisdiction; and, frankly, I think it's effective.

The next thing is the signature exclusion. Literally the signature is just somebody's handwritten signature, and I wonder if we shouldn't say "signature block" so that it will exclude all of the law firm name and the address, telephone number, and everything else. That ought to be all excluded, not just the signature. I don't know how literal "signature" means, but it might be better if you said "block." And then under "proof of service," I would say that we would call it a "certificate of service," because at the briefing level we're not involved too much in proving that we've served somebody, and I think that the rules call it a certificate of service. I haven't looked it up. And then the

certifications, I'm not sure what's included in that, but motions, which this will apply to motions, won't it? Or not? No? Because we have a certificate of communication that's required on motions.

MS. HOBBS: No, I don't think we do.

MR. ORSINGER: No?

MS. HOBBS: I don't think there's a word limit.

MS. SECCO: Right. My understanding, there's no current limit on motions, so we only imposed a word limit on things that were currently limited by pages under the rules.

MR. ORSINGER: Okay, then I'll let that go.

MS. SECCO: Other than motions for rehearing, to clarify.

MR. ORSINGER: There is a word limit on that?

MS. SECCO: Yes.

MR. ORSINGER: And we eliminated the certification communication on rehearings, or is that still with us?

MS. SECCO: I don't know the answer to that.

MR. ORSINGER: Gosh, we went back and forth on that. I think we still require --

MS. BARON: We did eliminate it. There is

no conference required on a motion for rehearing.

MR. ORSINGER: Okay. That's it. Thanks.

CHAIRMAN BABCOCK: Okay. Any more comments on the -- yeah. Hatchell.

MR. HATCHELL: I'm not too concerned about the longer briefs, but I do share Pam's and others' concerns about the shorter briefs and would ask the Court to consider what you may lose. The good brief writers that I know use a lot of internal signals in their briefs, headings, subheadings, and parentheticals describing cases, a convention I don't particularly like, but a lot of people use it. I think you may be forcing people to abandon those, and therefore, you'll have a decline in readability. A lot of times, particularly in your reply brief, which is the eight-page brief, you have to deal with things that you haven't had to deal with in the opening brief such as waiver points and the like, so you need as much room as you possibly can get. So I think my main point is to just ask the Court to consider what you may lose in terms of readability with the shorter briefs.

CHAIRMAN BABCOCK: Okay. Any other comments?

HONORABLE TOM GRAY: Are you still on (1) or have you moved to --

CHAIRMAN BABCOCK: No, we're still on the

first page, length and -- yeah.

MR. GILSTRAP: I just want to point out that --

MS. BARON: Chip, I just want to say one thing.

MR. GILSTRAP: I'm sorry, go ahead, Pam.

MS. BARON: I heard from Marcy. She had a telephone conference hearing this morning, but she is on her way, and she is very interested in this issue, and she will be here shortly.

CHAIRMAN BABCOCK: Okay. Is there going to be some sort of signal when she gets here, like trumpets or --

MS. BARON: Probably.

MR. ORSINGER: The door is going to open and everyone will --

CHAIRMAN BABCOCK: There will be a little intake of breath?

MR. ORSINGER: Yeah.

CHAIRMAN BABCOCK: Okay. Well, when she gets here she's certainly welcome to speak her piece about it. Frank.

MR. GILSTRAP: I just want to point out that the 14-point type requirement is going to apply to everything filed in the appellate courts, not just briefs;

and second, the end of the word count spells the end of Roman numeral pages. You know, you remember you used to put Roman numerals on the part that doesn't count and Arabic numerals on the part that do count, so that your 50th page, the part you look at, ah, there's only 50 pages. There is no page limit, we can start with page one.

CHAIRMAN BABCOCK: Okay. Who would have thought it? Justice Gray.

HONORABLE TOM GRAY: Under section (2)(a) we talk about the brief in a direct appeal, which clearly applies to the state's brief. Under subsection (b) we talk about a brief and a response. The old rules talk about the appellant's brief and the appellee's brief. It seems to me that a brief there is adequate as opposed to a brief and response, because I think we recognize that the response is a brief, just like we do in the subsection (a) because it's the brief, and it talks about that in the direct appeal to the Court of Criminal Appeals. Well, that's the appellant's brief as well as the state's brief, and so just for --

CHAIRMAN BABCOCK: Consistency?

HONORABLE TOM GRAY: Yes, thank you, that was the word I was looking for. And I'm not sure we need the word "appellate" in the lead-in under "maximum

length." It's just "The documents listed below," but that's a gnat.

CHAIRMAN BABCOCK: Yeah. Marisa, was there any reason why there was a distinction made between (2)(a) and (2)(b)?

MS. SECCO: No. I think that's just an oversight, so we'll clarify.

CHAIRMAN BABCOCK: Well, on the big issue, I'll call it the Frank/Richard debate about the number of words, do we have any consensus about that? Okay.

PROFESSOR DORSANEO: How would I know?

CHAIRMAN BABCOCK: Huh? Yeah, you would know. How do you feel about it?

PROFESSOR DORSANEO: I'm always worried about the police getting after me, and I want to avoid them at all costs, so I'd increase the speed limit a little bit.

CHAIRMAN BABCOCK: Well said.

HONORABLE TOM GRAY: Chip, one other thing that I noticed, it seems that the 90-page limit is lost. Is that right, Marisa, the old 90-page limit of all the briefs?

MS. SECCO: Yeah, it's not in this draft.

PROFESSOR DORSANEO: Get rid of it.

MS. HOBBS: Yes.

MS. SECCO: So --

HONORABLE TOM GRAY: I can just see a surreply coming in at 70 pages, you know, or 20,000 words under this scenario.

MS. SECCO: So I didn't know if anybody would notice or bring it up, but we will --

HONORABLE TOM GRAY: In this committee, nobody notice?

MS. SECCO: But, no, it's not included in this draft.

HONORABLE TOM GRAY: Okay.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN BABCOCK: All right, yeah. Professor Dorsaneo.

PROFESSOR DORSANEO: Instead of just talking in terms of analogies, I very much don't like to read opinions that say, "This has been inadequately briefed," "Nothing has been presented for review," "It's not long enough, this part of the argument, for me to understand what you're saying." I don't like that, and I think it's a related issue because sometimes people truncate or shorten something to satisfy a pagination limit and then it turns out, well, when you shortened it you made it inadequate under the standards for briefing and argument. That's perhaps an attitude problem in some places. I

don't run into that myself very often. I know some good lawyers have, and they asked the opportunity to rebrief. Usually that's denied. So that's part of my thinking. I worry about waiver deciding cases because I think that's a very bad way to decide cases.

CHAIRMAN BABCOCK: Okay. Let me pose the question slightly differently. Is there anybody that feels as Frank does, or Frank's opening comment, that the increase in the word limit is too much?

MR. GILSTRAP: From 14 to 15?

CHAIRMAN BABCOCK: Yeah. Anybody feel that way?

MR. GILSTRAP: I feel that way.

CHAIRMAN BABCOCK: Two people. Anybody else? Three people.

HONORABLE NATHAN HECHT: No, not me.

CHAIRMAN BABCOCK: Not you. Okay. Two people. All right. That's helpful.

Let's go on to the next page, and I think we've sort of bled over and we're talking about the 4,500 words and 2,400 words. What about the certificate of compliance? Any comments on that? Roger.

MR. HUGHES: I think it probably would be helpful to draft a certificate of compliance and make that part of the rule or at least provide a suggested format;

and the second thing is, as I mentioned earlier, owing to how we do electronic filing now, we start off in one program and then we file it usually in Adobe, and once again, different software, different ways of counting; and I'd sure hate to file a certificate that said this is 4,500 words and it turns out the Adobe -- if all you've got is the Adobe version, it may count it a little differently. So I think perhaps the certificate should say -- require you to say, "This is the software, Word or WordPerfect or whatever, that I used to create the document before it was converted to Adobe," so if there's -- God forbid, there should be a different between the way Adobe and Word counts words at least the counsel is being honest.

CHAIRMAN BABCOCK: Good point.

HONORABLE ANA ESTEVEZ: I have the same concern that Justice Christopher had addressed earlier. I was just asking her what about (1), on the side, like if we look at our first page and we have (e), (i), (1), (2), (a), (b), (c), if I was counting myself without a computer helping me, I would not count those; and I don't know if I highlighted it if it would count the (i), the (1), (2), (a), (b), (c), but I don't consider those words that should count against me in a brief. Those should be something I could use. So unless you're going to do a

definition of -- or some sort of instruction of how -- what does count and what doesn't count, you do need to have a certificate of compliance that will tell, just as Mr. Hughes stated, I either -- I counted them myself, this computer program counted it, however you do it, because, there's going to be discrepancies. If I counted by hand I'm not going to count those. I don't think it's fair to count how I decide to number my paragraphs as words. I don't think anyone would think that that should be a word.

CHAIRMAN BABCOCK: Yeah. What else would be excluded as a word?

HONORABLE ANA ESTEVEZ: And I think the issues presented shouldn't be counted as technically words. I mean, they are words, but I would want to exclude them if I was restating my issues in my briefs. That would be a good way of getting more words in.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: The reality is it's an honor system. You're an officer of the court. You certify that you've complied with the word count. Unless the brief looks somewhere outside of the complete zone of reasonable disagreement, there's not going to be any word count police that's going to be checking it against various programs. We don't do that with -- we don't do that with briefs now that are questionably within the page

limits. We just -- if they're anywhere close we just accept them, and the whole idea that we're going to devote time and resources to checking the word count given the fact that we're now going to be reading 12,000 words more a week, I don't think we're going to do that.

CHAIRMAN BABCOCK: Has anybody on the court of appeals or the Supreme Court ever seen a motion to strike a brief because it's too long or --

HONORABLE KEM FROST: Yes.

HONORABLE JANE BLAND: Well, I think in the Supreme Court they get that more frequently. I think they have more resources to devote to it, the page limit. I think practitioners have a lot more trouble complying with the page limit. I can tell you in the court of appeals, we don't have the time. We don't have the time, and the volume of briefs that we receive far exceeds, you know, our ability to keep up with anything but the worst offenders. It's like the police officer. You're not going to pull over the person going 60 in a 55. You're going to pull over the person going 90 or a hundred, so I don't think that we need to get so specific as to a particular program and all of that. I'll just count on their representation. If they sign and say it complies, I'm going to believe that it complies.

CHAIRMAN BABCOCK: If you have a motion to

strike, you'll have to take the time.

HONORABLE JANE BLAND: Well, then they'll have to show however they counted. I mean, what, we'll ask them to redraw it. There is nobody that gets dismissed, even the Supreme Court that I think works -- more vigilantly polices this sort of thing, gives everybody an opportunity to redraw their brief.

CHAIRMAN BABCOCK: Yeah, Nina.

MS. CORTELL: You could have a motion to strike under either system. I mean, I had one where they put 20 pages into an appendix. I moved to strike, and the resulting order -- it was from the Dallas Court of Appeals. They ordered me to refile with no footnotes, and I'm here to tell you both briefs got better.

CHAIRMAN BABCOCK: Yeah, but the question was raised about whether or not we ought to deal with issues about what things count and don't count like should -- you know, should (i), (1), (2), (a), (b), and (c), should those count as words or not? So the point has been made. Any other comments about that? Yeah, Justice Frost.

HONORABLE KEM FROST: I think it's a good idea to encourage people to use this -- the road signs and the headings, and so I would suggest excluding the headings as to encourage people to use them.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: The problem with that is, that's real -- and the problem with Richard's idea about excluding this restatement of the issues is it's almost impossible to do on a computer. I mean, when you have the part that you exclude and the part that you include, you start at the part you include, you run the program, and you get the number. But you can't then go through and pick out, well, I'm going to carve out this, I want to carve out that, and I'm going to carve out that. It's very labor intensive. I just don't think it's practical, and I don't think there's really an alternative to the way the Fifth Circuit does it, which says you certify it and if somebody wants to make an issue out of it they do.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: On line 47 there's a wording issue there that bothers me about stating the number of words in the document, and we have -- actually, we have words that are included and words that are excluded, and we wouldn't want the count to include the excluded words. So I would suggest, for lack of a better thought, is the number of included words in the document, some way to indicate that we want the count at the end to be just those words that count for the word limit. You see what I'm saying, Marisa?

MS. SECCO: Uh-huh.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: When you just say "included words," though, if I haven't been in this discussion I'm not sure I might --

MR. ORSINGER: Well, if you just say words, I'm afraid you're going to get --

CHAIRMAN BABCOCK: I know, your point is well made.

MR. ORSINGER: -- all the excluded stuff.

MR. GILSTRAP: Use the Federal language.

MR. ORSINGER: What does it say?

MR. GILSTRAP: It says you certify that it complies with the rule.

MR. ORSINGER: There you go.

CHAIRMAN BABCOCK: Yeah, there you go. Professor Dorsaneo.

PROFESSOR DORSANEO: Well, I was going to say something like that. That's fine.

CHAIRMAN BABCOCK: Okay. All right. Any other comments about that?

HONORABLE TOM GRAY: I'll just throw in "unrepresented" is a new term to reference either pro se or self-represented parties, and I'd just kind of like to use either "pro se" or "self-represented" as opposed to

"unrepresented" in (3). They are represented. They just happen to be representing themselves.

CHAIRMAN BABCOCK: Got it.

HONORABLE TOM GRAY: Gnat.

CHAIRMAN BABCOCK: Okay. All right. Anything on extensions? Oh, I'm sorry, Frank.

MR. GILSTRAP: On (4), extensions, we don't ever use the term "extensions." We normally use the term "extension" to extend time. I don't know that we use the term "extensions" in this context anywhere. Maybe we ought to call it "excess."

CHAIRMAN BABCOCK: Okay.

MR. GILSTRAP: That's good.

CHAIRMAN BABCOCK: All right. Marcy, there was some symphony that sort of went off when you came into the room.

MS. GREER: I'm so sorry. I had a hearing this morning.

CHAIRMAN BABCOCK: That's quite all right. But Marisa said that you might have some comments about this, and just so the record is complete, if you could tell the court reporter your full name and if you're representing anybody.

MS. GREER: Marcy Greer with Fulbright & Jaworski. I'm on the advisory committee as well as

representing myself --

CHAIRMAN BABCOCK: What am I thinking, Marcy?

MS. GREER: I'm in hearing mode.

CHAIRMAN BABCOCK: Brain cramp, sorry.

MS. GREER: Well, in light of the discussion about the rule -- and I apologize if I go over ground that's already been covered, but the concern of some of the appellate practitioners who file petitions and the shorter briefs, the 8-page and 15-page briefs, was that the word count might not fairly approximate what we've been used to under the page count rules; and so I wanted to do some math, so to speak, to try to figure out if it fairly approximated or not. There isn't really a rule quite like it in the rest of the country because the only briefs that are around 15 pages where they've tried to do a word count have been things like motions for rehearing, which is a very different animal from a petition for review or a mandamus petition or something where your entire case and whether or not the court will take it to the next level hinges on what you can get into that page limit.

So we took a number of briefs. I asked for briefs from a lot of different practitioners around the state. It's not a complete list. Obviously there are a

lot of great practitioners who are not on this list, but it was a combination of who I could get to and who could send me briefs, preferably in Word format so that we could actually run the word count. So then I personally ran the word counts on each of the briefs. We had 64 briefs that were either 15- or 8-page word limits that had been filed in cases, and of those about 37 percent were over the limit that's been proposed by the Supreme Court. About nine of those would have been within the word count that was proposed by the State Bar appellate section subcommittee, and so for that reason I think that -- I mean, these are obviously people who are active practitioners before the Court, not hopefully taking liberties with the briefs that they file, but the reality is in very complex cases that we tend to bring to the Supreme Court that we think are meritorious of its review, they tend to require a lot of background to context properly the issue that we want the Court to consider, and so I went to the practitioners who I thought would have those kinds of briefs, and about 37 percent of those briefs would have been out of compliance. So I think that, again, the goal is to get an approximation under word count of what we had under page count, and I would advocate for the rules that were proposed by the subcommittee of the State Bar appellate section.

CHAIRMAN BABCOCK: Okay. Marcy, we've gone through 9.4(e)(i) and all the way up to (j). Is there anything with respect to those specific subsections that you have comments on?

MS. GREER: I do not. I think that the limits for the longer briefs are more generous than what the Federal rules permit.

CHAIRMAN BABCOCK: Right.

MS. GREER: And we certainly have no problem with that. The real focus is on the shorter briefs.

CHAIRMAN BABCOCK: Okay. Great. All right. Let's move on to the comment, to the --

MR. GILSTRAP: Wait a second.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: We're skipping over (i), which is now (j), because there are no changes, but I think it needs to be scrutinized in light of the changes we're making.

CHAIRMAN BABCOCK: Okay.

MR. GILSTRAP: It says basically if you file a nonconforming document they can kick it back to you again. It tries to say if you do it again, they'll impose some penalty. The penalty is in the third sentence, which says, "If another nonconforming document is filed" -- I guess that means from the same party, but it doesn't say

that, it's very unclear -- "the Court may strike the document and prohibit the party from filing further documents of the same kind." I'm not sure what that means. I think that third sentence needs to be redone.

The fourth sentence has some material that may be obsolete. It prohibits the use of smaller or condensed typefaces or compacted or compressed printing features to avoid the limits of these rules. Is that something that we can -- you know, maybe that's obsolete in light of the fact that we're using fonts. I just don't know, but maybe that needs to be scrutinized again and cleaned up and brought into compliance with the rest of the rule.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: In line with what Frank is saying, we have this form, and the opening sentence talks about the whole 9.4 will be in the following form, and we have some form issues, typeface. Nobody -- nowhere does it say anything except by implication about the footnotes in typeface or bullet points or, you know, if the Chief Justice has a problem then -- with the form of briefs because of some of those issues the rule ought to say that those things are permitted or not permitted, and I don't exactly understand, you know, what the problem is, but I'm not arguing about taking this approach because

that would seem to be a foolish argument, but something more than typeface, you know, about form, binding and covering, and contents of cover. Like what are you talking about in terms of, you know, headings? We already mentioned that. You know, bullet points, you know, single-spaced bullet points --

MS. BARON: And Bill any --

PROFESSOR DORSANEO: -- things that are very effective.

MS. BARON: -- record cite is now going to be three words.

PROFESSOR DORSANEO: Pardon me?

MS. BARON: A record cite of 2 CR 6 is three words.

PROFESSOR DORSANEO: Three words?

MR. GILSTRAP: Run them all together.

PROFESSOR DORSANEO: Why should those even -- record cites, you're telling me I need to cite the record and I need to make really good cites to the record, except I'm using up a lot of words citing the record?

MR. ORSINGER: Hyphenate them, Bill. Then they're just one word.

PROFESSOR DORSANEO: Well, that's just -- that's good advice, but it also points out that to a certain extent this is a silly exercise.

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

MR. STORIE: If we're going to a word count would footnotes still present some opportunity for abuse? I mean, I assume the footnotes are going to be in the word count also.

MR. GILSTRAP: Yeah. Yeah.

CHAIRMAN BABCOCK: And how would that be abusive if the footnotes count?

MR. STORIE: Yeah, do we need that anymore?

CHAIRMAN BABCOCK: Right. Richard.

MR. ORSINGER: I'm glad to be back in agreement with Frank on an issue here. At the end of (j), which is lines 56 through -- or 57 through 59, I think that's obsolete. I think the cheating that people are going to do is going to be trying to create one word out of multiple words like hyphenating three words in a row or something like that, so I think these are -- need to be deleted, and we need to maybe be ready to adopt an amendment in a year or two when we figure out how people are going to try to beat this rule.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Brown.

HONORABLE HARVEY BROWN: This is out of order, but hearing how word counts are going to be done --

THE REPORTER: Speak up, please.

HONORABLE HARVEY BROWN: I want to speak in favor of 14,000 for briefs.

CHAIRMAN BABCOCK: Harvey, could you repeat that? Dee Dee couldn't get it.

HONORABLE HARVEY BROWN: Yes. After hearing further discussion about word counting I just want to speak in favor of the 14,000 limit for briefs themselves, even if you extend the amount of the petitions and replies like Lisa suggested, it sounds like the appellate practitioners think 14,000 is something they can work with, and the lawyers are going to find ways of making 14,000 be what we would today count as more than 14,000 by the way they do spacing, and I think Justice Bland's point that we read six briefs a week, sometimes more, actually 12, 12 briefs per week often, is a good point.

HONORABLE NATHAN HECHT: So if I understand, court of appeals is in favor of shortening their pages and increasing the Supreme Court's.

HONORABLE TRACY CHRISTOPHER: Yeah. That's exactly it.

HONORABLE JANE BLAND: You summed it up nicely. It appears as though the Texas Supreme Court may feel exactly the opposite.

HONORABLE HARVEY BROWN: 150 words versus a

thousand.

CHAIRMAN BABCOCK: That's why they're on top.

HONORABLE STEPHEN YELENOSKY: But they don't have to hear those cases, right?

CHAIRMAN BABCOCK: That's right. All right. Let's talk about the comment. Any comments on the comment? Nothing on the comment.

MR. ORSINGER: Well, I would just say that on line 63 it says "must comply with the new word limits." They're only going to be new for about six weeks and then they're going to be old, so I think we ought to take the word "new" out of there.

CHAIRMAN BABCOCK: Well, it's a comment to the 2012 change, so that --

MR. ORSINGER: Of course, Bill can still remember the 1946 new rules of discovery, right?

PROFESSOR DORSANEO: I know a lot about those.

CHAIRMAN BABCOCK: Can't we all, but since it's a comment to the new change --

MR. ORSINGER: Is the comment going to drop out and not going to carry with the rule permanently?

HONORABLE NATHAN HECHT: It will carry.

CHAIRMAN BABCOCK: You say it will or will

not?

HONORABLE NATHAN HECHT: Uh-huh, will.

CHAIRMAN BABCOCK: Will carry.

MR. ORSINGER: I think the new will become old, and it will look odd.

CHAIRMAN BABCOCK: Okay. Lisa.

MS. HOBBS: I would strike out the word "appellate" before "documents." I think Chief Justice Gray had made that comment earlier, and I don't know what an appellate document is.

CHAIRMAN BABCOCK: Yeah. Got it. All right. Any other comment? Frank.

MR. GILSTRAP: I think since we're about to move off of this I want to just mention again the problem with the length back on the previous page. We have statement of procedural history in there. That's only meant for the Court of Criminal Appeals, and 99 percent of the people who read it aren't going to know that, and they're going to say, "Well, yeah, pages 7 through 14 are the statement of procedural history and that doesn't count," and that's not the intent. We need to carve that out so that it applies only to the Court of Criminal Appeals.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Maybe it's not

typeface, but I don't see why "headings, footnotes, and quotations count toward the word limits" shouldn't be in the rule itself somewhere rather than just in the comment.

CHAIRMAN BABCOCK: Okay. Good. All right. Anything else about the comment? Okay. There's some language that has been stricken, and then on the last page of our document here we have Rule 71.3 that had some language taken out of it. Any comments about any of the rules that have been stricken or the slight modification to 71.3? Lisa.

MS. HOBBS: I don't know if the ones that are being stricken are the last paragraph of any given rule, but if they're not you need to make sure in your order that you strike -- that you change the numbers that follow. So if there's 64.7, it would now be 64.6, and that should be reflected in the order.

CHAIRMAN BABCOCK: Yeah.

MS. SECCO: I'll just say that we have thought about that and because there are cross-references in the rules to other parts of the rule, and cases that reference the rule reference the current numbering we'll probably actually just leave those as empty spaces in the rules.

MS. HOBBS: Deleted.

MS. SECCO: Yeah.

CHAIRMAN BABCOCK: Okay. What about 71.3 where we strike some words from it? Undoubtedly to get our word count down. Anything else? Okay. Looks like we're done with this rule unless there are other comments. Okay. Thanks, Marisa. Okay.

Okay. Let's go on to the small claims rules that have been occasioned by House Bill 79. We have members of the task force, the leaders of the task force here, Bronson Tucker and Judge Casey, who is a JP himself, and you guys want to take us through these, through what the task force has done and --

HONORABLE RUSS CASEY: Yeah.

HONORABLE NATHAN HECHT: Let me say one thing first.

CHAIRMAN BABCOCK: Justice Hecht would like the floor before you get there.

HONORABLE NATHAN HECHT: Let me just point out that last July I wrote the committee about 11 matters that we had from the session on which we needed to consider rules changes. The committee is finished with 10 of those, and the Court is finished with eight, so we expect the rules on dismissal and expedited actions in August and then that will be everything except the rules that we're about to consider regarding small claims, and so to -- in some of these areas we -- just to pick an easy

one, dismissal, the Court felt like the expertise in the committee was sufficient to expose all of the issues and have a thorough debate, but obviously on many others it was necessary to look outside the committee for expertise, and the small claims is certainly one of those areas. So we appointed a task force, the Court did, in September of 16 people from various areas of the state and various relationships to the small claims courts and the justice courts and hoped in that process to get a good range of views brought to bear on these issues.

I want to say that, as everybody knows, these are difficult economic times, and the Court's budgets were all cut in the last session, and one of the cuts to our budget was in funding for this committee, for example, which the State Bar has taken up, but for other task forces and committees, and so almost all of these people have contributed all of their time, but in many instances some expense to participate in this process, as I know some of you do. It really is a service to the state and to the judiciary that needs to be recognized because these people don't have to do this. It really is an imposition on them to do it. Very important work, we're talking about hundreds of thousands of cases today with these small claims rules, far more than the civil -- the civil docket in the district and county courts, and so

these -- these rules are going to affect people and industries all over the state, and the people that have served on the task force have given a lot of time and energy to it, and I just want to express the Court's appreciation for all of that.

CHAIRMAN BABCOCK: Great, thanks, Justice Hecht. Justice Medina, I didn't know if you had your hand up to say something or not.

MR. MEADOWS: No, I just agree with what Justice Hecht said.

CHAIRMAN BABCOCK: As do we all. Thank you, guys, for what you've done. I meant to do this before we got started, just some housekeeping. There are a number of people here that are obviously interested in these rules, and I want to list the written comments that we've gotten that are part of our materials, been distributed to the committee and posted on our website, and let me just read them out, because if there's something that I'm missing I want you to get it to Angie so we can make sure the committee has it and it's on our website. We got something from Gardner Pate at Locke Lord on behalf of the Building Owners and Managers Association; from Michael Scott on behalf of the Texas Creditor's Bar Association; from Nelson Mock, who was a task force member; from John Steisniek, who is with the Texas Commission on Law

Enforcement Officer Standards and Education; from Jan Steiger, who is with the Debt Borrowers Association, DBA International; I understand Trish Baxter is going to be here in Jan's -- there she is, in Jan's place. George Allen with the Texas Apartment Association; Craig Noack and Michael Scott with the Texas Creditor's Bar Association; Howard Bookstaff with the Houston Apartment Association; Joe Stewart with the Texas Association of Realtors; Judge Tom Lawrence, JP and a longtime member, former member, of this committee; Matt Hayes, a JP in Tarrant County; Buddy White, the Fort Worth Midcities National Association of Residential Property Managers; Janet Marton, who is a practitioner; Judge Hillary Green, who is a JP from Harris County; one of our members also received a letter from Rick Bauman, which has not been distributed or posted because I wasn't certain if private correspondence was intended to be distributed to everybody. Jim, it was to you, I think, and is Rick here? I know I talked to him on the phone. Jim, if you're talking to Rick and he wants his letter as part of our record we're happy to do it.

MR. PERDUE: I'll drop him an e-mail and see if he does.

CHAIRMAN BABCOCK: I just felt that when it's a private letter maybe they don't want that on the

website.

MR. PERDUE: I can't comment one way or the other.

CHAIRMAN BABCOCK: Okay. Is there anybody else that has any written materials that I haven't listed?

PROFESSOR DORSANEO: Did you mention Mary Spector?

MS. SENNEFF: That one came in late yesterday.

CHAIRMAN BABCOCK: There is another one that came in late yesterday. From Mary Spector?

PROFESSOR DORSANEO: Right. She's on our faculty, Rose's daughter.

CHAIRMAN BABCOCK: Okay. From the SMU faculty. Do you have that, Marisa?

MS. SECCO: Yes. I distributed that yesterday to the committee by e-mail, and we also received another letter yesterday from the American Collectors Association of Texas from Bruce Cummings, which I also distributed by e-mail to the committee.

CHAIRMAN BABCOCK: Angie, you'll get that on the website?

MS. SENNEFF: Yes.

CHAIRMAN BABCOCK: All right. With those additions, is there any other written comment that we've

received from anybody? Okay. Seeing no hands raised, Judge Casey and Bronson, we'll turn it over to you.

HONORABLE RUSS CASEY: First off I would like to thank Justice Hecht and the committee for giving us this opportunity to work on this. We had a great committee, some of the smartest people in the state, and every single member had a love in their heart for the justice court. To kind of enumerate a little bit about what a justice of the peace does, currently we actually have two separate courts. One is the small claims court, which is governed by Chapter 28 of the Government Code only. There is no Rules of Evidence. There is no Rules of Civil Procedure. It's commonly called the people's court. It's designed for a pro se to be able to address issues. There is some limitations on the small claims court in the fact that it can be for seeking money only, and there is some jurisdictional issues on who can file in a small claims such as businesses that are in the business of lending money, assigned debts, and things like this cannot file a small claims case.

We also have the justice court, which is governed by Chapter 27 of the Government Code and also the Rules of Civil Procedure and Rules of Evidence. Now, one of the themes that had prompted the Legislature to act on this is that a lot of people do not know the difference

between a small claims case and a justice court case. A lot of people expect lax rules in all cases, and that's not necessarily the case, and so it comes down to what did they order us to do. They wanted us to combine the two courts, and they have some specific directions on how they wanted to do that, and one of the things is they wanted to have the Supreme Court define what is a small claims case and then decide that the small claims rules will apply to those. So what is a small claims case? What is the discernible difference between suing my roommate for a thousand dollars because he kept my TV when he moved out or suing my roommate for a thousand dollars for the return of the TV in the alternative. A thousand dollars only, small claims case; a thousand dollars or the TV back is a justice court suit, no Rules of Evidence, no Rules of Civil Procedure, district court. What would a pro se defendant going in and say, "Which one of the rules do I want, which form do I fill out," and we wanted to eliminate that.

When we were going through exactly how we defined to be a small claims case, I think we rapidly got to the point to where Merriam-Webster would probably rip out his hair trying to distinguish the difference between a small claims case and a justice court case as we have it right now. So with that in mind, we had went upon the

principle of combining the courts and the tradition of a small claims court, and that's where we came up with this set of rules, and from now on I guess I'm going to turn it over to Bronson Tucker, who is the attorney for the Justice Court Training Center. He'll go over a little bit about what the house bill said and from there.

MR. TUCKER: Thanks, Judge Casey, and I just want to reiterate what Judge Casey said and thank the committee and thank the Supreme Court for the opportunity to serve on this committee. I really enjoyed the process, and I'm very glad to be able to participate. I think myself as well as our two program attorneys who are here, Mr. Rob Daniel and Ms. Thea Whalen, we're in a very unique position because we deal with justice courts in urban areas and rural areas. We have justice courts in Loving County where there are 80 people in the entire county, and we deal with justice courts who have attorney judges and justice courts who have laypeople judges.

Between the three of us we literally answer and address over a thousand questions a year from our judges about, you know, what the rules are, how to follow them, what should be done. We teach over 30 classes a year to our judges, so we're very uniquely situated to really be able to look into how justice court works across the state, and I would say with that in mind, I would be

more than happy to offer any answers or stance as this process moves forward to next May to any of the justices or any of the committee members. My e-mail address is bt16@txstate.edu if anybody has any questions about how the process works.

Just like Judge Casey mentioned, right now we have small claims court and we have justice court. The way I describe it to our judges is this: In small claims court what the judge is supposed to do is decide what happened and make a fair and just ruling based on what actually happened, and Chapter 28 of the Government Code says to do that the judge has the duty to develop the facts of the case even. Okay. They can summon witnesses, ask questions of witnesses, ask questions of parties. It's supposed to be -- the outcome should be what happened, what's fair and just based on what happened. As Judge Casey mentioned, in justice court right now there are formal rules, so in justice court the way the judge is supposed to rule is did the party with the burden of proof prove their claim under the Rules of Procedure and Evidence. Okay.

And what the Legislature tasked us to do, as Judge Casey mentioned, is provide rules for small claims cases in our courts, and it said that the rules cannot require that a party be represented, the rules cannot be

so complex that a reasonable person without legal training would have difficulty understanding or applying the rules. The rules cannot require that discovery rules under the Rules of Procedure or Rules of Evidence be applied except to the extent that the judge hearing the case determines that the rules must be followed to ensure that the proceeding is fair to all parties, and again they also use the language of "informal hearing," sole objective to being dispense speedy justice between the parties; and so when we sat down and looked at how do we want to draft these rules our goal was to draft a set of rules that if someone off the street wants to file a lawsuit or finds themselves being sued, they can go to court and do the things they need to do to go through the case without a danger of stepping in some procedural trap door. You know, "Well, I'm sorry, you're not able to speak" -- "to present the merits of your case because you didn't dot this I or cross that T.

We wanted to make basically the rules be a play book for people who are suing or being sued so that they don't need to have a lawyer be involved in the process, and so that's what our goal was when we created these rules, and as far as the actual rules, I don't know what the committee prefers. I can walk through the document and explain how that's different from how the

rules are currently in justice court and address some of the issues that some people had with some of those rules or I can respond directly to individual questions. I don't know what the committee finds more beneficial.

HONORABLE RUSS CASEY: And I would like to reiterate on that. Yet again I want to point out the difference that we're going to here. We're going from no Rules of Evidence and Civil Procedure and combining that with Rules of Evidence and Civil Procedure, and I think that our goal in combining that was such a way that it works out real well. For example, the Rules of Evidence applying as a judge sees fit. An example of this is, "Here's my receipt from Wal-Mart where I bought the TV." Without the proper predication I can look at that and see if it's a Wal-Mart receipt and not require that we have someone that wanted to testify from Wal-Mart that it was a receipt.

We -- in our proposed rules, we do have Rules of Civil Procedure. We do have Rules of Evidence. They are applied as the judge sees them necessary to be applied. One of the concerns about that is that each different court, in fact, in different cases in different court there will be different -- there will be different qualities and procedures in regards to that. Yeah, we like that. We like to treat every single case

individually on its own. We like to treat every single piece of evidence individually on its own. It is the judge's job to make sure that the people have or receive a fair trial, and in this regard in the justice court it is a big burden on the judge to make sure that people do have their day in court. We are designing the rules in order to allow that to happen.

I'm a little bit concerned -- and forgive me, but I actually enjoyed your comments and concerns about the appellate switching from page numbers to word count, and I want to bring up a comment that the Legislature removed Chapter 28 of the Government Code. It's repealed. There is no more small claims court as of May of next year. It's gone as of May of next year. The Supreme Court is tasked to having rules in place by May of next year. I love and encourage and I am here to talk about these rules, but we cannot pigeonhole this to where Chapter 28 goes away and we have nothing in place. That would be a disaster.

CHAIRMAN BABCOCK: Okay. Judge, I sense from your comments that you thought we were a little picky about Rule 9.

HONORABLE RUSS CASEY: No, no. I wouldn't use picky. I would say thorough.

CHAIRMAN BABCOCK: That is a reputation that

is hard-earned by this committee. Could you -- could one of you kind of give us an overview of what's been done, and specifically, are these rules that are before us meant to replace and supplant what's in currently part V of the civil procedure rules?

HONORABLE RUSS CASEY: Yes.

MR. TUCKER: Yes.

HONORABLE RUSS CASEY: Go ahead.

MR. TUCKER: Yes, sir. What we have done, as Judge Casey mentioned, the first thing we were tasked to do is define what is a small claims case. We have to write new rules for a procedure for small claims cases and decide which cases in our court are going to be small claims cases. What we ultimately decided was there's no reasonable line of demarcation between what should be a small claims case and what should be not a small claims case, so our plan, what we designed, was to apply these rules to all civil cases that are filed in the justice court, which obviously has a jurisdictional cap of $10,000, whether they are filing for money or whether they are filing for the return of personal property.

Additionally, the Legislature said we needed to design special rules for cases that are filed by assignees, collection agents or agencies, or entities that are primarily engaged in the business of lending money at

interest, because those entities right now, as Judge Casey mentioned, are barred from filing small claims cases. So we created special rules for those cases which we -- which we defined as debt claim cases, and we -- specifically the main thrust of what we did on the debt claim cases, a major sticking point right now when, for example, credit card debt is sued for in justice court there is a big sticking point on what can happen for a default judgment, do we need to have a hearing for a default hearing. The current rule says in justice court there has to be a hearing for a default judgment if the damages are unliquidated. Most appellate courts have ruled that credit card debt is unliquidated. There are court cases out there that have ruled the other way, that credit card debt is liquidated.

So as an example of what we did in those, is we listed a set of documents that if the credit card or the debt claim plaintiff files with the court they have those documents on file and they are served on the defendant and the defendant fails to respond, then they're entitled to a default judgment without having a hearing rather than defining it based on liquidated versus unliquidated which goes back and forth depending on what the appellate court decision is currently. We implemented those. The House bill also said that the Supreme Court

shall promulgate rules for eviction proceedings, so we created -- or we modified the current eviction proceedings to go along with the mentality of what we're doing here, which is allowing the judge to determine what actually happened rather than holding someone to the Rules of Evidence and Rules of Procedure like they would now; and just as an example of that, you know, especially in rural areas you often have landlords who are not necessarily sophisticated. You can have a landlord evicting a tenant, and the tenant has a Legal Aid attorney, and the landlord is trying to introduce their rent record, and they don't know how to lay a predicate for that, so they may have that objected out; whereas what we thought was really more fair was to allow the judge, just as they've been doing in small claims cases for decades, to determine what happened.

In these eviction suits there is not a lot of time for legal preparation. There are a lot of unsophisticated landlords. There are a lot of unsophisticated tenants, so we really thought that it was a good solution to apply that concept of fair, speedy, and equitable to eviction suits as well as small claims cases. Obviously eviction cases require their own separate set of rules also, because they're supposed to be very speedy. Okay. So the time frames are different and so on and so

forth.

HONORABLE RUSS CASEY: If I can --

MR. TUCKER: Sure.

HONORABLE RUSS CASEY: -- if I can speak on that for just a minute. A lot of you may not be familiar with an eviction proceeding. It is one of the fastest cases in the United States of America. By law it has to be heard no sooner than 6 days and no later than 10 days from when the defendant is served. Normally the defendant is served six days ahead of time and has six days to prepare for trial. It is -- currently we are under the Rules of Evidence and Civil Procedure for a district court. We've had problems with -- with everything. Discovery, how do you set discovery in six days? We've had problems with -- well, with all kinds of civil procedure that is in direct conflict with the time frame that is set by the Legislature in regards to those cases. One of the things that we felt was necessary was due to the nature of these cases, it was important to put that in with the small claims cases because 99 percent of these cases are pro se, both sides pro se. Under the Property Code either side in a suit for a nonpayment of rent or for hold over, either side can be represented by anybody, any representative.

The Legislature has designed these cases to

be very informal. Due to the informality of it, I think most judges have been treating the cases very informally, and the new rules reflect more what practice is currently than what the rule is currently, if that makes any sense. But it was very important that because of the vast number of pro ses that are involved in eviction cases that we did include them in a looser setting.

HONORABLE RUSS CASEY: Absolutely, and so the way we set it up is fairly close to the way it's set up now. We have separate rules for debt claim cases. We have separate rules for repair and remedy cases, which were actually promulgated by the Supreme Court very recently. We didn't really modify those except to make the timing square with the new timing that we did for the eviction rules and the eviction rules and then we have the baseline small claims rules, and so the baseline small claims rules apply unless there is a superseding rule in one of the other categories. As an example, in an eviction you have five days to file your appeal. That's in the eviction rules. Our baseline small claims rule gives you 20 days to appeal, so obviously in evictions you just get the five.

HONORABLE RUSS CASEY: And in there are -- that's five days. Rule 4 actually has an exception for an appeal in eviction cases, five days. Rule 4 counts five

days. It doesn't count -- or it counts weekends and holidays in that five days. One of the first things we did was we had a modification to -- to computation of time, to basically try to make it understandable if someone came in, a pro se, and said, "I want to know what the rules are in regards to these cases" that they would know what it is, and so instead of having a footnote way back in the back somewhere that this is how you compute time we put it up here, how to compute time. It's right there. It's rule -- I guess on the ruling, we numbered these just in order. These are meant to replace everything that's there, so sometimes the numbers don't correspond to the actual rule that's currently in place now, and we're going to leave it to Marisa to actually sort that out later.

CHAIRMAN BABCOCK: Let me just make a comment and then we'll take our morning break. As I understand it, the philosophy of these rules, whereas the old JP rules had the Rules of Procedure for district court and county court apply unless they were inconsistent with the JP rules, you-all have flipped that and said the rules as for district courts and county courts do not apply unless the JP says he wants to rely on them in some way.

MR. TUCKER: Yes, sir, that's correct, and you know, there's been some concern about that I think in

some of the notes that we've read. There's some concern that, well, allowing the JP to only apply those rules when they see fit, it leads to some unpredictability, and we are cognizant of that. We're sensitive to that, but we felt like we basically have three options here, is either the district and county court rules can never apply, they apply when the judge determines it to be fair, or they always apply; and our concern with having them always apply, again, the Legislature said we need this to be easy for someone who is not legally trained to follow the rules; and if you say, "Well, you're now not only responsible for this set of rules but you better look at all of these other rules that were not written with pro se people in mind in the terminology and all those things, you better know all of those and you better figure out when there's a conflict and you better be able" -- that becomes very complicated for a pro se person to start to follow those rules if they always apply.

CHAIRMAN BABCOCK: Gotcha.

MR. TUCKER: So if you look at then, well, they never apply then we have no fail-safe for those unusual situations, and we're really tasked with making sure every single possible thing is in the justice court rules or there's a black hole where there's nothing to fill it. For example, interpreters, we didn't put an

interpreter rule in the justice court rules. There is one in the district and county court rules, so if there's a situation where there's an interpreter, the judge can rely on that rule and because that's what's fair for the proceedings. So we felt like that was the best compromise in light of the direction that the Legislature gave us to make the system fair and quick and easy for nonlegally trained people to follow the rules.

CHAIRMAN BABCOCK: Great. Thank you. What we're going to do when we come back, you'll be happy to know, is we're going to take the rules one-by-one and talk about them and make comments until we get to the end, but as I said before, in case people have come in late, after lunch we're going to hear public comment from everybody who wants to speak, and we're going to have a 10-minute time limit per speaker just so we can get through everything we need to get through. So let's break for 15 minutes, and we'll be back at about 10 of.

(Recess from 10:35 a.m. to 10:55 a.m.)

CHAIRMAN BABCOCK: All right, we are back on the record. I know that there are a number of task force members that are here other than Judge Casey and Bronson Tucker, and if they could just introduce themselves, so we can spot you and thank you for your service.

MR. WOOD: Ted Wood. I'm with the Office of

Court Administration and one of the task force members.

CHAIRMAN BABCOCK: Great, Ted, thank you. Anybody else? Yeah.

HONORABLE RUSS RIDGWAY: Judge Russ Ridgway, presiding judge for the Harris County justice courts, 16 of us.

CHAIRMAN BABCOCK: Okay. Thank you, Judge.

MS. MARTON: I'm Janet Marton. I'm with the Harris County Attorney's office, and I'm general counsel for the Harris County justice courts.

HONORABLE GREG MAGEE: I'm Greg Magee. I'm justice of the peace from San Jacinto County.

HONORABLE GORDON STARKENBURG: Gordon Starkenburg, justice of the peace, Brazoria County.

CHAIRMAN BABCOCK: Well, thank you. Well, I don't know if you heard Justice Hecht's comments and Justice Medina, but thank you very much for serving on this task force. You guys have done great work, which our committee is now going to rip apart, piece by piece, but in the nicest possible way. If I can -- if I could use the prerogative of the chair to jump around a little bit rather than to go rule by rule in order, I would like to start with Rule 502. That's the issue I talked about right before the break about the application of rules in justice court and it takes a different -- different tact

than Rule 538 is it? 538, 528, we'll get it here in a second, 523. So if we could -- if we could focus on that and hear people's comments on Rule 502, if any. Richard.

MR. ORSINGER: My slant on it is slightly different. I'm a little bit concerned about the flexibility of being able to invoke procedural evidence rules to deny relief; and an important part of public perception of justice is there's equal justice under the law; and when everybody goes into court knowing that there's a set of rules that they have to comply with it, then if they don't comply with it in a sense they're kind of at fault; but if they're a layperson and they don't know the rules are going to apply and when judge says, "Well, I'm sorry, but your critical piece of evidence here is inadmissible because it's hearsay or something" then I'm worried that some people may feel like they were tricked or they were cheated out of their day in court because they didn't know that they were going to have the meet these technical requirements; and so if I had to vote of the three choices that were described I would probably not apply any of the rules, but I can see the problems that that would create.

And so as a compromise I'm wondering if we could have a rule at the start that's like Rule of Civil Procedure 1 that kind of is a broad philosophical

statement that these rules should not be applied in a way to deprive someone of being able to present the merits of their case, and I know that that's just kind of philosophical and I know you can't reverse any of this anyway, but it just seems like to me if we're going to allow judges to pull out technicalities when they want to and not pull them out when they don't want to that we ought to tell them that our overall goal here is to get the merits tried, not to have someone be unable to prove their case because a judge decided that a rule would apply that they didn't know was going to apply.

CHAIRMAN BABCOCK: That's a concern I had when I read this thing. Frank.

MR. GILSTRAP: Aren't we constrained by the statute? 27.060(d)(3) on page 46 of the statute, which says, "The rules adopted by the Supreme Court may not require the discovery rules or the Rules of Evidence be applied except to the extent the justice of the peace determines that they should be applied." That's the Legislature's mandate. I don't know how much wiggle room that leaves us.

MR. TUCKER: Right, and we talked about -- we talked about that, and certainly I absolutely agree with you that we had no wiggle room on the rules of discovery or the Rules of Evidence. We theoretically have

wiggle room on the other Rules of Procedure governing the district and county courts and, like I said, ultimately decided on the compromise position to favor the judge being equitable. I would definitely agree with the concept of what was mentioned as far as -- and this will be how it's instructed to our judges, that they should definitely not be applying these in a way to close the doors to the courthouse to people or prevent the presentation of the merits of cases. Absolutely agree with that.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, the antithesis to me of a rule is an ad hoc decision, and to say that -- if by saying the judge will determine it's fair to apply the rule you're saying the judge just makes an ad hoc decision at some point that the rules are going to apply to all of this case or to some of this case, to me that's not a rule. That's saying the rule is the judge doesn't have to follow the Rules of Civil Procedure or the Rules of Evidence and the judge can decide what's admissible or not based on other considerations. So you hold up, you know, your receipt and the judge says, "Yeah, I see that and I think that's valid and I accept that and that's persuasive to me," or the judge says, "I'm not sure about that and that's not persuasive to me." It's not a

court of record. There's nothing preserved, but I think to say, well, that's the judge deciding to apply the rules, to me is a little bit of an oxymoron and along with what Richard said leads to the suggestion that there's an arbitrariness here. So if you want to leave the judge flexibility, if we can do it consistent with the statute, I don't know, what Richard points out it seems to me you say the rules don't apply and you either say nothing after that, which then allows the judge to determine what's admissible based on consideration or you say the judge will determine admissibility based on, you know, appropriate considerations.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I'd like to ask the judges what rules that they think they might want to apply in a typical case that would fall into this exception.

CHAIRMAN BABCOCK: The interpreter rule was mentioned earlier.

HONORABLE TRACY CHRISTOPHER: Okay. What else?

CHAIRMAN BABCOCK: I don't know.

MR. TUCKER: Sanctions for discovery violations would be one. You know, again, and to address Judge Yelenosky's point, we -- I definitely understand

exactly where you're coming from, and I think part of the reason we put it this way is to give the judge some guidance and protection to say, look, if you decide based on this, for example, the interpreter provision, if you decide to follow this rule, you're allowed to do that, whereas if we don't have that at all, we can have some county, say, "Oh, no, we don't have to pay for an interpreter because there is no rule that says we do" and you can't just unilaterally decide you're going to allow an interpreter and make the county pay for it, for example, so if the judge clearly can follow that rule then that kind of eliminates the judge being attacked for entering a void rather than following a rule, but I definitely understand your argument there.

PROFESSOR HOFFMAN: Chip?

CHAIRMAN BABCOCK: All right. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I mean, and I don't mean to argue with you because I'm just trying to get a handle with, you know, how you would be doing something under these proposed rules, so right now discovery has to be by permission of the judge. And, you know, it seems to me that, you know, you give permission for the Judge, you have to warn someone that they could be sanctioned if they don't comply with discovery, and, you

know, if that's not getting done then suddenly imposing a sanction for not complying with discovery that's in another part of the rules doesn't strike me as a fair result. So I'm kind of wondering why we sort of -- why, you know, you pick and choose what rules you've put back in here, like why would we have to have a venue fight in JP court, you know, why you've put some of those rules back in. I mean, I'm just trying to get sort of a kind of a comprehensive feel of why you've put some things in and not others.

CHAIRMAN BABCOCK: Professor Hoffman has got the answer to that question.

PROFESSOR HOFFMAN: Very helpful, thank you. Backing up to the statute again, I'm not clear about that, it's a good question, but I'm not clear about the reading, and so 27 -- is the provision we're talking about 27.060(d)(3)?

MR. GILSTRAP: Yes.

PROFESSOR HOFFMAN: Okay. So that says that the rules may not require that discovery rules under the Rules of Procedure or the Rules of Evidence be applied except to the extent, blah, blah, blah, they think it's fair, that's what 502 says, but all it says is the discovery rules and then when you go back to beginning of 27.060, just the opening paragraph, that says "A justice

court shall in the small claims cases conduct proceedings in accordance with the Rules of Civil Procedure." So I'm happy to hear another interpretation, but I don't understand. That sounds like it says you're supposed to use the Rules of Procedure except as to discovery and Rules of Evidence.

MR. TUCKER: Right, but in (a) there it says, "In accordance with the Rules of Civil Procedure promulgated by the Supreme Court to ensure the fair, expeditious, and inexpensive resolution of small claims cases" meaning we -- the justice court shall conduct small claims cases in accordance with the rules that the Supreme Court ultimately adopts for small claims cases, but it in -- so, I mean, it doesn't say anything about the Rules of Civil Procedure that govern the other cases. It says they "shall conduct proceedings in small claims cases in accordance with the rules that ensure fair, expeditious, and inexpensive resolution of small claims cases," so that doesn't apply to the current district and county court rules.

CHAIRMAN BABCOCK: That makes sense.

PROFESSOR HOFFMAN: Okay. So what does the language in 27.060(d)(3) mean when it says -- let me say my question differently. 502 seems like it's trying to implement 27.060(d)(3). Am I saying that right?

MR. TUCKER: I think -- well, I think 502 generally is implementing the concept but goes further than (d)(3) mandates. Okay. I would say it was mandated by (d)(3) that we can't require the discovery rules or the Rules of Evidence to apply to small claims cases. It is silent on whether we could require the other Rules of Civil Procedure to apply to small claims cases.

PROFESSOR HOFFMAN: Okay.

MR. TUCKER: So we could have theoretically kept a system similar to what we have now where we develop small claims rules and we say where the small claims rules are silent we default to the district and county court rules, and the reason why we did not do that, again, is we felt that did not comply with the legislative mandate to make the rules fair and easy to follow for nonlegally trained people when you say there is this other body of rules that are written in generally legal language and you're going to be responsible for knowing all of those, that starts to take it out of friendly to pro se territory, in our opinion at least.

HONORABLE RUSS CASEY: And also in regards to that, we have a lot of situations that we cannot contend with these by putting every single thing into the rules. It was kind of pointed out as a joke, we have less rules here than is required in an appellate procedure.

There is less than 50 pages here. There is a -- as everyone is aware, you do not know what's going to happen next. We do not know what's going to need to be associated with some particular case, and so that is sort of a blanket situation. It was not meant to deny someone relief. It was meant to allow guidance for relief where other guidance was not given.

MR. TUCKER: Right, and the issue, like I said, so we decided based on fairness to the pro se people to not always rely on the district and county rules. If we fall into the other side of never applying the district and county rules then that means every possible scenario has to be accounted for in the new small claims rules, and that's a difficult burden to place and say anticipate everything that can come up, and if we go -- and again, Judge Yelenosky, totally understand and agree with your general concept of, well, that's not really a rule, but if we leave it blank then we're going to end up with legal battles over, "Well, there's no authority, Judge, for you to do that, so you can't," and then we get into the fight of how far can a judge -- can they do anything that the rules don't specifically say they can't, and so we wanted to give a little bit of guidance and thought as to, well, these are the rules that you're going to follow, there are some other rules if because of unexpected circumstances or

the specific circumstances of a given case some other guideline needs to be followed we're going to say, yes, the judge is okay and not doing anything wrong to follow that guideline.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Back to what Justice Christopher -- her question was, well, why would they need the Rules of Evidence, what would those circumstances be, and I would say that probably the one that would probably show up the most would be authenticity. I have a lot of issues sometimes where someone says, "Well, that's not my signature," and this is in the district courts, and so if for some reason they needed something to prove up the authenticity and there's actually a dispute as to whether that really is the Wal-Mart receipt, and I don't know that you need it in the rule, but you could easily put in the rule that in the court's discretion it can allow a brief continuance or recess for someone else to comply with it when they don't know that they're going to have to comply with a Rule of Evidence, and so you could --

MR. TUCKER: Right, and --

HONORABLE ANA ESTEVEZ: And I know they always have that inherent ability to do that; but if people are concerned about that thinking it wouldn't be fair when all of the sudden they arbitrarily bring in this

Rule of Evidence that says, "No, I'm going to exclude it because your objection is good, you know, and you haven't proved this up" and there's actually a fight about whether it's authentic or not, then they could easily do that; and I'm not as concerned on Rule 502 as long as the justice of the peace courts know and I guess the pro se litigants know that they can ask for that; and maybe you need to put it in there. If you really want people off the street to know what their rights are then you probably should put in there that a pro se litigant could request a brief recess in order to comply with the Rules of Evidence that are being applied when they're not expecting any of them to be applied.

MR. TUCKER: Right, and the task force talked about including language that said after notice and a hearing the judge may apply those rules, and we ultimately decided to not put that language in because we felt like a lot of the situations are going to be fairly straightforward and vanilla and like the interpreters and things like that that aren't going to affect the interest of the parties where they're going to need, you know, notice and a hearing, but, you know, I certainly would -- if a judge were to ask me, you know, I would say, yeah, that's proper for a continuance if a party's -- what they thought were going to be the rules get changed.

And just as another example on evidence where putting in this language that the judge can follow the rules if they determine it to be fair, you can also have a situation where there are juries; and so a judge may need to prevent something from going in front of a jury, for example, that's extremely prejudicial; and this makes it clear that the judge has the right to do that, you know, implicit in their ability to develop the facts of the case; whereas otherwise, again, there's going to be, you know, people filing complaints on judges that "They didn't let me put this evidence in front of the jury and Rules of Evidence don't apply so they don't have a right to not let me put it in front of the jury," things like that.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: On Judge Estevez' comment, I mean, I don't think -- I don't think that we can make a rule on that except maybe in terms of notice of a hearing. The rule says that the evidence don't apply except that -- the statute says the evidence rules don't apply except to the extent the judge wants them to apply.

PROFESSOR DORSANEO: It talks about discovery.

MR. GILSTRAP: It says evidence, too.

MR. TUCKER: And evidence.

PROFESSOR DORSANEO: "Discovery rules adopted under the Texas Rules of Civil Procedure or Texas Rules of Evidence." I realize that we don't think of the discovery rules as being --

MR. GILSTRAP: So you're reading discovery as apply to Rules of Evidence?

PROFESSOR DORSANEO: Yeah.

MR. GILSTRAP: Okay. Okay. Well --

MR. TUCKER: We did not read it that way.

MR. GILSTRAP: But --

PROFESSOR DORSANEO: That's what it says.

MR. GILSTRAP: If we don't do that then our rule has three parts. Part A, the evidence rules don't apply except to the extent the judge wants it to apply. Part B, the discovery rules don't apply except to the extent the judge wants them to apply. Part C, the other Rules of Civil Procedure, the nondiscovery rules, apply, and that's what we've got to decide today. We've got to decide either they don't apply except that they apply, they don't apply except to the extent the judge wants them, or somewhere in between. We've got to pick and choose. That's the only thing before the Court, before the committee, and I think we ought to go with the same approach, that they apply if the judge wants them to apply.

CHAIRMAN BABCOCK: Richard Munzinger, then Professor Dorsaneo, then Justice Bland.

MR. MUNZINGER: Rule 502 does not mention the Rules of Evidence. It applies to the Rules of Civil Procedure only.

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: Discussion of what is admissible or not admissible under Rule 502 is inappropriate unless the drafters left the Rules of Evidence out accidentally.

CHAIRMAN BABCOCK: No, 504. We'll get to 504 in a minute. That's Rules of Evidence. Professor Dorsaneo.

PROFESSOR DORSANEO: Well, as is not unusual, these legislative directives are not necessarily easy to interpret, particularly without -- without further guidance, but it looks to me like in 502 you use language from the statute in (d)(3) as a vehicle for allowing the justice or, you know, judge to go to a different part of the rule book generally. You didn't -- you didn't restrict that exception to the discovery rules adopted under the Texas Rules of Civil Procedure or the Texas Rules of Evidence.

MR. TUCKER: Yeah, I mean --

PROFESSOR DORSANEO: You used it as a broad

way to copy -- almost copy current law, okay, with respect to when the Rules of Civil Procedure apply in JP court and when they don't, and I -- I think that's a clever reading of the statute, but I don't know -- and I haven't thought about it for more than this meeting really because I didn't notice it, but I'm not sure that that's really what the statute had in mind.

HONORABLE RUSS CASEY: I would disagree. I was speaking with the sponsors of the bill. This rule reflects more of what they were intending.

PROFESSOR DORSANEO: Yeah, well, that's -- that may be useful information, but it's not --

MR. TUCKER: We actually did discuss --

PROFESSOR DORSANEO: -- maybe not helpful.

MR. TUCKER: We did discuss that reading, Professor, of does "discovery rules adopted," does that apply also to under the rules -- so there's --

PROFESSOR DORSANEO: Well, I'm leaving that issue out, whether it does or it doesn't.

MR. TUCKER: Okay.

PROFESSOR DORSANEO: Okay. The exception language is limited under (d)(3) to certain Rules of Civil Procedure, the discovery rules, and maybe all of the Rules of Evidence and maybe not all of the Rules of Evidence.

MR. TUCKER: Fair enough, yeah.

PROFESSOR DORSANEO: But 502 stretches this statute --

MR. TUCKER: Sure.

PROFESSOR DORSANEO: -- okay, to its limits and maybe beyond, and I think "notice and an opportunity to be heard" would improve it a lot. Those are the only things I'm saying, and I wonder whether it's a wise policy choice to give the JP or the judges the right even after notice and an opportunity to object to just go anywhere in the Rules of Civil Procedure and say, "I read this rule last week and I thought it was a very good rule and it ought to apply all the time."

MR. TUCKER: And I understand that, and I guess my response would be that's generally what they have been doing for decades in small claims court because there are no explicit procedures laid out in small claims court, and it's explicit that TRCP and the Rules of Evidence don't apply to small claims.

PROFESSOR DORSANEO: And that's why you're doing what you did.

MR. TUCKER: Right. It's already kind of doing what they've been doing, deciding what's fair. This is just putting it to the paper so there's no dispute that it's okay or not for a judge to utilize one of those rules when necessary. It reflects what's been happening.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I question whether we need Rule 502. It makes the rule more complicated. It references other rules that people may or may not have easy access to. It seems to me like Rule 501 directs people to the part of the rule that they need for their case, and Rule 502 is sort of saying if the rules that we direct you to don't work, here's the gap filler, but that's what judges do all the time, and that's what justice court judges absolutely do all the time, so why are we putting in a rule about that? They have the statute that allows them to go elsewhere, but to inject what I think Judge Yelenosky aptly described as an element of arbitrariness into the rule itself doesn't make any sense.

CHAIRMAN BABCOCK: Yeah, I agree with that.

HONORABLE JANE BLAND: And it isn't easier to follow. It's hard to follow. It's hard for me with seven years of higher education to follow and a law degree, and I don't think most people looking at these rules are going to have law degrees.

CHAIRMAN BABCOCK: Yeah, not to mention a distinguished judicial career.

HONORABLE JANE BLAND: Well, I think that's under question.

CHAIRMAN BABCOCK: But what about the point that under the current rule, 523, which people have all grown up with for many years, it says that the civil procedure rules do apply unless they're inconsistent?

HONORABLE JANE BLAND: But we're supposed to be streamlining, simplifying, lessening, making easier rules --

CHAIRMAN BABCOCK: I know, but if we don't say --

HONORABLE JANE BLAND: -- and that means jettisoning rules. It doesn't mean making more rules and making more complicated rules. It means making fewer rules that are easier to follow in a no record court where we will not be able to enforce these rules. They will always be at the discretion of the presiding judge.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Maybe everyone else understood this, but I didn't originally focus on it, but the statute is prohibitory. It says what the rules may not do.

CHAIRMAN BABCOCK: Right.

HONORABLE STEPHEN YELENOSKY: And to the extent Bill Dorsaneo is correct, which he appears to be, that it's really written narrowly then it's a narrow prohibition, this is what we may not do. We may not

require that the discovery rules adopted under the Rules of Civil Procedure or the Rules of Evidence be applied and then it has an exception. As long as we don't require that those things be applied, we don't have to say anything, is my view of it. Three doesn't require us to say anything. It prohibits us from saying certain things.

CHAIRMAN BABCOCK: Okay. Any other comments on this -- yeah, Justice Peeples.

HONORABLE DAVID PEEPLES: I'm having trouble looking at these rules. They make a lot of sense to -- it make sense to simplify things for small claims, but I'm wondering if it makes the same amount of sense to simplify things in eviction cases, and I'm wondering if you-all think that all eviction cases are small claims because there are a lot of people that don't feel that way --

MR. TUCKER: Yes, sir.

HONORABLE DAVID PEEPLES: -- and I'm wondering, a related question, if -- there's a part of me that wants to focus on whether these changes will impact the speed that's essential in eviction cases, but we haven't talked about the assumption that eviction cases are small claims cases and ought to be treated the same way, and I don't know if this is the right place to talk about that, but we need to have that discussion at some point.

MR. TUCKER: I would be happy to address that if I can. Yeah, we talked about that, and I guess they're not technically small claims cases, but these -- the general rules are going to apply. We have separate rules that are specific to eviction cases regarding timeliness and things like that. When we looked at this and said do we want Rules of Procedure and Evidence in eviction cases, do we want the judge to be able to develop the facts of the case in eviction cases, the task force was very strong in favor of yes, and when I've talked to justices of the peace around the state they're strongly in favor of yes as well.

As Judge Casey mentioned, many times eviction suits are between pro se litigants who don't necessarily know how to follow the Rules of Procedure and Evidence, and so then you're in -- if we're going to apply them we're in the situation of the judge either just letting it go or people being blockaded and even worse when you have an attorney on one side and a pro se on the other, which can go either way. We can have a landlord represented and a pro se tenant or a pro se landlord and a tenant with a Legal Aid attorney or something like that. You really open it up to people being prohibited from presenting the merits of their case.

I gave an example earlier about landlord

trying to present their rent record, their rent payment record. Well, if the tenant has an attorney they can make them lay the predicate for that or it's never going to come in. Is that really what we want to do in eviction cases, or for a tenant to be able to bring in a record indicating they have paid, but they don't know how to lay the predicate, so we're not going to let them introduce that. We decided that's really not what we want to do, and actually the judge developing the case can increase the speed of eviction cases because the vast majority of eviction cases are pretty open and shut. It's the landlord alleges that the rent's not paid. "Tenant, have you paid the rent?"

"No."

"Do you have any legal reason why you haven't paid the rent?"

"No." Okay, here we go, and if you don't allow the judge to control that and develop that, you get it -- you do get it dragged out and then the tenant is going to tell you their life story of all the things they have had to pay and why they haven't paid, and it's all things that aren't relevant to the actual issue of the eviction suit itself.

HONORABLE RUSS CASEY: I handle an average of 10 to 30 eviction cases everyday. There were judges on

the committee that handle twice to three times that amount. No one on the committee wanted to do anything that was going to increase the time it takes to do an eviction case.

HONORABLE DAVID PEEPLES: The question there is if they're being handled well now, why change?

HONORABLE RUSS CASEY: We're trying to make the rules reflect how they're being handled now instead of us going outside of the rules.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Keep in mind there are about a thousand JPs?

MR. TUCKER: 840.

HONORABLE NATHAN HECHT: And they handle two million cases a year.

CHAIRMAN BABCOCK: Carl.

MR. TUCKER: And I would just concur with what Judge Casey said on that, and, you know, generally obviously you don't want to write rules that just reflect the current practice for no reason. That's not a way to go about it; but when current practice deviates from the rules because the current rules are inadequate to handle the procedure, which generally happens in eviction cases. Judges are frequently developing the facts of the cases in eviction cases and being lenient with the Rules of

Procedure and Evidence already, which is outside of what the current rules are; and again, when we think they're very quick, there's not a lot of time for legal preparation, a lot of pro se people, absolutely felt that eviction cases make sense as an informal proceeding based around a fair, just, and speedy resolution.

HONORABLE RUSS CASEY: And also the vast majority of eviction cases are for nonpayment of rent. This is someone who has not paid their rent. I think it would be unconscionable to say, "You need an attorney to help you figure out how you should handle your court case" when they can't even pay their rent. I think it is necessary to have very lax rules for eviction cases; and most judges do; and like I said, our practice is that we do handle these things very informally; and the average eviction case lasts me a whole two, three minutes. It's not long. "Did you pay the rent?"

"No."

"Okay, here's where we go from here," and I think it is necessary for the rules to reflect that because technically I'm really not supposed to --

MR. TUCKER: What happens in the meeting stays in the meeting.

HONORABLE RUSS CASEY: Yeah.

CHAIRMAN BABCOCK: Well, don't assume that

because we're on a public record.

Carl.

MR. HAMILTON: Are there any other, other than the eviction and repair to rental property, are there any other cases other than small claims cases as that's defined?

MR. TUCKER: Debt claim cases. Debt claim cases, which are cases brought by assignees of a claim, collection agencies or agents, or individuals or entities primarily engaged in lending money at interest.

HONORABLE RUSS CASEY: And we're considering those small claims but with additional rules.

MR. TUCKER: Right. I mean, these basic -- the basic set of rules are going to apply to all cases, and there are three separate types of cases that have specialty rules, which are evictions, repair and remedy, and debt claim.

CHAIRMAN BABCOCK: Okay. Justice Gaultney.

HONORABLE DAVID GAULTNEY: I'm having a little difficulty following this, but is it your anticipation that if a judge decides to follow a particular rule that he will provide advance notice of that?

MR. TUCKER: No, it's not going to be required. I think it's going to be on a case-by-case

basis. Again, frequently it's going to be fairly impractical. As the example I gave earlier, if we're having a jury trial and I want to introduce a piece of paper in my 5,000-dollar civil lawsuit showing that the defendant in this case has a previous sex crime on their record, okay, at that point I think it's appropriate for the judge to say, "Look, I'm going to follow Rule 403 and say this is prejudicial, and I'm not going to allow it to come in, and I'm not going to allow it to go in front of the jury," and if we're going to have to say we have to stop the proceedings and have a hearing at some point in the future and they have to have notice then that's going to be -- it's going to drag out the process.

HONORABLE RUSS CASEY: And can I remind you, everyone, that most of the time we are operating without pleadings. Both in small claims court and in justice court currently at this time pleadings shall be oral. We don't know about these things until we're there. So, you know, I know it's understandable that we want to, you know, try to safeguard against surprise. I don't think we have anything other than surprise on a daily basis.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, there is no advance in justice court. I mean, it's been years since I did it, but there is no advance in justice court.

Everything happens right then, even a jury trial. You get there, you pick your jury, you do the trial, so there isn't an advance, and if the question is do I tell the people, you know, 10 minutes before "I'm now going to apply this Rule of Evidence which I have the right to arbitrarily decide to apply" or I simply say as the justice of the peace, "I'm not going to admit that evidence because it's prejudicial." I don't need to refer -- if the rules don't apply, I don't need a rule in order to have the authority to decide what's going to be admitted, particularly if there's a jury, or if there's not a jury to decide how much weight I give.

MR. TUCKER: Right.

HONORABLE STEPHEN YELENOSKY: So to me, again, to call it click on, the rules are in effect and click off, they're not, creates exactly this notice problem, which goes away if you don't talk about clicking the rules on or off. You just say the judge is not constrained by those rules and obviously judge has to make decisions consistent with the Constitution and the statutes, and as long as that's done you don't need to refer to the rules.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Well, I understand that, but first of all, I thought we were

dealing with Rule 502, which is the discovery rule, and I think the evidentiary rule comes later, but we can consider them together because if I'm told that there are no Rules of Evidence going into a proceeding, why am I not justified in thinking anything I bring into the court is admissible? I mean, why is it that the judge can exclude some things and not others if there are no Rules of Evidence? So if I'm going to trial, I'm thinking that everything I'm bringing in is going to be presented to the judge and he can consider it or give it whatever weight that he wants; but if we're going to say that you come in with that anticipation, these rules don't apply, but then suddenly in the middle of trial I'm going to say, "Well, no, this specific rule does apply," you know, I just think it's a notice issue.

I think it's something -- and maybe there is no such thing as advance notice in these quick trials, but there ought to be some process by which you know going into trial what -- what is going to happen, either everything is admissible or we're going to go with -- one possible way of reading the statute is that instead of saying you can pick and choose what rules you want to apply on particular cases, that if the rules should be applied to a particular proceeding. So it says -- it uses rules, plural, that the rules must be followed to ensure

that the proceeding is fair. So one way to read the statute is that if you would determine in a particular case that the Rules of Evidence or Procedure need to be followed in a particular case and let the parties know.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: My esteemed colleagues over there have now convinced me without trying to that we probably don't need Rule 502. I was speaking before about Rule 504, but Rule 502, if it really does just deal with the Rules of Civil Procedure, we -- you incorporated a full set of rules, and so you're going to have other problems when there's conflicts between the Texas Rules of Civil Procedure. You have different time lines, you -- and I think you'll create a problem with adopting Rule 502 more than you would alleviate any issues.

Rule 504, I do think there's fairness issues that can be dealt with within the system, and I don't know if you want to talk about them together. I think I was talking about 504 before when I was addressing the issue of the Rules of Evidence, and even when he had a question or someone had asked him a question regarding 502 and when would it be applied, his response had to do with a Rule of Evidence, not with a Rule of Civil Procedure because I can't think of -- and maybe someone else can think of a

Rule of Civil Procedure that actually would come in that isn't already addressed by these rules that --

MR. TUCKER: Interpreter one was one.

CHAIRMAN BABCOCK: Yeah, Rule 183, but --

HONORABLE ANA ESTEVEZ: Well, there's a statute on the interpreter, so you don't even need that. I mean, there is an actual full statute that says that we have to have -- at least in the district courts. I don't know what it says for JPs. You have to have a certified interpreter, so, you know, you can deal with that as a separate rule and not have this Rule 502, and you can decide what you want to do for interpreters. I think it would be very expensive if you require a certified interpreter for every case that the statute requires in our district courts. We have to have certified interpreters if it's in Spanish no matter how far away they are, and then there's different rules regarding if you have some other language that you don't have within 150 miles. There's different rules regarding the interpreters, but you can make a specific interpreter rule.

MR. TUCKER: Yeah, I'm sorry, and just I agree with Judge Yelenosky's argument from an academic perspective absolutely. I think the problems that come up

are on the practical side. I agree totally academically that's exactly right. Practically, though, like I said with the issue of commissioners paying for interpreters, if you can't show them "This is where I have the authority to order it and you have to pay for it," our judges have battles all the time with commissioners not wanting to pay for things and, again, with complaints being filed with the commission because, well, the judge did this and there's no authority for them to do this. This precludes a lot of that, and you know, and I understand that that's not the whole reason why we're writing the rules, but I think to -- I know, I do agree with that, but as far as -- and also giving guidance to judges who are laypeople because I promise you if you leave it silent there are going to be a lot of judges that go, "Well, it doesn't say anything, so what am I supposed to do where something comes up and it doesn't say anything?"

HONORABLE STEPHEN YELENOSKY: That's where your training comes in.

MR. TUCKER: I know.

CHAIRMAN BABCOCK: Justice Christopher, did you have your hand up earlier?

HONORABLE TRACY CHRISTOPHER: Well, I was going to say that in small claims court right now you don't have the Rules of Evidence, but you also don't have

this idea that -- you don't have a rule that says a judge can follow a Rule of Evidence if they want to, but you're doing that already. So -- and it seems to be working, so why do we have to put it in a rule that -- you know, and create this uncertainty and cause Justice Gaultney heartburn.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I understand that -- I see an overarching concern about the fact that justice courts are -- you know, because they deal with such a high volume and so many people they're often the subject of complaints, but we can't write rules to handle that. I mean, ultimately that's got to be a totally separate issue of training, of reasonableness, of all these things. We cannot -- we can't write rules to address that issue. We're supposed to be writing rules for the litigants so that the litigants can easily figure out what they need to do when they appear in a justice court, and I don't think that writing a rule to avoid a potentially frivolous complaint is -- I mean, you're still going to get the complaint. People lose their case.

MR. TUCKER: Sure.

HONORABLE JANE BLAND: They get upset. We cannot write a rule that will stop that and even if the judge did everything exactly right, so I don't like that

idea, and I think that's where we're going with this rule, and it's just -- it doesn't help, and it doesn't help anybody because a party can't read that and say, "Oh, I know what I need to do when I go into justice court."

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: Yeah, taking -- I think Justice Bland was right back a while ago that we don't need 502. 523 is going to be gone, and it's gone, and you have discovery rules in these rules. Really 502 is kind of a junior modernized version of Rule 523. Huh? But if the 523 approach is a bad approach, you ought to have your own rules, then be consistent and have your own rules. You say, well, we're going to leave something out.

MR. TUCKER: Right.

PROFESSOR DORSANEO: Okay. Well, I don't know if the 523 approach is the best way to deal with that problem or just let it be dealt with as the justice sees fit.

MR. TUCKER: Right, and I -- and I guess my last response on that would be if we don't -- if we say -- if the rules are silent, right now the 502 says let's look to these other rules as a guideline. If we take that out then we're saying do whatever you want, and I think that's going to be even less predictable than having them rely on these additional rules where there's a problem, but --

CHAIRMAN BABCOCK: Well, I -- yeah, Roger.

MR. HUGHES: Well, I realize this may seem very arbitrary, but I'm -- I guess I kind of like this, the Rule 502, because, first, I think one of the chief functions of the rule ought to be to tell people what the court is really doing; that is, this is how we do things, this is how we're actually doing it; and if this rule arises out of what the courts are actually doing now it's helpful that people know that going in; and then the second thing about the apparent criticism the judges are kind of doing this on the fly, in practice how is that any different from the abuse of discretion test for all rulings on evidence and procedure anyway? I mean, if it seems to me that whether a judge has unfairly applied a Rule of Evidence is subject to the question of did the judge abuse the discretion, well, it seems to me then it's just -- it seems that we have a system in which it's very much like Rule 502 and 504 to begin with, only they're saying the judge chooses to apply the rule that seems just under the circumstances, and in the other courts we say, well, that's the rule, but it's subject to the abuse of discretion, so I --

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, it may get to semantics, but I think it's important semantics

here. If a judge says, "I am not going to allow that before the jury because it's prejudicial" and a judge does that because it makes sense, it's common sense, it's consistent with due process and the Constitution, people know it going into court, expect the judge to do things with common sense, consistent with the Constitution; but it's different if the judge says, "I think it would be fairer to now apply the Rule of Evidence, whether or not it's consistent with fairness here in this particular instance, but I'm going to apply a Rule of Evidence that says I don't allow things that are in -- in that are prejudicial," it suggests that the judge is constrained. A rule suggests the judge is constrained in some way. "I cannot admit that evidence," and it's misleading to tell people that the judge will apply the Rules of Evidence as consistent with fairness when what you're really just saying is the judge will do some things that mirror the Rules of Evidence or perhaps mirror the Rules of Civil Procedure because they're merited in their own right, not because they're rules.

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

MR. STORIE: I did. I'm going to follow-up I think on Roger's comments. I think the goal of this is clearly transparency, and so I would at least say that the

judge should give the parties the reasons for applying or not applying the rule, and maybe also that the parties could request application of a rule, you know, leaving aside the timing of doing that.

CHAIRMAN BABCOCK: Yeah. Okay. Well, should we -- yeah, Justice Gray, then Carl.

HONORABLE TOM GRAY: I don't understand the last sentence in 502 if it's not to give somebody notice of something.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: And it seems to me that it looks like -- or at least the way I would read that at least as a layperson was that whatever rules I'm going to be subject to when I go in the door I can go somewhere during business hours and get them.

CHAIRMAN BABCOCK: Right. Carl.

MR. HAMILTON: As I understand this, if the judge applies a Rule of Evidence and he's wrong that can go up on appeal and be reversed.

HONORABLE RUSS CASEY: We're not a court of record.

MR. HAMILTON: Huh?

HONORABLE RUSS CASEY: We're not a court of record. It's a trial de novo. It's a trial de novo.

MR. HAMILTON: Well, there are appeals,

though, from JP court.

HONORABLE RUSS CASEY: An appeal is a trial de novo.

MR. ORSINGER: It just wipes it all out.

MR. HAMILTON: Okay.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: That last sentence in the section about putting the Rules of Civil Procedure, you probably ought to add "and evidence" if you're trying to get full disclosure, but I would question in this day and age whether we really want people down there reading the Rules of Procedure and Evidence in these justice courts, and that maybe it would be better for OCA or the Supreme Court or somebody to put these rules up on the internet and then just provide that there will be an instruction sheet or something that tells people where they can go on the internet to see a copy of the Rules of Procedure and Evidence because that's really what they're going to do. They're not going to go study this for five days.

MR. TUCKER: And if I can respond to that, we put in the -- in, for example, in the language that has to be on the citation that we will have a website where the rules are posted, and that web address needs to be on the citation, but what also has to be taken into account is there are a lot of litigants in JP courts, especially

in rural areas, that don't have access to the internet or don't know how to use the internet, and so --

MR. ORSINGER: I'm shocked. They don't have iPads?

MR. TUCKER: Right, yeah. Loving County, no iPads.

HONORABLE RUSS CASEY: Loving County has eighty people.

MR. TUCKER: And so we thought that there needed to be -- to allow those people to have access there needs to be a copy of the rules at the court rather than only online because that's going to block a lot of people from access to those rules.

MR. WOOD: If I could speak for a minute, Ted Wood for the task force. The whole point here, what we were trying to do, was let the pro se litigants find the rules that would apply to the case in one place. We didn't want them to have to go back to other Rules of Civil Procedure, everything leading up to 500, and that's why the default here is that those rules don't apply, and speaking for the committee, I think we very strongly feel there should be a Rule 502. If you go back to Rule 2 of the Rules of Civil Procedure and talk about the scope of the rules, all the Rules of Civil Procedure, it says that they apply in justice courts as well as district court and

county courts, so we're changing that with 502 and saying they don't apply unless the judge says they do. That's where we're coming from, and that's why we have the last sentence, is so that people can get the rules all in one place and are not forced to be like trained lawyers and go back to the rules prior to the 500 series.

HONORABLE STEPHEN YELENOSKY: But that would be you would stop then with saying that they don't apply. You would leave out the "except." That's what we're arguing for, leave out the "except."

PROFESSOR DORSANEO: Well, and you can't use Rule -- Rule 2 is in the general rules for all of the rules, okay, but that doesn't mean that part II of the rules automatically applies or selectively applies in the JP court system. I mean, we have introductory rules that apply to all the rules and then we have introductory rules in the district and county court rules with -- I think your use of Rule 2 to say anything goes that -- in terms of the rules of -- for district and county level courts, you know, without Rule 523, I think you have to get to those rules through 523, not through Rule 2. Okay. You can't get back to the district and county court rules for JP courts through Rule 2. Rule 2 is introductory to all the rules.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: 523, 523 gets you back to part II, rules for district and county level courts.

CHAIRMAN BABCOCK: But that's Ted's argument. I mean, that's what he says.

PROFESSOR DORSANEO: Well, but we're taking -- the 523 approach is gone.

CHAIRMAN BABCOCK: I know, but he says that's why you need 502, because otherwise Rule 2 is going to make applicable all these rules.

PROFESSOR DORSANEO: No, I don't think that's a fair reading of the rule.

CHAIRMAN BABCOCK: It says, "These rules shall govern the procedure in the justice courts of the State of Texas."

PROFESSOR DORSANEO: Yes, "these rules," the ones that apply to the justice courts will apply to the justice courts.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: Right?

CHAIRMAN BABCOCK: Lamont.

PROFESSOR DORSANEO: Which are in these rules.

CHAIRMAN BABCOCK: Got it. Lamont.

MR. JEFFERSON: Just real quickly on 502, I don't see how you can possibly incorporate the Rules of

Civil Procedure and the Rules of Evidence in a way that laypeople can apply them and be consistent with the mandate in the statute that says the statute should be -- or the rules should be -- the rules should be enacted in a way that a person without legal training can understand and apply them. I mean, just look at the rules that we debate on this committee, all the cases that interpret those rules, all the Rules of Evidence. There's just -- I don't see a way that you can incorporate those rules and give litigants the -- give litigants any comfort that they can rely upon those rules in an expedited procedure like this, a simplified and expedited procedure.

CHAIRMAN BABCOCK: Good point. I think maybe we should require everybody in this country to go to law school. That would work.

Let's take a vote.

PROFESSOR DORSANEO: I know some people would be in favor of that.

HONORABLE STEPHEN YELENOSKY: That's not the dream act. That's the nightmare act.

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: Yeah, I have one question, and it might have been answered, but as I read this it says, "Any other rule of the Texas Rules of Civil Procedure." Nowhere in here does it address Rule of Evidence; is that

correct?

MR. TUCKER: The complementary provision for the Rules of Evidence is in Rule 504, which says, "The Texas Rules of Evidence do not apply to justice courts except to the extent the judge hearing the case determines that a particular rule must be followed to ensure that those proceedings are fair to all parties."

MR. LOW: I know, but Rule 502 does not refer to anything other than the Rules of Procedure.

MR. TUCKER: That's right.

HONORABLE RUSS CASEY: That's right.

CHAIRMAN BABCOCK: Let's take a vote. How many are in favor of Rule 502 as written? Everybody that is, raise your hand. Overwhelming, one, two. Everybody opposed to it as written?

Okay. Two in favor, 20 or so opposed, the Chair not voting. So what could we do to this rule that would satisfy the 20 people that don't like it as written?

HONORABLE STEPHEN YELENOSKY: A period after "justice courts."

CHAIRMAN BABCOCK: What's that?

HONORABLE STEPHEN YELENOSKY: Put a period after "justice courts."

MR. ORSINGER: I'd say that goes too far, though, because that would actually negate the application

of rules that you may need such as an interpreter rule.

CHAIRMAN BABCOCK: So how would you fix it, Richard?

MR. ORSINGER: I would prefer to have a general hortatory statement at the beginning that these proceedings should be conducted in a way to allow the cases to be decided on the merits with competent evidence or something like that and just have a big philosophical statement and then just back away and just let them do justice. That's --

CHAIRMAN BABCOCK: But on the issue of -- which 502 addresses, of whether the other Rules of Civil Procedure apply or not, what would you say?

MR. ORSINGER: Why do you have to take a position on that? I mean, is it necessary to say that they do or don't?

CHAIRMAN BABCOCK: Well, Rule 523 takes a position. Rule 2 takes a position.

MR. ORSINGER: Those are rules that are not going to be in effect anymore, right?

CHAIRMAN BABCOCK: 2 is.

HONORABLE RUSS CASEY: 02 is a reflection of how we changed 523.

MR. ORSINGER: Gosh, I don't know. I don't know how to fix these. I think these are legitimate

problems. The truth is, is that is we're dispensing quick justice in a court that doesn't have any appellate review.

CHAIRMAN BABCOCK: Okay. I've heard one proposal. Judge Yelenosky says put a period after "courts."

HONORABLE STEPHEN YELENOSKY: They have a better proposal.

CHAIRMAN BABCOCK: Justice Bland has a better proposal.

HONORABLE JANE BLAND: Well, I just would put a period after "procedure" and put it with the evidence rule. So "Application of rules."

CHAIRMAN BABCOCK: Okay. After --

HONORABLE JANE BLAND: Yeah, apply -- you know, "conduct in accordance with the rules in Rule 501."

CHAIRMAN BABCOCK: Right.

HONORABLE JANE BLAND: Period. And then, you know, just collapse 502 and 504 together and then just say, "The Texas Rules of Evidence do not apply." We haven't gotten to that discussion yet, but then we're not making any -- we're not signaling any approval or disapproval of proceedings conducted similarly or in alignment with the Rules of Civil Procedure that also are merited by --

HONORABLE STEPHEN YELENOSKY: Their own

merits.

HONORABLE JANE BLAND: The exposition of the evidence or --

CHAIRMAN BABCOCK: Okay. So if I understand your proposal, "Civil cases in the justice court shall be conducted in accordance with the rules listed in Rule 501."

HONORABLE JANE BLAND: Just so -- you know, section, Chapter V, whatever, you know, Roman numeral Part V, Rules of Practice in Justice Courts.

PROFESSOR DORSANEO: Yeah.

HONORABLE JANE BLAND: Assuming that captures all the justice rules that we're going to be working on.

CHAIRMAN BABCOCK: Okay. Would you leave the last sentence in about how applicable rules are available?

PROFESSOR DORSANEO: No.

HONORABLE STEPHEN YELENOSKY: No.

CHAIRMAN BABCOCK: No, take it out. Okay. Justice Christopher and then Judge Wallace.

HONORABLE TRACY CHRISTOPHER: I have a suggestion on the Rules of Evidence, although we haven't voted on that. I would say, "The Texas Rules of Evidence do not apply to justice courts. The judge will review

your evidence and decide what will be considered by the judge or jury." Because that's what the judge does.

CHAIRMAN BABCOCK: Yeah. Judge Wallace.

HONORABLE R. H. WALLACE: Well, I was just going to ask if we made those changes and just say that the Rules of Evidence and the Rules of Procedure do not apply, that would sort of bring it in line from what I'm hearing with the small claims rules, but it would be a big change from the current justice rules, and I'd like to hear from some of the people who have more experience than I do as to, you know, how would that impact the way cases that are being conducted under the Rules of Evidence and Procedure now. Is that a good change or bad change?

CHAIRMAN BABCOCK: Yep. Anybody want to speak up?

HONORABLE R. H. WALLACE: Because I don't know.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: No, I was going to change the subject real quick and just apologize to the committee. On my last comment on interpreters, I do criminal and civil and family law, and it is mandatory in criminal law for the interpreters and so when I was talking about the mandatory interpreters in the statute, that was in the criminal -- criminal statutes, and so I

apologize to the committee for any confusion, that's all.

CHAIRMAN BABCOCK: Not a problem. Richard Munzinger.

MR. MUNZINGER: The change that's being suggested, let's assume for a moment that the Court adopts the rule that says the Rules of Civil Procedure do not apply in justice courts nor do the Rules of Evidence, so now it's the rule, and a case comes before a justice court. Does the justice of the peace have the authority to allow some discovery within the justice of the peace's discretion? The rules are now silent. Heretofore our rules have said that they're governed by the Rules of Civil Procedure so that discovery has been built into those rules, whether there is the practice or there is not the practice of discovery. Do you want to say something to the effect in this rule, "A justice of the peace may allow such discovery as the justice believes required to serve the ends of justice"?

CHAIRMAN BABCOCK: Don't we get to that in 507?

HONORABLE RUSS CASEY: We get to that in 507.

CHAIRMAN BABCOCK: Yeah.

MR. MUNZINGER: That's in 507 now?

MR. TUCKER: Yes, sir. No, in the new.

HONORABLE RUSS CASEY: In the new, in the proposed rules it is currently proposed 507.

HONORABLE STEPHEN YELENOSKY: They have a special discovery rule for justice courts.

CHAIRMAN BABCOCK: Yeah. Yeah, Professor Dorsaneo.

PROFESSOR DORSANEO: For me the statute -- are there discovery rules in these first parts?

MR. TUCKER: In the proposed rules?

PROFESSOR DORSANEO: Yeah.

MR. TUCKER: Yes, sir. 507 and 507.1.

PROFESSOR DORSANEO: Okay. That's what I thought. They are just different discovery rules.

MR. TUCKER: That's right. But bring it in line with the current small claims discovery process, which is --

CHAIRMAN BABCOCK: Let's not get off on discovery --

MR. TUCKER: I'm sorry.

CHAIRMAN BABCOCK: -- just yet until we solve this problem of 502 and 504.

MR. TUCKER: One other note, and I don't know if this would be a problem or not on 502 if we make it explicit the other rules don't apply. There are rules such as service by publication where -- in these proposed

rules where we say, "The rules governing district and county court rules" -- "district and county courts would govern this process." They are generally things that are complicated and rare. I don't think that that would create a problem, but I just wanted to put that also on the table. If we make the -- it may cause conflict if we explicitly say these rules never apply and then other times say they sometimes apply.

PROFESSOR DORSANEO: Chip, let me say one thing.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: So you made the decision not to -- pursuant to the statute, which is the only decision you could make, not to apply the regular discovery rules for district and county level courts, and the solution to that was to make your own discovery rules for justice courts and to put them in this packet. Okay. But in other circumstances, like with respect to the Rules of Evidence, you haven't done it like that. Okay. With respect to the Rules of Evidence you didn't work that hard to make your own Rules of Evidence and put them in here. Okay. You said, "If we need to use those others rules that we're not supposed to use, we use them," okay, under the quoted statutory language. Now, that may just be a drafting issue, but you get my point. I mean, it seems

not -- Judge Christopher's point about saying the judge is going to rule, okay, whether evidence is admissible or inadmissible, maybe that could be more detailed, but that's like the judge is going to use the Rules of Evidence that the judge is going to use, not the Texas Rules of Evidence. Okay. Now, that's just like we're going to use the discovery rules here rather than the discovery rules in the beginning part of the book, so maybe it is just a drafting problem.

MR. TUCKER: Again, I would say that the reason why we did it that way is because there are specific rules of discovery in small claims cases right now, and so we took the legislative intent to make that process the same, where the judge has full control over the discovery process, and so we just wanted to make that clear in the rules that the judge has control over that process. As far as evidence, we put that language in there, again, that tracks the statute. That's why that was put in there.

CHAIRMAN BABCOCK: Okay. Let's take another vote, but let's vote on the proposal that was floated by Judges Yelenosky, Bland, and Christopher up there in the right-hand corner of the state here. Could you read the language that you-all -- it was "Civil cases in the justice courts shall be conducted in accordance with the

rules listed in Roman numeral V," or I lost you there.

HONORABLE JANE BLAND: Part V.

HONORABLE STEPHEN YELENOSKY: Part V.

CHAIRMAN BABCOCK: Okay. Of the --

HONORABLE JANE BLAND: "Of the Texas Rules of Civil Procedure," period. "The Texas Rules of Evidence do not apply to justice courts."

HONORABLE TRACY CHRISTOPHER: "The judge will review your evidence and decide what will be considered by the judge or jury."

CHAIRMAN BABCOCK: Okay. Everybody that likes that, raise your hands.

MS. GREER: Can I have a question?

CHAIRMAN BABCOCK: Not while I'm counting. Everybody opposed? 24 to nothing in favor of that proposal, with a question.

MS. GREER: With a qualified vote. Does that address your concern about there being a hook in the rules so that the county commissioners will have to pay for it or does --

MR. TUCKER: Probably not, but that will -- I mean, you know, that's just one of those things. I would say to possibly avoid that conflict, I don't know if -- how would you think about putting at the start "except where other" -- "except where otherwise specifically

provided by law or these rules civil cases in a justice court shall be conducted in accordance with rules listed in Rule 501"?

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Unnecessary. If the rule itself refers to somewhere else, a statute or rule or somewhere else, it's within the rules.

HONORABLE STEPHEN YELENOSKY: But good try.

MR. TUCKER: Thank you. I'll accept all the E's for efforts that I can get.

CHAIRMAN BABCOCK: Bronson and Judge Casey, you should know that this committee has a long history of the fact that we voted a particular way is not binding on the Supreme Court, and it is frequently disregarded, so --

MR. TUCKER: Yeah, and I would just also -- I really -- I like the evidence language. I think that's --

HONORABLE RUSS CASEY: I like the language you proposed. I'm not with him on this one.

MR. TUCKER: I stand alone.

HONORABLE RUSS CASEY: I like to keep it very simple and just pure this is what you've got without any kind of really a whole lot of leeway on that, because -- and we've had the introduction of television

court shows that have given people an idea of what they think small claims court is, and, you know, they get -- really they do, they get past the entertainment value and they see it as a place where you can just go and tell your story, and I think that your language reflects that very well.

MR. GILSTRAP: Judge Judy without the browbeating.

HONORABLE RUSS CASEY: Exactly, no commercials.

CHAIRMAN BABCOCK: Buddy has got a question.

MR. LOW: I had one question. Did the committee consider that the Legislature had restrained them to some extent on evidence, where it says that "The judge shall hear the testimony of the parties and the witnesses that the parties produce," like they've got to hear everything you produce, "and shall consider other evidence offered." So does that -- was there any thought that maybe the Legislature says the judge has got to consider? He might not give weight to, but he's got to consider everything they offer, everything the witness says, as restraining what Rules of Evidence he can follow in regard to admissibility?

MR. TUCKER: No would be the short answer. We didn't take that as overly restrictive, and I think if

we held that to a strict ruling and say you have to let a party put on any evidence or witnesses that they desire, you're going to end up with huge, long proceedings because again, these people are pro se. A lot of it these people are in court because they just want to tell somebody else what a jerk that guy is, and they're going to go on and on and on, and so, no, I don't think any -- I don't think we want to impede the judge's ability to say, "That's it."

MR. LOW: Well, I'm not -- I'm not for that.

MR. TUCKER: Right, no.

MR. LOW: I'm just saying their language is pretty clear and was that considered.

HONORABLE RUSS CASEY: In my opinion her language addresses that easily. We are addressing if you want to offer, the judge is considering it. I think that's good.

MR. TUCKER: Yeah.

MR. LOW: All right. That's it.

CHAIRMAN BABCOCK: I think that's right. I think that's an elegant solution to this. Let's go to Rule 505 and talk about that until we're hungry.

MR. ORSINGER: We're skipping Rule 503?

CHAIRMAN BABCOCK: For the moment.

MR. ORSINGER: Are we going to come back to it?

CHAIRMAN BABCOCK: Yes.

MR. LOW: After you're gone.

CHAIRMAN BABCOCK: Thank you, Buddy. You should know that Buddy Low is the vice-chair of this committee and wields considerable power.

MR. TUCKER: We already talked about counting words. We don't have to talk about counting days.

CHAIRMAN BABCOCK: 505, it looks to me is taken directly out of the statute, but Bill Dorsaneo has some --

PROFESSOR DORSANEO: I noticed that, too, that it comes directly out of the statute, and it's a safe thing to copy things right out of the statute, but is that really what it should say? What's the point of the statute? Does this kind of change the role of a trial judge in a JP court from the role played by trial judges in, you know, county level courts and district level courts --

HONORABLE RUSS CASEY: This mirrors the --

PROFESSOR DORSANEO: -- and if it does, how much does it change?

HONORABLE RUSS CASEY: This mirrors the role of a justice in a small claims case.

MR. TUCKER: Right. This is exactly what

the law is right now for small claims court.

HONORABLE RUSS CASEY: Almost word for word from Chapter 28 of the Government Code.

MR. TUCKER: Right. So when we merged the courts together we said this is the way they want that marriage to happen.

PROFESSOR DORSANEO: Does it mean that the judge is supposed to -- if the judge sees that one of the parties is not presenting the case properly --

MR. TUCKER: Yes.

PROFESSOR DORSANEO: -- is to step in and help?

MR. TUCKER: Yes.

HONORABLE RUSS CASEY: Sometimes, like "Do you have a copy of your canceled check," is not an uncommon question, but it is not meant for the judge to cross-examine witnesses or to act as an advocate.

PROFESSOR DORSANEO: Well, now you're elaborating on it and you're telling me more about it, but you tell me that those words are good enough because you know what they mean.

HONORABLE RUSS CASEY: They've been working for 50 years.

CHAIRMAN BABCOCK: The statute says, "The judge shall develop," and you've changed that to say, "The

judge may develop."

HONORABLE RUSS CASEY: Yeah.

CHAIRMAN BABCOCK: Okay. We're cool with that?

HONORABLE RUSS CASEY: Yeah, we kind of went on a wing there.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: Well, I was going to point that out, and not only it says that "shall," but it says the rules must provide that, but secondly, we have expanded what the judge is doing in developing the facts when we say "may summon any person." The rule or the statute only says "may summon any party." So we've expanded the judge's role in developing the facts to allow the judge to summon any person, and I thought that might be a little troubling.

HONORABLE STEPHEN YELENOSKY: You read "party" as "litigant"?

HONORABLE HARVEY BROWN: Yes.

CHAIRMAN BABCOCK: Sure. That's a big difference, frankly. Lisa Hobbs.

MS. HOBBS: I was just going to point out that the statute did have "shall," but if you want to, if you're purposely picking "may" then I might change the word "duty" to "authority," but either you say "duty of

the judge," and you keep the "shall," or you say "authority of the judge" and you keep the "may," but as it's written I think it's inconsistent.

CHAIRMAN BABCOCK: Justice Christopher, then Richard.

HONORABLE TRACY CHRISTOPHER: In a lot of the comments that we've gotten there are a lot of people that don't like this rule because they want to have separate rules for what were traditionally small claims cases versus all the other cases that were traditionally filed in JP court, and we sort of talked about that a little bit at the beginning, but I know that that's something that we're going to hear from them in the afternoon, and that we haven't really, you know, fleshed out. Are we going to have separate rules for small claims, or are we going to have one set of rules for all the cases with some special rules for eviction and credit card debt? So I don't know if you ever want to get to that point, but I mean, that kind of impacts how you're voting on the rest of these issues.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I wanted to raise the issue on Rule 505 and 506 about the production of documents. If the Court has the power to sua sponte issue subpoenas to persons to come, I think we ought to make it clear that

they can also require the production of documents, which would require that the concept of bringing documents to court be included in several places in those rules, but I can't imagine why we wouldn't want a JP to have the authority to summon records, if they can make people come testify.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo.

PROFESSOR DORSANEO: This is the same kind of technical point that I'm making that maybe I'll ask it this way. These are the words that worked for years. Could you say them better to more accurately express what it is that should be done?

HONORABLE RUSS CASEY: Always. Always. And I think that reflective of that is why we have a permanent committee for this exact purpose. I think there's always better words, but --

PROFESSOR DORSANEO: So you --

HONORABLE RUSS CASEY: -- we married the language there is what we --

PROFESSOR DORSANEO: You could write it better but you won't.

HONORABLE RUSS CASEY: No.

CHAIRMAN BABCOCK: No, that's our job.

HONORABLE RUSS CASEY: I don't know if we --

well --

PROFESSOR DORSANEO: They're in a better position to do it.

HONORABLE RUSS CASEY: I don't think we tried to write it better. I'll put it that way. How about that?

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I just want to join the point I think Lisa made. I really don't like the word "duty" in the title. I mean, I can see someone coming out of court thinking that "Well, that judge didn't represent me adequately." I mean, it kind of throws the whole concept of the role of the judge -- I realize that the Small Claims Act provides for the development of the case. I like the fact that we're using the word "may." I would just urge we get away from the concept of the judge having a duty to develop the case.

CHAIRMAN BABCOCK: What word would you substitute?

HONORABLE DAVID GAULTNEY: I think you could simply say "development of the case."

HONORABLE ANA ESTEVEZ: She had "authority," she just said a few minutes ago.

HONORABLE DAVID GAULTNEY: I would take out "duty of the judge."

CHAIRMAN BABCOCK: Okay.

HONORABLE STEPHEN YELENOSKY: And how are we being consistent with the statute?

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: That's the exact -- David, that's the exact issue. I mean, because as I understand it, in the Brazilian court system there is a basic rule like Rule 505 where the judge is supposed to make certain, regardless of what the lawyers or the parties do, that justice is done and that the case is decided properly under the law and the facts. Okay. And their system is designed to work like that, and it creates huge problems for them because it doesn't operate as efficiently as it might, okay, if the judge said, "Well, what about such and so." Huh? I think that that's an important matter to consider. And this is -- which way are we going to do it and how much in which direction is the issue to me, and I don't see how you can say that "shall" from the statute means "may." Sometimes "shall" means "may," but I think the idea of the statute fairly read is that this is what the judge is supposed to do, you know, not if she feels like it.

MR. TUCKER: And the discussion we had on why we wanted to go to "may" versus a "shall" is I think the default position is going to be the judge should be

the one developing the facts of the case. Like I said, the overarching thing that should be happening here is the judge should determine what happens and render a judgment that is fair and equitable. There are going to be situations where you have represented parties taking each other on, and in those situations they may be much more comfortable with the judge not interfering with how they are trying to develop their case, and so we didn't want to create a conflict where it says, well, that the judge is going to get involved in your case. So that was kind of the thought process of allowing the judge to back off and allow a represented party to maintain their trial strategy without, like you said, stepping in and intervening.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: Yeah, I can understand that. I would suggest something like "shall, if necessary," because if the statute says "shall" it seems to me it should be "shall." I mean, the idea is to give justice to people who may not be able to acquire it on their own. They're going to need some help, and that's what the statute is doing.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: I was going to suggest the same thing.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, that's a great policy argument, and it might have swayed the Legislature, but apparently it didn't or it wasn't made, and a lot of my job is interpreting statutes. I don't see how you interpret this statute to mean anything but the judge does have a duty and should say "shall," and we should just repeat what the statute says, and it's the Legislature's fault.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: What about the implicit obligation? In other words, "To develop the facts of the case, the judge may question a witness or party." Because the Legislature says "may question a witness," "may summon any person," and do these other things. It's all "may," so why don't we just say, "To develop the facts of the case, the judge may question"?

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, and I'd like to put in here somewhere "Bring your witnesses and your documents to trial. The judge may ask them questions." Just to be clear as to what's going on.

MR. TUCKER: I think we definitely like the -- I would say the "shall, if necessary" language may address both of those issues, and I think that's a good point as well.

CHAIRMAN BABCOCK: Judge Wallace, did you have your hand up as well?

HONORABLE R. H. WALLACE: Well, no, but it seems to me that the statute says, "The Supreme Court must provide that the judge shall develop the facts of the case." So, I mean, to me "shall" is "shall" and that's what we've got to do.

HONORABLE DAVID PEEPLES: The more I listen to this discussion I think what the Legislature is saying here is the judge has a duty to take charge in this hearing, not to sit back and say, "What are you here for," but to be proactive, and something like this happens a lot in nonjury family law cases. If you've got a big docket, you just cannot afford to just passively sit there and say, "Tell me what you're here for." You take the lead and start asking questions, and I think that -- I think that's what the Legislature is saying here, we want judges to do that, and we want to tell them they're supposed to do that, so "shall" --

HONORABLE RUSS CASEY: I would totally agree with that.

HONORABLE DAVID PEEPLES: -- you don't need the qualifier, "if necessary."

CHAIRMAN BABCOCK: Yeah. I wish we had a video record to show your little huddle. That was good.

MR. TUCKER: I think there's a strong argument that if the party has already developed the facts of the case the facts are developed, and so the judge, you know, that's not putting a -- you know, the "may" language on the specific actions indicates that your job as the judge is to make sure all the facts have come out, and if the parties didn't do that, you need to do that.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I would just be careful of expanding the duty of the judge. I do agree you should just follow the language, but the language does not include from the Legislature that the judge has to also subpoena other witnesses, and I think that puts a bigger burden on the judge than is necessary. I think you should be able to do it with a party, but if there are other witnesses I don't know that they should have that big of a duty.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: But the Legislature shows that they do know what the word "may" is because they used it twice and "shall," so they know a difference.

CHAIRMAN BABCOCK: Yeah. Professor Dorsaneo.

PROFESSOR DORSANEO: I think the more important words in this are not all of these "may" things

in between, but the idea of a correct judgment. I mean, that's the responsibility, and I read that to be correct judgment under the law and the facts, okay, without regard to what anybody did in the presentation of the case.

MR. TUCKER: Right.

PROFESSOR DORSANEO: The judge has an independent responsibility to make sure that there's a correct judgment, and that seems to be the principle thing, and these other things are just descriptions of how you might go about it.

MR. TUCKER: The most common example would be in small claims court I prove that the other party breached their contract, but I don't put on any evidence of what my actual damages are. The judge would have a duty to inquire into what my damages were; whereas in justice court right now, they would render you a judgment for zero because you failed to meet your burden of proof on damages. So I agree that this would now place that burden on the judge to -- if the party fails to introduce that evidence to develop those facts.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I would think the better way to say it would be along the lines of "The judge shall ensure that the facts of the case are sufficiently developed." I don't want to say that the judge has to

take control and cut the parties out, but I don't think that the Court -- I don't think the judge should be prohibited from allowing the parties to develop their case, so why not just say, "The judge's responsibility to ensure that the facts are fully developed" or "sufficiently developed"?

CHAIRMAN BABCOCK: Richard Munzinger, did you have your hand up? No?

MR. MUNZINGER: I agree with most everything that's been said. If the Legislature says, "The judge shall develop the facts of the case," they meant the judge -- this is a power and a duty and an obligation for him to act. The rest of this "may" is illustrative only. If I had the duty to develop the facts of the case and I'm a judge, why can't I order the production of documents? I clearly can, and these are mere illustrations.

CHAIRMAN BABCOCK: Yeah.

MR. MUNZINGER: And the rule should track the language of the Legislature.

CHAIRMAN BABCOCK: Justice Moseley.

HONORABLE JAMES MOSELEY: We're reading this as the judge having a more active role in developing the facts of the case, and I think it includes that when you do a fair reading of the statute, but the judge also develops the facts of the case by saying, "Call your first

witness." I mean, that's part of the process of judging. So I don't think it's necessarily requiring that the judge take over and have an independent role in every case.

I do have a question. At the end of the rule as drafted there's the word "ensure" is inserted "shall call witnesses as the judge feels necessary is to ensure a correct judgment," and I note that the word "ensure" is not in the statute, and I just wondered does that word have a meaning here, and if so, how's it different from the statutory language?

CHAIRMAN BABCOCK: A little silence. You caught them on that one.

HONORABLE JAMES MOSELEY: I don't know the answer either. I just --

MR. TUCKER: Yeah, I think that was just to kind of emphasize, kind of what Professor Dorsaneo was talking about, that the judge has an active obligation, and we thought that word kind of emphasized that.

HONORABLE JAMES MOSELEY: My concern about inserting the word "ensure" there is that it seems to presume a pretty active role for the judge in every case, have a duty to call witnesses, basically take over the case to ensure that a correct disposition, correct judgment is --

MR. TUCKER: I guess my thought is sometimes

those actions are not going to be necessary to ensure the correct judgment because the parties are going to take those actions independently of the judge.

CHAIRMAN BABCOCK: Professor Hoffman.

HONORABLE JAMES MOSELEY: Do you think Rule 505 also applies on a default?

MR. TUCKER: On a default judgment? Probably, yes.

HONORABLE JAMES MOSELEY: That's part of what I'm worried about.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: So I have two thoughts.

CHAIRMAN BABCOCK: Only two?

PROFESSOR HOFFMAN: Only two, but they'll go on for a little bit.

CHAIRMAN BABCOCK: Okay.

PROFESSOR HOFFMAN: The first is the language that they've drafted can't possibly be the right decision. I mean, you've chosen to follow the statute but then you didn't actually follow the statute using the words that the statute used and then you added something you liked so that doesn't make any sense. What does make sense to me is that we follow the statutory language but not their grammatical, you know, mess-up. So let's take Bill's point that the end of the language in 6 is relevant

to understanding what "shall develop" means. So let's just move it where it goes.

So how about the 505 now reads, "The judge shall develop the facts of the case as the judge considers necessary to a correct judgment and speedy disposition of the case and for that purpose may question the witness," et cetera, exactly the language of the statute only it now makes clear what we think the Legislature -- well, I'm sorry, it makes clear what the Legislature actually said, so I'm essentially adopting Bill's suggestion, following the statute.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

PROFESSOR DORSANEO: Also my suggestion to say it better.

HONORABLE STEPHEN YELENOSKY: Yeah, I mean, as far as I feel about "shall" it's essentially impotent because it doesn't command any particular action by the judge; and we ought to be faithful in some way to the statute by using the words they use; but when you get to the "may" and say "et cetera," Justice Brown made a point that I think is important because the question is when you get to the "may" does the JP have authority to summon somebody who is not a litigant, not a party, because that is something that a JP I guess could get mandamused on or something could be brought to say "You didn't have

authority to bring me in court sua sponte; and Justice Brown says, well, "party" there means litigant. The task force says "party" means a person or a litigant. The way the statute reads is "may question a witness or party and may summon any party." Now, the first witness or party would clearly seem to imply that "party" there means litigant, but I'm not sure the second "party" means just litigant because you don't normally need to summon a party. So I think the second "party," my interpretation would be is a person, and so we need to I think resolve if we can in the rule whether the statute gives a JP authority to summon any person.

CHAIRMAN BABCOCK: Okay. Richard Munzinger.

MR. MUNZINGER: I just come back to Lonny's suggestion that you include the "may do this" and "may do that." You have to interpret the statute, it seems to me, if you impose upon a judge the duty to develop the facts of the case, he has the duty to develop the facts of the case and then when you say he may summon a party or a witness but don't say he may order the production of documents, have you limited him in meeting the duty that you've imposed? I think you have. You know, "Hey, Judge, you don't have the authority to order documents. It only says -- the statute says you can only require a witness to appear." I think the more terse the rule the better if

the interpretation of the Court is that the justice of the peace is now obligated to ensure that the facts are brought out so that justice is done.

CHAIRMAN BABCOCK: Okay. Good. Richard.

MR. ORSINGER: Is there an existing practice on whether JPs can sua sponte issue subpoenas to nonparties?

MR. TUCKER: Yeah, I would say the general practice is that they feel like they can in a small claims suit but not in a justice court suit.

MR. ORSINGER: And so what do you think the expectation is when these are merged into one court?

HONORABLE STEPHEN YELENOSKY: Can you speak up? I know it's better to ask Mr. Orsinger, but --

MR. ORSINGER: My question was what is the existing practice on JPs issuing subpoenas to nonparty witnesses, and the answer is in small claims, yes; in JP court, no. We're now eliminating the distinction, so my follow-up question is, wasn't it the Legislature's intent to expand or expand the small claims role to embrace more of the JP role, and therefore, wouldn't we expect the subpoena power to apply across the board to nonparty witnesses?

MR. TUCKER: I mean, that was our thought when we were discussing it, it would be yes, but part of

developing the facts of the case is, hey, if we need to get Joe Mechanic in here to testify about this then that's what we need to do, but I don't have a dog in the fight either way of whether they should or should not be allowed to do that, but that was our thought when we wrote the rule.

CHAIRMAN BABCOCK: So Joe the Plumber has a brother named Joe the Mechanic.

MR. TUCKER: Little known fact.

CHAIRMAN BABCOCK: Running for Congress. Yeah.

HONORABLE ANA ESTEVEZ: I just have a question. If one party appears, wants a default, is it then the duty of the judge to summon the other party so he can fully develop the case even though the party may be entitled to a default?

MR. TUCKER: And I would say no, and because of the -- we have a specific 525 rule we proposed that handles default, and if we're going to have a default hearing the language here is "If the defendant does not answer, the plaintiff must appear at the default judgment hearing and provide evidence of its damages. If the plaintiff proves its damages, the judge shall render judgment for the plaintiff in the amount proven. If they're unable to prove its damages the judge shall render

judgment in favor of the defendant."

HONORABLE ANA ESTEVEZ: Then this couldn't be -- well, then I guess this is a party that failed to appear after an answer, so there's no post-answer default?

MR. TUCKER: And I guess I think the reading of it, if you read it to mean anything other than I can summon random people is I can summon -- if the defendant appears, I as the judge could summon them to appear as a witness. In other words, I could make the defendant answer questions.

HONORABLE ANA ESTEVEZ: Okay, and if I -- I'm just trying to grasp what it would necessarily mean because even though there's a regular default there's also the post-answer default. They answered, they had notice of the hearing, they didn't appear. So this point as the judge do I have a duty to fully develop the case and summon them as a witness?

MR. TUCKER: I say no. I would say no.

HONORABLE ANA ESTEVEZ: So then what party would I be summoning?

MR. TUCKER: That's what I'm saying. I think there are two readings of the "summon a party as witness in the case." One is using the word "party" as interchangeable with "entity." I can summon someone else to come testify as a witness. The other is I can summon a

party as a witness. They're already there, but I can make them be a witness, and I can question them about what happened; whereas normally obviously if the party doesn't want to tell their side they don't have to, but you could read that as -- it's not saying bring other people in. It's saying the judge can make a party offer testimony.

CHAIRMAN BABCOCK: Okay. We're going to break for lunch. When we come back we're going to have our public comment period, hearing from people who wish to address the committee, and then after that concludes I think we're going to move to Section 8, debt claim cases, Rule 576 at page 26, and the rules that follow.

HONORABLE NATHAN HECHT: And our guests are invited to lunch.

CHAIRMAN BABCOCK: And our guests are invited to lunch, if we have enough.

(Recess from 12:25 p.m. to 1:33 p.m.)

CHAIRMAN BABCOCK: Okay. We're at the part where we're going to hear from people who are interested in these rules and want to share their comments with us, and you are welcome to speak from anywhere in the room. We've got the podium pulled up here in the corner if anybody wants to use that, and as I said in our last meeting, I just don't like to limit people to time, but with all we have to do and the number of speakers, we're

going to limit people to 10 minutes. So I hope that doesn't unnecessarily burden anybody, but that's what the committee and the Court has decided to do, and I've got a little handy iPhone that has a stopwatch on it, so I will do that, and who wants to go first? Just if you would identify yourself for the record, unless your name is Marcy Greer, in which case we already know you.

MR. STEISNIEK: Good afternoon. I'm John Steisniek, and I am the chair of the civil process and liability for the Law Enforcement Commission. I also write a book for Lexis and teach a lot of classes about civil law, and I submitted a written evaluation where I think some changes, just word changes, need to be made to make these rules consistent with the service rule, and I want to call your attention to those and have you look them over, and if you ever have a question about them you can call me and I will try to answer your question about it and just wanted to let you know that I appreciate coming here and sitting in on this meeting. I found it very interesting, and I hope the comments helped you in creating consistency where it lessens the liability for the people serving the paper because it's a consistent system where all the rules match from the perspective of what the person out there actually doing the paper documents -- they need that consistency to make it where

it works all the time. Thank you.

CHAIRMAN BABCOCK: Thanks, John. One minute, four seconds.

MR. STEISNIEK: Told you it would be brief.

CHAIRMAN BABCOCK: Nicely done, nicely done.

MS. BAXTER: Good afternoon. My name is Trish Baxter, and I am a member of DBA International. DBA is an organization that represents companies that purchase portfolios of charged-off debts, both consumer debts and commercial debts, from national banks, state and regional banks, and other financial institutions. We've been in existence for over 20 years. We have over 500 members nationally, and right here in Texas we have over 30 companies that are either headquartered or have offices here. Our companies employ thousands of Texas workers, and we also engage local Texas collection firms to pursue collection suits in these debt claim cases in order for our members to recover the sums due on the portfolios of charged off accounts that they purchase. While our organization supports many of the proposed changes to the rules for the justice courts, we are here today to make you aware of some of the concerns that we have with particular requirements under the debt claim cases rules. Those are Rules No. 577 and 578. Our organization executive director, Jan Stieger, submitted a letter to the

committee approximately a month ago, and that is in your materials, but I wanted to highlight a few of the more important concerns that we have.

First of all, our organization believes that some of the proposed rules will have a negative impact on the industry generally in these ways: In Texas the portfolios that are sold in general or traded in the industry, in Texas generally there are about 12 to 50 percent of the accounts in each of these portfolios comprised of Texas-based accounts with Texas residents or Texas debtors; and so we believe that some of the changes in these proposed rules will have a negative impact because they will restrict access to the courts for remedies and recourse to recover the sums due on these portfolios, and we think that it will then create an immediate devaluation in the inventory and the portfolios for our member companies; and the net effect of that will be there will be a loss of revenue to the banks which rely on this important revenue stream when they sell these charged-off portfolios in the secondary market; and then finally, we think it will have a chilling effect on the issuance of credit generally here in Texas because those Texas consumer accounts will have little or no value and that important secondary revenue stream won't be there for the banks; and certainly there will be that consequence to

our industry as well.

If I might draw your attention to those two rules, in 577 there are pleading requirements which have specific date or information points regarding the original creditor's documents, the original creditor's information as to the residence of the consumer, and that address is to be provided in the original petition, and the petition didn't include that original address that was in the -- or an address in the creditor's record then it would be a defective pleading and potentially wouldn't go on. What I want this committee to be aware of is practically speaking in the industry these portfolios are traded and electronic data is transferred from the banks to subsequent assignees to member companies of our organization; and sometimes the electronic data includes an original address for a creditor's -- an address that was part of the original account of that consumer; but more often, because these are delinquent and then defaulted account, it's hard sometimes because the consumer moves and that original address isn't relevant anyway to establishing identity. What's more important and what we have supported in alternative rules that the Texas Creditor's Bar has offered to this committee is the residence address, and so we would support a rule that said that the consumer and their current residence address that is the address used

for service so they get proper notice is the right address to require, not an address that may have long been a bad address in an original creditor's record.

The couple other data points that are in proposed Rule 577 that are an issue are the date and amount of last payment and the date of origination. We don't believe that that date or information is relative to -- relevant to finding liability or to establishing the claim amount in these cases, and what we can tell you is that practically speaking in the industry that data and that information isn't always provided in every portfolio, so the effect would be that our member organizations wouldn't be able to file the pleadings. They wouldn't be complete because they wouldn't have each and every one of those data points.

The other rule that's a concern for our member organization is the default judgment rule in these debt claim cases, and that's 578. That rule proposes that our member organizations provide at default judgment time, whether it's without or with a hearing, and even in those cases where it's default judgment with a hearing, that they provide copies of account documents from the original creditors. Those account documents are enumerated in the proposed rule as either an application, a statement, or a computer printout, or cardholder agreement. While we may

be able to obtain those in some cases, we can't obtain them in every case, and typically when collection actions are filed, the consumer doesn't answer. Many of these move forward through the case and become default judgment cases, more than 50 percent and many of my clients tell me more like 75 or 80 percent of these are default judgment cases; and so our members wouldn't be able to meet the burden of proof at the default judgment hearing because they won't be able to provide a copy of one of these types of original creditor records at the time of the default judgment hearings.

Why is that? Well, a couple of reasons. We all know now in recent years with bank mergers, acquisitions, failures, and closing the original creditors aren't even in existence. So to be able to obtain original creditors' documents in those instances is often difficult. In addition, under the Federal laws that govern record retention such as Truth In Lending Act and the Equal Credit Opportunity Act the documents are typically required to be obtained for about two years or 25 months; and so in our industry when we're purchasing charged-off receivables we may be pursuing an account well within the statute of limitations perhaps for a credit card account, four years here in Texas; but it's well beyond that two years or 25 months that those documents

have had to be retained by the original creditor, and so it's just impractical and in some cases impossible for our member organizations to obtain those documents.

And then finally we have a concern about the requirement of an original creditor affidavit that's also in the default judgment pleading -- or default judgment rule as proposed. Same issue, I mean, sometimes you just don't have access to the original creditor anymore to get an original creditor affidavit to authenticate the documents that you can't get, but also in this case the types of information that are being required to be placed in that affidavit are not the type of -- it's not the type of data that the banks are willing to offer, and there isn't currently a Federal or state law to compel them to provide those affidavits nor is it typical in our business and industry operations that we have contractual obligations, where the banks have contractual obligations to provides us with that original creditor affidavit.

In the alternative what we would request is that the proposed rules be changed and that we offer an affidavit from the current creditor from the assignee and that that be recognized as reliable, as relying on the original creditor's records, and is incorporated in the current assignee -- or creditor's business records. So these are the concerns that our organization has with

respect to the proposed rules changes for debt claim cases. We thank you very much for your attention and for inviting me to speak with you today. Thank you.

PROFESSOR HOFFMAN: Chip, is there a place for questions while they're here if there's extra time or do you not --

CHAIRMAN BABCOCK: No, we'll take questions, especially since Justice Hecht has one.

HONORABLE NATHAN HECHT: How many of default judgments are ultimately collected, any idea?

MS. BAXTER: I don't have that statistic, I'm sorry.

CHAIRMAN BABCOCK: Lonny, did you have a question?

MS. BAXTER: Yes. Oh, I'm sorry.

PROFESSOR HOFFMAN: What is the alternative -- do you have alternative language that you've proposed for 578 or do you just not like the idea of attaching anything?

MS. BAXTER: No, we very much like the idea of attaching current creditor or current assignee affidavit, but we do have proposed rules, and those were drafted by the Texas Creditor's Bar, and I think they're in your packet as well, but we support the alternative language that they drafted.

PROFESSOR HOFFMAN: And the other thought is the language in 578. It seems like it says, "The following documents may be attached." What's your concern about that language?

MS. BAXTER: Well, if you read it in total it's a requirement that in order to obtain the default judgment it's one of --

MR. MUNZINGER: Could you speak up?

MR. TUCKER: That's only to receive a default judgment, though, without a hearing. (e) says that if they don't file, if the creditor does not file those documents, then the case will proceed under 525(c), which means the plaintiff would have to appear before the court and offer evidence. So basically what the task force was trying to do was say if you have this set of evidence we're going to treat this as so credible that we're not going to make you show up for the hearing, because generally creditors are hopeful to do that because that's less expensive and less time-consuming, and we totally understand that desire, but if you are unable to have those documents, (d) allows you to receive a default judgment by appearing in court and putting on evidence that the judge feels proves up your claim.

MS. BAXTER: So the proposed Rules 578, there's an (a) and there's a (b), and it was our

understanding that (b) had the documentation requirement and alternative (a), (b) or (c) -- or (1), (2), (3), excuse me, that would apply in cases where there was a default judgment with a hearing because (a) was a default judgment without a hearing.

MR. TUCKER: I know, and I don't think that's the intent of the --

MS. BAXTER: Okay.

MR. TUCKER: -- committee. I think our intent was (b) clarifies what the documents in (a) must look like to support a default judgment with no hearing.

MS. BAXTER: Well, that's helpful.

MR. TUCKER: And (d) says, look, if you don't have these -- because of the practical considerations that we definitely understood, if you don't have those documents, of course, we need to give you some other alternative way to recover. It's just going to now require a hearing so the judge can weigh that evidence and take a look at what you have rather than just rely on it on its face, and obviously, I'm sure most of you -- many of you are aware, we discussed the issue of the Simeon court versus the *Midland vs. Martinez* Credit Management, which discusses are -- is an assignee's affidavit sufficient to prove up the business records. Say Bank of America sells their credit card debt to Unifund.

Can Unifund submit a affidavit to prove up Bank of America's records, and --

MS. BAXTER: I would say yes.

MR. TUCKER: So you would say yes and the Simeon court agrees with you.

MS. BAXTER: Under Simeon, yeah. Uh-huh.

MR. TUCKER: And the *Midland Credit Management vs. Martinez* court would say no, and the task force preferred the Midland -- we kind of disagreed with the logic a little bit on Simeon just because it's difficult in our opinion for Unifund to say that Bank of America -- how their business records were kept because they don't have personal knowledge of that, so that was the mentality of the task force at least in establishing that as the baseline rule.

HONORABLE RUSS CASEY: May I speak real quick --

CHAIRMAN BABCOCK: Certainly.

HONORABLE RUSS CASEY: -- in regards to this? Okay. The basis for this comes out of the legislation that we needed to provide rules for these types of cases. I think the -- it is my feeling that the reason that it is in the legislation was because these types of cases were specifically barred from small claims cases under Chapter 28. When the committee was

considering the -- I think that the committee felt that the intent of the law was that these sort of cases need a special consideration, especially since we're basically offering under very limited Rules of Evidence in regards to that, and so the committee tried to put together like a laundry list, if you will, of what we felt may be important documents.

She made some very strong concerns, and we understand those. Our thinking was that a lot of these are based upon breach of contract, a breach of contract based upon laws of another state, with absolutely no copy of a contract or even that we had an operation under those guidelines. That's why we said, "This is what we're looking for," you know, and in Texas we have an 18 percent cap on interest. Credit cards usually get in another state so that they don't have that cap. There's very few credit cards that are actually operating under Texas law, but very few times do they even know what law they're operating under when they get to a debt buyer situation, because they were not provided with these sorts of situations.

She is saying about questions of denying them relief in the courts. That is a very strong concern. We do not want to lose their business. We appreciate their business from our courts, but at the same time there

is always the concurrent jurisdiction with the county court at law. If there is a situation where this particular case we can't operate under this, we can always file there and get our relief. Most of them prefer the justice court because we're fast and we're cheap, but we're not denying them relief by anything in here.

MR. TUCKER: And one other note just on how these documents -- the requirements would work.

CHAIRMAN BABCOCK: Yeah, let's hold off on discussion about the rules until we get to the rules. If anybody has got questions of the speaker then let's ask the questions while they're here because everybody has got a schedule and some people may not have time to stay around. So, Justice Christopher, you have a question?

HONORABLE TRACY CHRISTOPHER: Yes, my question is what percentage of these types of cases are filed in JP court versus county and district court, if you know?

MS. BAXTER: Well, I don't know percentage and actual number, but I can tell you because of the 10,000-dollar monetary limit most of my clients' claims are going to fall in small claims, and they have been as well as -- justice courts, excuse me, because consumer accounts generally are going to be in that range, you know, the mid-range somewhere there between 2,000 and

10,000.

HONORABLE TRACY CHRISTOPHER: And you choose to file there because it's cheaper and faster than county court or district court?

MS. BAXTER: For all of the above reasons.

MR. TUCKER: And just for the edification of everyone, right now they cannot file in small claims court --

MS. BAXTER: Right.

MR. TUCKER: -- because assignees, collection agencies or agents, or people who lend money at interest can't file in small claims, so they currently would be under the justice court rules, meaning the standard Rules of Procedure and Evidence currently apply to those cases.

MS. BAXTER: That's correct.

CHAIRMAN BABCOCK: Okay. Any other questions? Yes, Justice Brown.

HONORABLE HARVEY BROWN: We've been talking about some of the general rules this morning. Did your organization have any discussion or points on the rules we've talked about so far that we should know about?

MS. BAXTER: No, no other ones. Thank you.

MR. JEFFERSON: Am I understanding these cases are not in JP court now?

PROFESSOR DORSANEO: Not in small claims court.

MR. JEFFERSON: Not in small claims.

HONORABLE TRACY CHRISTOPHER: Not in small claims.

MS. BAXTER: They are not in small claims, but they are in --

MR. JEFFERSON: They are in JP court. They're not in small claims court.

MS. BAXTER: That's correct.

MR. JEFFERSON: The problem is consolidating and trying to figure out how they're going to happen while you're --

MS. BAXTER: Right, and having different pleading and default judgment standards and between the trial and the county courts or district and county courts versus the justice courts.

MR. JEFFERSON: And so Justice Christopher's question to you about the percentage of cases being filed, I understood your response to say if these rules are enacted your clients will file these cases in the consolidated JP court?

MS. BAXTER: Two things probably likely will happen as we've seen similar things happen in other states with similar types of rules and similar impact, and that's

a rush to the courthouse before the rules are actually implemented because the documentation requirements right now aren't there or the affidavit requirement isn't there, but the other thing is absolutely there will be a shift, and those cases will more likely to be brought in the district and county courts rather than in justice courts if the proposed rules remain as is.

MR. JEFFERSON: But there are statistics out there now about the experience of these kinds of cases in JP court that we could look to to see what percentage result in default, what percentage are appealed.

MS. BAXTER: Yes

MR. JEFFERSON: That sort of thing.

MS. BAXTER: Yes.

MR. JEFFERSON: What percentage are answered.

MS. BAXTER: Yes. Yes.

CHAIRMAN BABCOCK: Justice Moseley.

MS. BAXTER: If that would be helpful for the committee we could develop that.

HONORABLE JAMES MOSELEY: This is a question, and it's directed to y'all. I wanted to ask it while ago while you were still at the podium, but it seems to be something that may be relevant to some of the other people coming up also, and as you mentioned that based on

your reading of the statute it was the committee's view that these types of cases needed to be handled differently or at least the Legislature thought they ought to be handled differently. Without going line by line, could you, again, indicate what provisions of the statute support -- or where would I go to look that up?

MR. TUCKER: To show that they wanted special rules or what they wanted the special rules to be?

HONORABLE JAMES MOSELEY: Well, some of both.

MR. TUCKER: Yeah, the Legislature didn't really give explicit guidance on what they want the special debt claims rules to be. It just says that "The rules of the Supreme Court must provide specific procedures for an action by an assignee of a claim or other person seeking to bring an action on an assigned claim; or (2), a person who primarily engaged in the business of lending money at interest; or (3), a collection agency or collection agent." Those are all current plaintiffs that are barred from bringing cases in small claims court. So as Judge Casey mentioned, our thought process was, you know, these people already couldn't file in small claims as it exists. They have to file in the more complicated justice court.

HONORABLE JAMES MOSELEY: Under -- currently

under the rules --

MR. TUCKER: Under the current rules, yes, sir.

HONORABLE JAMES MOSELEY: -- including the Rules of Procedure and Rules of Evidence.

MR. TUCKER: That's right. And so our thought process was that we interpreted that to mean they probably have already previously decided these cases aren't appropriate for the free for all type of small claims and we need some more guidance on what these -- what the procedure and evidence requirements in these cases should be.

HONORABLE RUSS CASEY: And to kind of get back to your -- I don't have exact figures, but I can tell you a vast number of these cases, as in over 80 percent, are defaulted.

MR. TUCKER: Yeah.

HONORABLE RUSS CASEY: And of those that answered, the majority of those that answer are not contesting the claim. They may just understand where the amount came from, but they're basically, "I owe them money," you know, and they want to work something out. It is actually a very small percentage of these types of cases that are actually -- actually adjudicated at trial.

CHAIRMAN BABCOCK: Justice Gray. Question?

HONORABLE TOM GRAY: To the speaker.

MS. BAXTER: Yes, sir.

HONORABLE TOM GRAY: You indicated that this was going to be a problem because the data had not been captured on these claims that are currently in the system. Is that going to be a temporary hiccup if these rules were passed as they have been proposed and that the banks and the credit card companies that are making these loans originally will start capturing and maintaining that data, and if so, how long of a time period are we talking about before they catch up?

MS. BAXTER: Well, my expectation is the most recent legislation, which would have impacted this type of issue and this type of data was the Credit Card Act of 2009 and the subsequent stay or implementation of that, and to my knowledge there was nothing in that that would have changed or added an additional requirement to retain these particular types of information or data that would be in this requirement, so I don't think there would be a change in bank practices or the industry generally to change and expect that that data would be available at some point in the future.

HONORABLE TOM GRAY: And that would be because they just don't want to adapt their system to the Texas collection model?

MS. BAXTER: Well, currently because of the restriction on remedies available to creditors in Texas, Texas accounts generally are valued at the very bottom of all states, I would be quite frank with this committee, and so in a portfolio when you have an additional encumbrance such as these types of pleading rules or documentation rules then the value of the portfolio in the market is going to drop or at least that portion of the Texas accounts, and I don't know that the banks have responded on a state-by-state basis when they see changes like that to change their entire system to go back and capture data that they may have in different parts of their systems or to start retaining data just to be responsive to the needs that have developed --

HONORABLE TOM GRAY: So what you're saying is Texas would be creating an even higher bar for the original loans, and therefore, the Texas collections that were in this or the Texas debt that was in these portfolios would be valued even less.

MS. BAXTER: Absolutely. Yes, sir.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: Getting back to the pleading requirements, isn't one of the reasons, though, for this defendant's name and original address is so that you can address mistakes at -- that if you're suing me from

Michigan that I say -- I can then look at that and say "That's not me. That's the wrong Robert Levy."

MS. BAXTER: Absolutely. If, in fact, that were an issue, that identity were an issue. In fact, those of us who practice in this area know that's generally not -- they're not contested, but more importantly, that could be something that's developed as a fact issue in the case going forward, but we don't think it should be required at the initial petition.

MR. LEVY: But how do I know if that's -- you know, if it's easy to identify that as a mistake based upon the identity in question, but if you don't put the name and my address in there, I don't -- I don't know if it's clearly a mistake or not. It's much harder for me and then I've got to work through tracking it down.

MS. BAXTER: Well, the rule as currently drafted just says "the address as appears in the original creditor's records." It's not even clear if it's the first address upon application, the last known best address, the address that the statements were sent to, so we have that vagary right there to deal with, but really what happens in the industry is many times the banks will transfer the electronic data with blanks in address spaces where they have reason to believe that whatever address they had on file was a bad address. In fact, they don't

want the liability of passing on a bad address so that data is omitted intentionally, and then there's a record saying they're giving you the best information they have, and it's your obligation to then pursue through third party data sources the current correct address of that consumer.

CHAIRMAN BABCOCK: Marcy.

MS. GREER: When I understood your original chilling argument you were premising that on the fact that you couldn't get a default judgment in this court; is that correct?

HONORABLE TRACY CHRISTOPHER: We can't hear you.

MR. MUNZINGER: We can't hear you.

CHAIRMAN BABCOCK: Marcy, speak up.

MS. GREER: Sorry. When you were discussing the chilling effect originally, you were thinking you couldn't get a default judgment at all in this -- under this court procedure; is that correct?

MS. BAXTER: Yes, that's correct.

MS. GREER: If the rule actually says, well, you can't get it without a hearing, does that have a substantially lessened chilling effect?

MS. BAXTER: Well, there's still a requirement to have an original creditor affidavit even

with default judgment hearing, am I correct, if that was the intention of the task force?

MR. TUCKER: If you're wanting to -- yes, if you're wanting to prove up the original creditor's business records, you would need an affidavit with someone of personal knowledge of those business records.

MS. BAXTER: So I think the net effect would be the same, and our position is that we would seek to modify both of those provisions, the documentation requirement and the original creditor affidavit requirement.

CHAIRMAN BABCOCK: Justice Moseley.

HONORABLE JAMES MOSELEY: How much of the collection work in this area is done on a pure contingent basis?

MS. BAXTER: I don't know that I have actual statistics for that --

HONORABLE JAMES MOSELEY: Ballpark.

MS. BAXTER: -- but if you're referring to the placements with collection firms, generally it's done on a contingent basis, so all of that activity.

HONORABLE JAMES MOSELEY: What -- and my follow-up question is if the Supreme Court were to go with something like what's currently proposed --

MS. BAXTER: Yes.

HONORABLE JAMES MOSELEY: -- either with default with additional documentation or hearing with lesser documentation, roughly what kind of costs, additional costs, are going to be imposed as a result of that change in the rule?

MS. BAXTER: As a matter of fact, I'm going to defer that response because we do have another speaker here today that's with the Texas Creditor's Bar, and he's probably in a better position to respond to that because his membership is composed with Texas attorneys that deal with that very issue. So and are there other questions?

CHAIRMAN BABCOCK: Thanks very much, Trish.

MS. BAXTER: Thank you very much. I appreciate it.

CHAIRMAN BABCOCK: All right. Who's next?

MR. SCOTT: I guess I am.

CHAIRMAN BABCOCK: Great.

MR. SCOTT: Michael Scott appearing on behalf of the Texas Creditor's Bar, and I have an iPhone app also and hopefully mine will run a little bit --

CHAIRMAN BABCOCK: Well, you're 7.3 into it.

MR. SCOTT: Can I pick up the eight and a half minutes from the first guy? All right. Justice Hecht, Justices of the Court, and Chairman Babcock and members of the committee, my name is Michael Scott, and

I'm the President-Elect of the Texas Creditor's Bar Association. It's an association representing collection attorneys in Texas. We do most of our work in consumer cases. We do a substantial amount of that work in justice courts, and so the rules that are before this committee today are extremely relevant to our practice and our cause of concern. Just to give you a sense of the Texas Creditor's Bar Association, our clients tend to be national banks. About two-thirds of our business is a national bank business, Bank of America, Capital One Bank, Discover Card, Citibank. Chase Bank hasn't been doing any collection work for the last year and a half, so we won't put them on the list, and then the other third of our business is related to debt purchasers, people who acquire accounts, as Trish was talking about, from original issuers and then pursue the collection of those accounts on their own behalf.

I'd like to express my appreciation to the committee for allowing me the opportunity to speak, and I'd also like to express my appreciation to Judge Casey and to the task force. Even though I may be critical of a couple of rules here today, I want this committee to understand that there was a very interactive involvement between our organization and the task force. They kept us in the loop. They allowed us to make comments on the

proposed rules as they were being developed, and the whole project, which was Herculean in nature, was conducted above board and with our participation.

To give you a little sense of what a collection law firm in Texas is, my law firm has 80 employees, eight of them are attorneys, three of them are compliance officers that their whole job is to make sure we stay in the straight and narrow. We have over the last five years filed lawsuits in probably 700 of the justice courts. We file about 2,000 lawsuits a month, and it keeps us pretty busy. Firms with our organization file somewhere in between 100, 150,000 lawsuit as year. 85 percent of those occur in justice courts, is the best estimate that we have, to answer one of the questions that was asked earlier. In total our firms will advance on behalf of their clients some five to seven million dollars worth of filing fees and some eight to ten million dollars worth of service of process fees.

My purpose here today is to address mainly Rule 578, the rule dealing with default judgment. I wish to give the committee here a perspective of what the effect of that rule is in the practical world in which we live, to talk to the committee about the legal underpinnings of the proposed rule and whether those legal underpinnings are justified, and then finally to suggest

to this body and to the Supreme Court another way, a different rule that I think more comports with the expectations of the Legislature and with the needs of the Court, but before I do that I need to give you a perspective of what the credit industry is all about.

According to the Federal Reserve, in 2010 there were 58.6 billion credit and debit card transactions in the United States. 58.6 billion. About 15 percent of those occur in Texas, 10 to 15 percent. About half of those are credit card transactions. The number is actually 45 percent, but if we step back and we say how many credit card transactions occur in Texas today, the answer is about 10 million credit card transactions today. Four percent of those will default. That's 400,000 transactions today will ultimately default and not be paid by the consumer to the credit grantor in exchange for the services or monies provided. These banks have various ways of dealing with that, whether they have charge-off portfolios or whether they sell them or whether they try to collect them themselves. If they try to collect them themselves or if they sell them to a debt purchaser who seeks to collect them through a legal channel then those cases generally end up in justice court because that's where these cases belong. They're 4,000-dollar cases. They don't belong in county court. They don't belong in

district court. Even though there might be concurrent jurisdiction, they don't belong there. They belong in courts of regular daily practice, which is what justice courts are.

It's kind of quaint to think about justice courts. It's the one-on-one dispute. You know, "You took my TV, you owe it back," type of thing, but they are also the courts that handle the transactions of life. Today the credit card cases are 150,000 a year. Other states who have exactly the same issue before them that Texas has before it have moved their jurisdictional limits up as high as $25,000. Their courts of nonrecord have jurisdictional limits of $25,000, and you can bet that the Legislature is going to be confronted with this issue over the next sessions, and so the rules that we're talking about today will soon become the rules that affect much larger claims. So the challenge for the justice courts and the challenge for the Supreme Court and the challenge for collection law firms is how to deal with 100,000 cases a year and to do so efficiently, fairly, and inexpensively. I was trying to remember the magic three words, but they're on the next page.

So by filing a collection case I'm going to serve about 80 percent of the people. 20 percent I'm not going to be able to get service on. So of the 80 percent

that I serve, somewhere between 25 and 30 percent of them are going to answer the lawsuit. That's our experience, and actually the number has been creeping up over the last couple of years, but let's say it's 25 percent. So of the hundred cases I filed, 80 I got served, 20 answered, and 60 are sitting there in this limbo period. It's time for the answer, nobody has shown up. There is a continuation of a theme we see in debt collection, which is nobody is here to answer the phone or to respond to the letter. Now they're not responding to the lawsuit. So what do we do now? What do we do with 60 cases out of a hundred or 60,000 cases out of 100,000 cases, and we've got to get through a prove-up hearing? We've got to get a default and get through a prove-up hearing.

Now, 578 is the mechanism by which the task force suggested that we do that. I'm here to say that that's problematic because of exactly the issues that Trish identified earlier, which is that these documents are not readily available, the banks are reluctant to sign affidavits, and especially if that affidavit has to start testifying to multiple stages of documents, and so the whole default judgment on submission proposed by the rule doesn't really happen. So what we've now done is if we adopt the rule as currently drafted these 60,000 cases are not going to be defaulted on submission. They're all

going to be set for trial. We're going to pull attorneys down to do this sort of strange dance in the courtroom where we're chit-chatting while we're handing documents back and forth.

One of my main concerns about the effect of the rule is that those sections that deal with submission, that say, well, if you want to fast track this thing, well, let's just get the following documents, the application, the terms and conditions, the statement that shows the balance activity on the account. Let's get all of those that -- the justice courts are simple beasts. They understand simple rules, and if you tell them that's what you need to prove a claim, guess what, that's what you need to prove every claim. These rules of submission will become rules of practice for every case that is before the court, and I've completely skipped my outline, so I'm in trouble, but --

CHAIRMAN BABCOCK: You're also at eight minutes.

MR. SCOTT: I'm at 7:45, sir. These cases have defaulted. What are we to do? We're to prove them up. That's all we're to do. The Supreme Court says that if somebody fails to answer a lawsuit the only issue before the court is the amount of unliquidated damages. The question is, is what about Rule 578 goes to

unliquidated damages at all? It doesn't. It goes to liability. It goes to satisfying the curiosity of the court that really the bank is entitled to this. We site in the booklet that we produced -- we provide the Supreme Court's decision in *Texas Commerce Bank vs. Gnu*. We provide the damage affidavit from *Texas Commerce Bank vs. Gnu* to simply say there is a -- a damage affidavit doesn't have to say a whole lot. It only has to say that I've reviewed the records of the business and according to those records the amount owed is X.

I would suggest that if we adopt 578 as drafted that from sort of a 10,000-foot view that what you're essentially going to do is you're going to create sort of two senses of the rules in Texas. This is how you get a default in county and district court. I can bring a simple affidavit in, I can get a default judgment, but down in county court it's a whole new -- whole different dance, and I don't know that there's a reason to do that. We just need to get these 60,000 cases out of the pipeline. We need to do it and ensure fairness. We need to make sure that the plaintiff is held to their burden, but we don't need to do it by rewriting the laws of the State of Texas.

The -- I believe that we've submitted a letter -- many of you have seen it -- that sort of goes

through and challenges the various elements of the rule. There was a reference earlier to Simeon. There is certainly a dispute -- there is certainly a disagreement in Texas over how a third party record could be proved up in a legal proceeding. The key about Simeon is that this is a trial hearsay exception decision. This is not a prove-up decision. The Supreme Court says that at prove-up it is not the job of the court to ask whether this is hearsay or not. They simply look at the basis of the affidavit to determine whether the person making the testimony of the affidavit was capable of testifying. So Babcock is going to hook me off this podium here in about --

CHAIRMAN BABCOCK: Even by your clock.

MR. SCOTT: So the five second ask is this: Tab B, section B in the booklet, has two proposed rules; one a pleading rule, one a default judgment rule. We would ask you to take a look at that. We think that the language of that rule more comports with the legislative intent and accomplishes what prove-up default judgment rule should accomplish, and we would respectfully ask you to consider those rules.

CHAIRMAN BABCOCK: Thanks. Questions? Yeah, Justice Gray.

HONORABLE TOM GRAY: You made it clear that

the task force worked with you-all on this. Was there a representative from your industry as such on the task force?

MR. SCOTT: I've always been told to answer questions quickly. The answer is no. Although, they took a lot of suggestions from us, and, in fact, everything in the last tab of the book, which says "Resource Information," is communications that we had with the task force, proposed rules, responses to proposed rules. They were very open, but there was none of our members sitting on the task force, no.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Your criticism of Rule 578 is that your clients or your members can't provide the information that Rule 78 requires to prove up the default. So my question to you is what do you propose to adduce as evidence to prove that the defendant has incurred the debt and that your client is the owner and holder of the debt that the defendant incurred? What other types of proof would you like to see in the rule that you believe would be sufficient evidence to prove those two things?

MR. SCOTT: All right. The -- in fact, the first proposal that we made to the task force with regards to the pleading requirements and default judgment

requirements.

HONORABLE JANE BLAND: I'm not talking about the pleading. I'm talking about proving up the default, the actual judgment.

MR. SCOTT: Right.

HONORABLE JANE BLAND: I understand your concerns about the pleading. I just want to know what of this -- because there's a list of things that you can use to prove up the debt and that the defendant incurred the debt and that you-all are the owner and holder of the debt and you're saying, "We can't provide that." What do you propose you provide?

MR. SCOTT: Well, I'm sorry. It's not that it can't be provided. It cannot be provided in the time frame contemplated by the filing of the petition --

HONORABLE JANE BLAND: Okay.

MR. SCOTT: -- and the moving of the case forward.

HONORABLE JANE BLAND: Right. So what alternative proof is missing? What kind of proof do you propose should be adequate to convince the judge to render the default?

MR. SCOTT: Typically we have an affidavit from a corporate representative of the holder of the debt testifying to the acquisition of the debt, the information

that they obtained from the predecessor at interest, there have been no subsequent payments on the account, and that the balance as of this date is X; and that that affidavit, because it is based upon information of paying through a business transaction and is relied upon by the businesses going forward and the conduct of its own business, that that -- it has sufficient credibility and sufficient weight to be able to establish the claim. And I think that the Simeon case, there are probably six or seven cases that have followed on in the First and Fourteenth, San Antonio, Beaumont, all address that issue of the corporation of information, relies upon that information.

HONORABLE JANE BLAND: So similar information, different affidavit. Is that the main problem, is that the person who is averring to all of this stuff is -- you would like to see it to be the current holder of the debt?

MR. SCOTT: Absolutely. Because --

CHAIRMAN BABCOCK: Other questions?

MR. SCOTT: If I may.

CHAIRMAN BABCOCK: Yeah, sure.

MR. SCOTT: I apologize. Just informational for this body, things are very different out there than people think they are. The banks will not sign an affidavit to save their life. If you want wording change

in an affidavit it goes to a committee, and it's five months to get a word changed in an affidavit, and so things like business records affidavit banks take terribly seriously. They will not put one of their representatives out there to testify to documents unless they are very thorough in terms of reviewing them, and that's part of the reason why this rule is unworkable, because it assumes banks can do something that they will not do in today's day and age.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: You said that you're concerned that 25 percent more or less of the cases are the default cases. Well, that's what I understood you to say.

MR. SCOTT: 25 percent of the cases will answer, 75 percent of the cases will not answer.

MR. MUNZINGER: Will not answer. Let's look at a case where a party has answered and there is a trial. What must you prove to recover that is not included or rather is included in Rule 578? Is everything in Rule 578 required for you to win a case that is contested?

MR. SCOTT: I don't know that everything is --

MR. MUNZINGER: What is not?

MR. SCOTT: Partly because one of the

theories of recovery in these cases is account stated --

MR. MUNZINGER: Okay. What is not?

MR. SCOTT: Well, in an account stated case, terms and conditions are not required, application is not required. Statement -- statement history to the debtor is required, and then in eight of the districts in Texas an affidavit from the original issuer is not required. And that's part of our concern is -- with the rule is that it adopts what is really a developing line of case law in Texas, and it sort of kills that line and says by process and procedure we will not let this line of case law to sort of come to fruition.

MR. MUNZINGER: So then if the rule were tailored to limit the requirements at a default hearing to what would be required in an adversary trial or a trial in front of a judge who is duty bound to develop the facts, that would be a rule your group could live with?

MR. SCOTT: Well, I'm going to push back on the question simply because this is default. This is not an adversary trial. There is no hearsay exception to overcome here. All I have to do is prove my damages. I have to prove the amount of my damages. They have confessed by their default that I have a claim. They confess that there is liability. All I have to do is prove a dollar amount at this point, so and that's part of

our problem with 578, is it really puts the court in the position -- the court and the Rules of Procedure in the position of being the attorney for the defendant, and that's a major shift as far as we're concerned because that's not what we see in the county and district courts. They say, "Of course they've defaulted, just tell me how much is owed."

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: I understood from one of the letters from one of the groups that is aligned with you that you were in negotiations or discussions or agreement with Attorney General on how these lawsuits should be filed and what should be in them. Can you tell us a little bit about that?

MR. SCOTT: The tab -- it says, "Section A, Exhibit 1" in your booklet, is an agreed compliance document between one of the largest debt purchasers in the nation, the state Attorney General's office, and the Attorney General agreement with them said, okay, let's -- we want to make sure that if you file a lawsuit you say certain things, you tell the person who the original credit card was. You don't just say, "Unifund vs. Smith, and we have an account." You say, "We bought that account from Citibank. We bought that account, and the account number was X, and when we bought the account from them the

balance was Y." You definitively lay out these factual assertions in your petition so the defendant properly understands who you are, because they don't know who Unifund is. They know who Citibank is or whoever the original creditor was.

And then another issue that the state Attorney General wanted to make sure is that if you're going to sign a damage affidavit that you do it based upon the information you receive from the original issuer. You review that, you have legal professionals involved, you rule out only on your business records, you certify that you've matched it up, and then you sign it in front of a notary. A lot of it is process, but one of the issues that we were trying to underscore is that -- is that as far as the state Attorney General is concerned, their Office of Consumer Protection Division, that it is acceptable for that debt buyer to look at its own business records for the purpose of determining what the balance owed on the account is.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky, then Frank.

HONORABLE STEPHEN YELENOSKY: You said something that was interesting. As a district judge I've dealt with the mortgage crisis, not with the debt crisis, but you said that this rule asks you to do or have banks

do something they won't do. First of all, I'm glad to hear banks are refusing to do certain things that they did before that we were seeing in the mortgage crisis, but without getting into particulars, if the banks are being asked to do something they won't do, isn't that a red flag? Doesn't that mean they're unwilling to attest to something that I as a judge might want them to attest to?

MR. SCOTT: I would say "no" to the question, and here's why. It's not that banks are reluctant to do that. They just see no -- banks have become very self-preservational right now and very brand-oriented. They don't see any value in that affidavit to them, and they have the Office of Comptroller of Currency, they have the Consumer Financial Protection Bureau looking over their shoulder checking everything they do, and so why would I spend time signing an affidavit when the only value to that -- I have zero value to me and only exposure if one of these regulatory bodies thinks that I didn't quite do it the right way.

The Consumer Financial Protection Bureau just released its audit parameters for collection agencies and collection firms. It's an audit manual of 802 pages. The members of our association and the members of Ms. Baxter's association are preparing for this. They will be here. They will come in, and we will be regulated just

like the Federal banks are regulated, and so for somebody like B of A to be asked under those current circumstances, to just "Oh, could you sign this," they're not going to do it.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: You're saying the banks don't have any incentive. Well, maybe the incentive is they can get more money for their debt. I mean, what you're saying is, "Well, we want to get a lot of money for our debt, but we don't want to prove it up," I mean, so "Therefore, courts, you need to solve our problem." It seems to me the problem is with the banks. If they want more money, they've got to prove it.

MR. SCOTT: Well, and there was a question earlier about the time, the implementation. Time implementations is about two years in this industry, so if the banks see that all these states are making these requirements they will then start making the business decisions about whether to meet the requirements or to forego the recovery and pass off the loss that they could have, you know, recovered to other -- you know, to other aspects of their business. It's certainly reasonable to say, you know, "Here's the rules and that's the way that it's going to be, and come on, boys, you've just got to step up and do it that way." Texas is, as Ms. Baxter

indicated, sort of on the low end of the list of their priorities, and so they would take note of it and if five other states joined in they might start putting it into their process.

CHAIRMAN BABCOCK: Bronson.

MR. TUCKER: Yeah, Mr. Scott, I had a question. I know at least one assignment company has kind of gotten around this issue by submitting a deposition on written questions to the bank, which is just the four questions of "These are the documents you gave. Will you answer the question that these were kept in the ordinary course of business, made by someone with personal knowledge," and that's what they're submitting to prove up those documents. Do you have thoughts about what the obstacle to using that method would be?

MR. SCOTT: Number one, clients don't generally -- we are generally precluded from involving our client in discovery devices, so for me to go back to B of A and say, "Well, I want to depose you" --

MR. TUCKER: As part of your contract.

MR. SCOTT: -- I'm not going to get to do that. I certainly understand their desire to do that because it sort of changes the evidentiary character of what was a business records affidavit with certain criteria on it to a deposition and sort of comes around

the edge of Simeon for courts that do not follow that reasoning.

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: I don't know anything about Rule 185 on sworn account. Does that only apply to sale of goods? Does that -- doesn't apply in this situation where you can give a sworn account affidavit and that's all you had to give, unless they deny and then you get a default if they --

MR. SCOTT: And Mr. Tucker had spoken earlier a little bit about that. There's -- the courts of appeals sort of differ on whether a credit card can be brought as a sworn account. The general sense among the practitioners in this state is that it shouldn't be brought as a sworn account.

PROFESSOR DORSANEO: "Should," did you say?

MR. SCOTT: Should not, and it's not because we wouldn't like to do that. We would love to do that. The thing is, is that if I bring a suit on a sworn account in a court that does not recognize it as a sworn account, I have been -- committed a Fair Debt Collection Practice Act violation under Federal law because I attempted to characterize the nature of the claim differently than what it is. So out of an abundance of caution we don't come to the court with sworn accounts, even though there's

probably a pretty decent argument for it being a sworn accounts.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Sworn accounts used to be goods, wares, and merchandise, but the rule has been expanded many times, and the courts -- he's right, the courts are still confused about whether a stated account under a credit card --

CHAIRMAN BABCOCK: Well, you need to straighten them out.

PROFESSOR DORSANEO: Huh?

CHAIRMAN BABCOCK: You need to straighten them out.

PROFESSOR DORSANEO: Well, I've written it all very clearly.

CHAIRMAN BABCOCK: We have no doubt.

PROFESSOR DORSANEO: Chapter 12.

CHAIRMAN BABCOCK: Justice Moseley.

HONORABLE JAMES MOSELEY: My question is the earlier one I asked, if we were to go with -- if the Supreme Court were to go with a rule like this, imposing additional costs, how much are we talking about in the context of this contingent?

MR. SCOTT: I'm glad you sort of cycled back around to that. I probably pay $30,000 a month for

appearance counsel for prove-up circumstances. I pay another $20,000 a month for other trials. It's a real cost issue for us, especially when it is largely a formality that we go through. We stand there, we hand documents over. Documents will be mailed to the court two weeks before, and now we're handing them, and there's really no reason for that information. Part of the purpose of these rules is to create an inexpensive avenue of resolution of these cases. This rule certainly doesn't accomplish -- as written doesn't accomplish that.

HONORABLE JAMES MOSELEY: How much, either percentage or dollars?

MR. SCOTT: Well, for my side of the industry, we're probably in the close to 60 to $80,000 a month in additional costs just to -- just to go through the act for something that could be done essentially by mail.

Oh, one thing I do need to add, I apologize, but the suggestion that these cases can go to county court and district court, a 5,000-dollar credit card case isn't going to county court. The cost associated with it, the extra 200-dollar filing fee, no, you're living in the margin there in terms of whether there's any return on the monies expended in a case or not. So if these cases are denied access to the justice courts or effectively denied

through the operation of rule then these cases die for the most part.

MR. TUCKER: If I could just offer a little bit of a clarification on the default cost in the -- we clarified in the default judgment rule if you're going to have a default judgment hearing we added a provision, "With permission of the court, a party may appear at a hearing by means of telephone or electronic communication system" to try to address some of that.

MR. SCOTT: That's our great hope.

MR. TUCKER: Right, to try to address some of that issue, because we did recognize that could create an additional burden on appearing, so that's our thought process. Where it's solely on documents that are already submitted, hopefully they can appear telephonically or by electronic communication.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I do recognize that a lot of these you are not going to recover, but obviously you wouldn't be going through all of this if you weren't going to recover something, and so just to make the point if it costs you more and you had more attorney's fees then you get to recover more attorney's fees. You get attorney's fees and court costs, and I know some of it may not be part of the attorney's fees, but if the attorney is

going out to try to get the documentation then those are increased attorney's fees that they're entitled to under their contract, because it's usually in their contract on those credit card bills, you know. I mean, I give them attorney's fees every time I do a default, and for whatever reason, even though you claim you don't file them, I'm pretty sure you file quite a bit or someone with your name files at least 20 of them a week in my court.

MR. SCOTT: I select every one of them and I sign every petition and we won't --

HONORABLE ANA ESTEVEZ: Yeah, and at least 20 a week in my court.

MR. SCOTT: -- ask for attorney's fees. It's based upon contingent recovery, so we do not turn around and bill our client for it, and the following banks at this point will prohibit collection of attorney's fees from the court: Bank of America, Discover Card, Chase Bank, Citibank, Capital One Bank. All of them have over the past year removed from their recovery policies attorney's fees, and most of them have removed post-charge-off interest. The cases that the courts will see going forward are going to be about the charge-off balance on the account and that balance loan. Bank of America routinely tries to shoot me when a judge grants statutory post-judgment interest. They said, "We don't

want interest." I said, "It's statutory."

HONORABLE ANA ESTEVEZ: Well, they may change their mind if you have to do more in your contracts, because obviously that's money that they can recover that they were paying you to do. It's there if you guys need it.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: I'm not sure why the creditors have made the decision that they made in our district courts in Tarrant County, but they found it cost-effective to bring these suits under $5,000 in the district court, and I assume they've calculated the filing fee in that regard, and we see a substantial number of these cases, and my understanding of the rulings of the courts thus far with regard to unobjected to hearsay is that it is thought -- it is probative, but it doesn't change the affidavit from being conclusionary or showing the adequate basis for the evidence that's supposed to come forward, and so I just have a lot of caution about the comments made today and some of the more well-briefed cases we're seeing are contested cases over credit cards where there is a debtor bar actively seeking clarification on these issues and joined by the creditor bar, so I'm not sure I can join in the conclusions of the speaker.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: In industrial terms let's suppose you're sitting there with a million dollars in judgments. What do you do with it? How do you collect it? How much do you get?

MR. SCOTT: I'm going to be -- we're going to let the economists put a number on that and --

THE REPORTER: Speak up, please.

MR. SCOTT: The value of a Texas judgment is one and a half cents on the dollar.

MR. GILSTRAP: And they're sold to somebody, they go to another secondary market?

MR. SCOTT: They can be sold to somebody.

MR. GILSTRAP: And who ultimately -- somebody -- presumably one and a half percent of these people pay. How do they get -- do you get paid?

MR. SCOTT: If our firm is collecting on judgments, which is not something we do a lot of, but it's certainly something that the industry is pushing, then we are simply going to send them a letter once every six months and reach out and contact them. So many times when somebody defaults on a credit card, defaults or loses their car or something like that, what you're dealing with, you're not dealing with people who don't want to pay you. You're dealing with people who can't pay you, and so your possibility of recovery on that claim is not to just

hound them into the ground. That's not going to do any good. I can't make them have money. What I have to do is talk to them a year and a half from now, two years from now. Maybe they are in a position at that point to try to deal with some of their financial obligations, and our clients -- because the Texas judgments are so poor in terms of liquidation, our clients are very understanding about let's get this taken care of. So we typically have some chance of authority to get these matters solved.

MR. GILSTRAP: But it's worth more money with a judgment than just as a credit file when there's no judgment?

MR. SCOTT: The judgment converts the asset to one with a 10-year life as opposed to a four-year life, and the judgment is honestly is -- the judgment is my completion of my duty to the courts. I can't start a lawsuit without intending to go to judgment on it, and it's a completion of my duty to my client. In terms of a value to me, it has very little value.

CHAIRMAN BABCOCK: Okay. Michael, thank you very much. Appreciate it. All right.

MR. PENDERGRASS: Good afternoon, committee members. My name is Tod Pendergrass. I'm a certified process server.

HONORABLE TRACY CHRISTOPHER: I'm sorry, we

can't hear you down at this end.

CHAIRMAN BABCOCK: Let's start over again.

MR. PENDERGRASS: My name is Tod Pendergrass. I'm a certified process server. I have just a couple of quick comments on the rules that relate to service of process. Specifically the proposed rules are 511, 512, 513, and 514 and then Rules 574 and 575. Specifically, Rule 512 regarding service of process in justice courts, I would just remind the committee that in 1993 when this committee was formed one of the first recommendations it made to the Court was to simplify the Texas Rules of Civil Procedure, specifically to rely on the Federal Rules of Civil Procedure as a guide. There are currently at least 16 separate TRCP rules that deal with two issues involving what I do as a process server and that is who may serve and how to serve. It's understandable that many procedures in the justice courts differ from the district courts and county courts at law, but the issues of who may and how to serve are virtually identical and the physical act of serving process is actually identical. There is no difference between a JP citation and a district court citation when it comes to my job.

The only difference that immediately came to mind with regard to a separate set of rules for justice

courts was the defendant's time to answer. Currently it's the Monday following the expiration of 20 days in district and county and it's the expiration of 10 days in justice court. The only reason that's a concern to me is because my return must be on file at least 10 days before a default can be taken in the higher courts, and it must be on file at least three days before a default can be taken in the justice courts. Other than that I believe that all or nearly all of the aspects of who may serve and how to serve in those proposed rules that I've mentioned can be covered with one sentence.

I take your attention to Texas Rules of Civil Procedure, the current rule, rules relating to the service of garnishment, and you don't have to look there, but 663 says that "The writ of garnishment shall be served and return made as other citations," so that covers everything with regard to service on the garnishment, just matches what's already there for district and county courts. 663a begins "The defendant shall be served in any manner prescribed for service of citation," so I'm only suggesting that a sentence that read something like "Service on the defendant shall be made as prescribed by law or these rules for the service and return of citation in district and county courts at law."

Now, I added "and returned" because I think

that this sentence might literally cover all of those rules except for the answer date. The concept is taken from 663 and also in Rule 17 reads "Except where otherwise expressly provided by law or these rules." So, you know, this kind of concept is already in existence in the TRCP, and it would make all of these details about service the same as for district and county courts at law. By including the words -- let's see, I already said that, "and returns." More importantly, this simple addressing of all these issues with relation to service would not increase the disparity of all these different rules for all these different jurisdictions. It would definitely help reduce that disparity.

Also, I wanted to bring to the committee's attention, too, and I'll give you a guys a copy. I didn't submit it before I got here, but there was an error in Rule 536a about sub service, and I think that whether you guys go with your proposed rules or whether you do a one sentence easy fix, it's going to correct that long-standing error in rule -- it's in Rule 536, and I'll give you a letter on that. So that was just a side note that I wanted to mention for that.

Regarding Rules 511 and 513, Rule 511 under issuance and form of citation, this is different from what we're used to seeing for the form of citation Rule 99 for

county courts and district courts. There's a bold, when you get a citation, "You have been sued. You may employ an attorney." That's in bold. This kind of changes it up, and I think it would be inappropriate to tell a citizen, a defendant, what they can and cannot ignore. I mean, some people ignore service all the time because they want it to go to default. It's cheaper for them for it to go to default, but that aside, I think that it should be similar to what we already have in district and county courts for that required statement on the front of the citation. Instead of adding this language, the bold should be applied to "If you do not file an answer," et cetera, et cetera, "a default may be taken against you." That is adequate to make it apparent to the citizen that it is not in his or her best interest to ignore the citation.

And then lastly, Rule 513, there are -- aside from what laws exist allowing any disinterested adult to serve certain kinds of citations, the sheriff, the constable, the clerk, a process server, which is disinterested in all, or a certified process server, Rule 513 does not provide for just the disinterested adult that's appointed by request, so I think that just needs to be fixed. Unless anybody has any questions I just have one last statement about subpoenas.

MR. LEVY: I do.

CHAIRMAN BABCOCK: Yeah, Robert.

MR. LEVY: I think your comments are very helpful. On the issue of notice, though, not knowing what the task force was thinking; but I can read into this the fact that we want to make sure that participants in these courts who are very intimidated by the legal system, don't understand their rights, and are almost assuredly not going to be able to hire a lawyer should know that they are allowed to go in without a lawyer and protect their rights; and the normal service of process is written by rule in a way that is hard for a layperson to understand, so I think this was designed to make it clearer.

MR. PENDERGRASS: Okay.

MR. LEVY: Do you object to that?

MR. PENDERGRASS: I just object to the disparity. I don't think that a defendant in the justice court cases should be treated any differently than a defendant in a district or county court case, so I think the notice to defendant should be the same for all jurisdictions, whatever it ends up being.

MR. LEVY: I think the idea is that, in fact, we do want to have a little difference --

MR. PENDERGRASS: Okay.

MR. LEVY: -- because these courts should be

more accessible. At least that's my understanding.

MR. TUCKER: I would agree, and I would say the Legislature has said we need to treat these people differently by putting that guideline that they need to be friendly to nonlegally trained people.

MR. PENDERGRASS: And so the cases that are filed on these 5,000-dollar cases but they're filed in district court, is the notice going to be pursuant to -- see, the notice in that case would be pursuant to Rule 99.

MR. LEVY: Right.

MR. PENDERGRASS: So what -- the idea that you're saying for these lower level --

MR. LEVY: Well, some district courts don't have even that level of jurisdiction. I mean, in some cases a thousand-dollar case would have to be heard in a county court at law. That's because this is a more efficient process, but so hopefully the plaintiffs will be going there but also the defendants will know that they can protect themselves without a lawyer.

MR. PENDERGRASS: I would certainly leave the final decision up to you guys.

CHAIRMAN BABCOCK: Any other questions? Did you want to add something about the subpoena?

MR. PENDERGRASS: Just one little thing about subpoenas. I would just like to point out that

there's an inconsistency. Rule 176 for the service of subpoenas and the new proposed rule that is going to deal with subpoenas out of justice court can be served by any nonparty adult. That's been that way for a long time. It's the standard in Texas, the standard for the Federal rules, and I think that the committee just needs to be aware that we have this certification and all the wording about getting certified process servers and everything you'll serve if you're certified. That's got to be in the rule versus a disinterested adult, that's got to be in the rule. It's just a disparity that anyone can serve a subpoena if you're 18 and not a party, and you have these other requirements for service of citation. I'm just here to say that a process server, when I ring the doorbell, there's no difference between handing a person a citation or handing them a subpoena. The physical act of the job is exactly the same. That's all.

HONORABLE RUSS CASEY: I guess I don't understand that because we specifically say it's any other -- you're referring to Rule 506(1), and we have that "A subpoena may be served at any place within the State of Texas by any sheriff or constable of the State of Texas or any person who is not a party and is 18 years of age or older."

MR. PENDERGRASS: Yes. I'm just pointing

out the disparity.

MR. TUCKER: Yeah, I think what you're saying, right, if I could -- I think there's a misunderstanding. I think you're saying there is a disparity between subpoenas and citations that maybe the committee might want to consider limiting subpoenas to certified servers.

MR. PENDERGRASS: Just the opposite, that citations can be served -- I mean, you can be certified. That's one option, and you get statewide authority, it's great, but you can also be authorized on a blanket order or a county -- you know, a single order case-by-case, and you just have to be over 18 for that. So it's just -- it's opposite ends. You have licensing for this citation, and you've got just over 18 for this citation, and subpoenas for this -- you know, over 18 for subpoenas as well. So there's just a disparity, and it's the same job.

CHAIRMAN BABCOCK: Thank you very much. We've got your letter --

MR. PENDERGRASS: Thank you.

CHAIRMAN BABCOCK: -- and that will be posted on the website and distributed to the committee, and I should have said we also received today the booklet from the Texas Creditor's Bar Association, which will also be posted on the website and distributed to the committee.

Thanks very much today, Tod.

MR. PENDERGRASS: Thanks very much. Thank you for giving me time.

CHAIRMAN BABCOCK: Mary.

PROFESSOR SPECTOR: Thank you. I'm Mary Spector from the SMU Dedman School of Law. Can you hear me in the back? I teach a civil clinic where we represent some of the debtors that we've been talking about earlier today. I've also through that representation have taken a more academic look at the debt collection process in Texas, and I've shared some of that information with the committee in a letter sent late yesterday. Some of you may not have had a chance to see it, but I think it's been distributed. What we've heard that most of the -- and I'm going to speak only about the 577 and 578, the debt claim cases. Those are the cases that I've been most involved with over the last couple of years and the ones that I'm glad that the task force paid some attention to, and I know it wasn't your choice, it was the Legislature gave you that task, but that -- that what the task force has done, their proposals are very consistent with similar proposals that are being promulgated in other states.

Just this year the state of Maryland passed a set of small claims rules that look very much like the one proposed in the debt claim cases. Other jurisdictions

have done the same, and I think that one of the -- or many -- a major reason for those rule changes is the concern that so many of the cases result in a default judgment, that the courts are being used in a nonadversary way to obtain a judgment that becomes more valuable than an open debt account, and when the courts are entering the judgment I pay attention, and citizens pay attention to a judgment. They may not know that that's what happens when they don't show up. They may not know that even though they think this case doesn't involve them that they should show up, and that's what we hear from some debtors. "I don't know what this is about." "I didn't show up." We hear, "It's not me, I paid it." "They've been bothering me," those kinds of things.

Now, there are many, many ways to collect a debt, and going to a court is at the very end of the rope to turn the debt into a judgment, and so where we have the majority of defendants, of the debtors appearing or not appearing, and then if they appear, most of them are unrepresented, the idea that the judgment is supported by the kinds of evidence -- by the kind of pleading that the task force has asked or recommended be instituted and that a default judgment be supported on paper by the kind of evidence in Rule 578 helps in my mind to ensure that the judgment is a sound one, and that's very important because

that judgment with its long life will very likely show up on a credit report later down the road, and that may be the first time that a consumer learns that there was a judgment against them.

They may have received the service. They may have ignored it, but they may not know what the effect, and so when they see on a credit report that there is a judgment, that may be their very first time, and so knowing that it may be a few years down the road, I think that a debtor who admits that he or she owes some amount can at least have some confidence that the system that entered the judgment did so based on the kinds of evidence that are contained in the rule or in the proposed rule, and so I want to thank the task force for in general providing or proposing a set of rules that I think will go a long way to protecting the interests of all consumers and all Texans in the courts. I'm happy to answer some questions if y'all have any.

CHAIRMAN BABCOCK: Anybody got questions? Justice Bland.

HONORABLE JANE BLAND: Mr. Scott rightly pointed out that when somebody doesn't appear, liability is admitted, the only thing that needs to be proven up is damages, and that the proof that's required by the rule goes further than that, and he seems to -- by looking at

what the voluntary agreement with the Attorney General, he seems to acknowledge that maybe we're going to require more because these are special kinds of cases but takes issue with the identity of the affiant, but that the original, that it doesn't -- couldn't it be the current holder of the debt that proves up the identity of the debtor and the amount owed and why does it have to be the original creditor. Is there some reason from the debtor's perspective that that affidavit needs to be from the original creditor rather than the person who has acquired through -- you know, and proves up that they've acquired it at the end of the day?

PROFESSOR SPECTOR: Well, two ways to answer. The very end of your question, is there some reason it should be the original creditor, that --

HONORABLE JANE BLAND: Right, can we have it be the current holder?

PROFESSOR SPECTOR: That may be the person -- the original creditor would be the entity that the debtor is most likely to recognize. They may recognize Bank of America or Discover or -- not Chase -- Citi, but they may not recognize the name of the assignee who is actually the plaintiff in the case, so that is -- by having that information it's something that lets the debtor know, oh, that's what this is about, and maybe in

fact the debtor will show up because ensuring that the defendant would challenge the -- or would appear so that the case would be decided in the way most adversary cases are decided is I think a consequence of these kinds of rules. And then the second point I wanted to make is that we know that there -- that the defendants aren't going to show up. We know there aren't going to be lawyers. As lawyers, we have ethical responsibilities to the court to make sure that what we're presenting the court has some basis in fact, and I don't know that an assignee knows if the debtor paid somewhere down the road, because admittedly the original creditor's records can contain errors and be problematic.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Doesn't the original petition even in these rules require that the nature of the claim be stated so that the debtor, who has somebody's money, they took the money, they knew enough to take the money, they knew enough to sign the original account, they've got the money, and now they don't want to pay the money, and you say that we should have all these rules in a default judgment to take us back to the original debtor when they may not exist, and there's an industry that has built up that serves the interest of the public in getting money to the banks. My interest rates may be affected by

banks who lose money to people who don't want to pay it.

Why should we have a rule that forces someone to go back to get an original account if the petition states, for example, "Richard Munzinger debt collection agency purchased the account of Frank from the Bank of America." Okay. You know that it's the Bank of America. Frank signed it. I don't -- I'm sympathetic with small people and citizens, very sympathetic with citizens. They are citizens, but they have duties as well as rights, and when they take money from somebody with a promise to repay it, they ought to repay it, and we ought not to make hurdles to people attempting to recover fairly and honestly.

MR. TUCKER: But it could have been a different Frank Gilstrap that actually got the document.

CHAIRMAN BABCOCK: That's a bad example. There is only one.

MR. TUCKER: I gathered that from my time here so far today.

HONORABLE RUSS CASEY: If I may, this still -- also we go back to our pleadings, motions, our initial petition are under different sets of rules; whereas, currently right now all pleadings are oral. So, I mean, when we put it in that we would like to put this in there, it's not required really anywhere else.

MR. MUNZINGER: No, I understand, but your Rule 509, your petition says you have to state the basis for the claim. The basis for the claim is a claim against the defendant. Rule 509(5).

HONORABLE RUSS CASEY: Yeah.

MR. MUNZINGER: (a)(5).

HONORABLE RUSS CASEY: Okay. I misunderstood you, I guess.

MR. MUNZINGER: No, that's what I'm saying. If I come to court and I have to tell you how I got the right to sue you for money, for someone to say the debtor needs to be told to go back to the original place so they'll know who they owe, they're told who they owe in the petition. They were served with the petition. All of this business about, oh, the poor person didn't do this. The poor person has duties. They have to read what's handed them. It says "The State of Texas, you've been sued." Read it, and don't tell us that we have to adopt a rule that destroys an industry or raises the cost of litigation or slows down the process or slows down the courts. Let people honor their obligations as well.

CHAIRMAN BABCOCK: You don't want a pussyfooted rule, do you?

MR. MUNZINGER: I want individual response -- I am responsible. Frank and I have been talking.

These rules apply to $10,000, for god sakes. Is there anybody in this room that would chunk $10,000 out there in the middle of the room and walk away from it?

CHAIRMAN BABCOCK: Frank, but --

MR. MUNZINGER: The lenders have paid that money. It was their money and they paid it on a promise to be repaid, and the person who didn't repay it is now saying, "I don't know anything about it." I bet I've heard that before.

PROFESSOR SPECTOR: Well, can I answer?

CHAIRMAN BABCOCK: Yeah. Since you're the focal point of this rant.

PROFESSOR SPECTOR: You know, I think any information of the sort that the task force has asked for, information about the debt, is helpful to the debtor to identify what the claim is about. You're right, some of the debtors have more than one account, and if they don't -- more than one account in collection, and we want to make sure that they know which one they're talking about, and there also are amounts -- I've had debtors tell me when they see, "They sued me for $10,000. I never had a credit card for $10,000. I had a credit card with a limit of $2,500. $10,000, it can't be me." So that, you know, we have lots of different levels of understanding and education among our debtors, but providing more

information to them, particularly when you don't expect them to show up, that it makes that judgment more secure in the long run.

MR. TUCKER: If I can just give you an example of the things that our courts see all the time, we have a lot of times where the assignee files a claim and then their documents they send in for judgment are a one-page computer printout from their record that says, "Bronson Tucker, $5,250." Then there's a one-page affidavit that says, "I promise that this is what our business records say," and they want a judgment against me for $5,250, and the problem is there's really no affirmative link that this is me.

MR. MUNZINGER: And that's what Justice Bland was after and it was my question to the previous speaker was after. If you have to prove a case in a contested case, what do you have to prove and how can we require the production of documents that satisfy this judge that he is not saddling a citizen with someone else's debt or improper debt? We all want justice.

MR. TUCKER: Right.

MR. MUNZINGER: But to create a rule that lets deadbeats beat the system is not smart, and there's got to be a better way of doing it.

HONORABLE RUSS CASEY: I would agree that

your assessment right there is exactly what the intention of the committee was. We may have not done the best job, but if we can from going forward to here move with that same concept in order to find something that's happy with everybody, I think everybody is happy, but you espoused exactly to the tee exactly what we were trying to do.

MR. MUNZINGER: Well, why do you have to know who the original debtor is in --

PROFESSOR DORSANEO: Creditor.

MR. MUNZINGER: Creditor is in the proof of the case, if you have verbal testimony? A man comes to court and says, "I'm Joe Schmoe and I bought this account from the Bank of America, and the Bank of America at the time told me so-and-so and so-and-so." Would you grant the judgment based on that, or would you make the fellow go back and get you the original papers from the Bank of America? And it's a contested proceeding, and you're looking at the two parties there. I think you would probably grant the judgment.

HONORABLE RUSS CASEY: I think the important concept is that the defendant would know that it was actually originally a Bank of America account there instead of Midland Funding, Unifund, you know, so-and-so's partners. A lot of times the defendants come in and they say, "I don't know who this person is," if they ever come

in at all. "I don't know who this law firm is. I've never dealt with this person before," so we would like them to know, oh, yeah, this is about that particular credit card, and that's the purpose, is to find out or for it to show this was the original debt, this is what it was coming from. It's not necessarily -- we were not trying to put a stumbling block in anyone's way.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: The way these rules work out, I think it's pretty clear to me that the without a hearing approach is problematic for all of the reasons talked about. If you need -- if you need to have a hearing so you need to go to 525(c), it's very unclear in the law generally about prove-up hearings, and maybe it's becoming more clear that a hearing doesn't necessarily need to be, you know, an in court to prove up like I used to have to do when I was a younger person, but it isn't clear whether those documents that you have there would be -- you know, would be enough at the prove-up hearing. I guess there's some uncertainty about that, right, as to how much needs to be -- what does the prove up need to be. It would seem to me it needs to be -- it is not liability, but it's still the question of the difference between liability and indebtedness --

MR. TUCKER: Right.

PROFESSOR DORSANEO: -- is a --

MR. TUCKER: Yeah.

PROFESSOR DORSANEO: You know, it's a tough question as to where one -- where one ends and the other begins.

MR. TUCKER: Agreed.

PROFESSOR DORSANEO: And I think that's the thing we need to know the answer to. What do the debtors lawyers think ought to be enough, you know?

CHAIRMAN BABCOCK: Judge Estevez, and then Judge Evans, and then Justice Moseley.

HONORABLE ANA ESTEVEZ: I appreciated the passion and the policy argument, but I do believe that at the point that we're talking about here, if you do not have that original creditor and you're talking about someone who has bought this debt, we're not helping the banks or hurting the bank. The banks have already written it off. They've already sold it. They bought it at a dollar -- I don't know, they paid a dollar for every one cent of the debt at this point. So even if you're paying it back, this is a business that someone else has at that point. You're not helping the economy. The bank is already out of it. If the bank was still in it they would have the original affidavit. It wouldn't be an issue. The bank would be the plaintiff, and no one would have a

question if it's the bank or the credit card company, whoever it is. I mean, I can tell the difference every time I get a default from Mr. Scott or if I get a default from an original creditor. I mean, I can just look at the pleadings and I know who originally is suing them and I also know that they may not have a clue who is suing them or if they even got the right party. You know, the original person wouldn't normally know who borrowed the money from them.

MR. LEVY: The bank is not going to go and loan you money tomorrow if they don't think they can collect it a year from now. It has a huge economic impact, not just after they sell it, but from day one. They need to know there is a market to resell their debt.

MR. MUNZINGER: And there's no secondary market if the secondary market buyer figures that he can't recover on 25 percent of the accounts that he's buying unless he spends another X amount of money, and so eventually it may come to the point in time where the banks don't make the sales or the secondary market dries up, but that's all beside the point.

HONORABLE ANA ESTEVEZ: Well, they can add the affidavit when they sell the debt. They can put in an affidavit that goes with it as part of the package. I don't think that would be that difficult for them to do if

that's what's required.

MR. MUNZINGER: If there are thousands of accounts and people make sworn statements on thousands of accounts --

HONORABLE ANA ESTEVEZ: They do it all the time.

MR. MUNZINGER: I don't buy that.

HONORABLE ANA ESTEVEZ: I gave one for the secondary person.

CHAIRMAN BABCOCK: Yeah, by the way, since this is Jeopardy be sure your answer is in the form of a question. Judge Evans.

HONORABLE DAVID EVANS: I would just say, I would estimate that one-third of the contested credit card cases I have, once the records are produced the original affidavit changes and the balance changes, and it goes down. It is a function of selling the paper as to whether or not the purchaser wants to buy the digital records that support the book balance. They can buy that paper with or without the supporting paperwork. The cases brought by the original credit card companies, they are always able to produce digital forms that show the charges and show the goods that were purchased or the services that were bought that led to the balances and the penalties that were produced. This is not a matter of somebody going and

digging into some file and searching around, pulling out a paper. This will go on a flash drive.

Now, the problem is, is that the affidavits, just like the affidavits that were being filed under foreclosure market, are inherently suspect. You cannot tell that they were signed in front of a notary. They are conclusionary and merely say, "My records say this." You don't even get a screen picture of the record. Now, you know, I accept the fact that a district judge doesn't have the authority that a JP does, but I do want you-all to note that I was at least quiet this morning, but hearsay testimony has to have some trustworthiness to it, and the rules allow a trial judge to look at a piece of hearsay testimony and say, you know, "This just stinks," and I don't think I'm too uncomfortable with a JP having that authority.

CHAIRMAN BABCOCK: Does anybody have any more questions of Mary? Gene.

MR. STORIE: I just have a -- I hope a short one. Professor Spector, I did get to look at your paper, and I thought that was very interesting. I wonder do you know whether the Legislature was looking at those kinds of issues when they passed House Bill 79?

PROFESSOR SPECTOR: No, I don't know.

CHAIRMAN BABCOCK: Any other questions?

Frank.

MR. GILSTRAP: Do you ever have cases where people have -- where two people are trying to collect the same debt? Has that ever come up?

PROFESSOR SPECTOR: It's come up in the context of clients coming to us and saying. "I've had people calling me about this. I don't know who they are," and whether or not some -- it's the debt buyer or a previous debt buyer. We've also had clients who have talked to -- maybe they had a relationship with the bank where they -- that issued the credit card, and they went into the bank, and they talked to an officer there and mistakenly believed that writing it off was the end of the line and so then were quite surprised when the debt buyer came to try to collect the debt.

MR. TUCKER: And the last time I instructed on this subject I had a JP that had that similar thing where the bank had sold the debt unbeknownst to the consumer. The consumer then paid the bank. The bank accepted payment, and they proved that they had paid the bank and then a suit was filed from the assignee against the consumer to recover that same debt.

HONORABLE RUSS CASEY: And it is not uncommon at all. I don't know exactly how often, but it's often enough that I have one debt buyer file a claim, sell

the debt. The new debt buyer files a claim, and I'll have two separate places for two separate plaintiffs that both involve the same debt. It is a very common act.

CHAIRMAN BABCOCK: Any more questions for Professor Spector? Nina, did you have one?

MS. CORTELL: That may address it. I was going to ask Mary whether -- I understand wanting the information about the original creditor, but do you support that the rule should require an affidavit by the original creditor?

PROFESSOR SPECTOR: Well, under current law that would be the way I would want to prove a debt or a contract if I were a plaintiff going into court to prove the contract. So my answer now would be "yes," that's what I would want because that's what I would need in other kinds of contract cases.

CHAIRMAN BABCOCK: Okay. Thanks very much. Let's have our next speaker, if you think you're ready for this.

PROFESSOR SPECTOR: Well, at least y'all weren't yelling at me, so --

CHAIRMAN BABCOCK: Don't be so sure of that.

MS. WHITLEY: Hi, my name is Tracy Whitley and I am a consumer protection attorney for Legal Aid, so I represent debtors in exactly these sorts of cases, and

over the last five years probably 85 percent of my cases are debt collection defense cases now, and I want to thank the task force for allowing us to appear before you and to submit some proposed rules, and I think you've done a really good job, and we absolutely agree with you that the Midland Credit Management line of cases is the much more reliable line of cases.

I just had very short a couple of comments. For both 577 and 578, we really do need to see the actual agreement. We need to know the terms of the agreement that the debtor signed because debt collection cases are at heart a breach of contract claim, and we need to know the terms of the contract. It's going to make a difference in what sort of fees are imposed, and it's going to make a big difference to know when you go into default and what made you go into default, because you need to know the date of the default to know when the statute of limitations starts running.

On one case I've got before me now -- and this is typical of almost all of the cases -- they say the debtor opened the credit card, applied for a credit card in 2002, but the representative agreement that they provided in discovery, they certainly didn't provide it with the pleading, is a 2008 card agreement that I can't read anyway, and I've asked and asked to get the actual

agreement. I finally did get a 2004 credit card agreement, but they simply say they don't have those agreements because they're not -- the banks are not required to keep the actual credit card contracts. I can understand that, but the document retention statute as far as I know has not changed the elements to prove a breach of contract case in Texas. We still need to see that contract that applies to this client in this debt, and they usually do not have it, so they need to be required to produce it so we can -- we can prove our defense.

I would also suggest that they provide more than just a date of the assignment. The copies of the assignment that I get in discovery are just a one-page or half a page, which says, "We affirm that this group of accounts was assigned," and then the debt buyer has usually generated a one-page piece of paper which has my client's name and address and account number on it, but they generated that. That's not part of the agreement, and the assignment is always an exhibit of the true bill of sale, so we're not even getting the true and complete document. We're getting an unsupported exhibit with a created list of my client's name. If we could see the entire bill of sale with the terms then you start seeing a lot of wacky things, because most credit card debts are securitized and sold on Wall Street, a lot of the times

these assignments are not assigning the right to collect on a debt or the right to sue. Sometimes they're just servicing. A lot of the times the account is sold to one entity, but the receivables are sold to someone else, and you can't tell from just the assignment who has the right to collect there, who owns this account and can sue on it. So it would be nice if we had rules, so if people -- if the debt buyers had to prove they actually own this debt that they're collecting on.

And just a quick answer on how the debts are being collected, what I see on people who are -- who often didn't even know that they had been sued, they come to me because their bank accounts have been frozen and garnished, and they didn't know about a lawsuit. To freeze and wipe out a bank account for the working poor is absolutely crippling, but that's usually the means of collection, and I'm happy to answer any questions.

CHAIRMAN BABCOCK: Yeah, well, we'll be the judge of that. All right, questions. Questions, now. Robert.

MR. LEVY: All right. My question to you is we're trying to sit here amongst others, I'm sure the Legislature as well, to define a balance; and you obviously want to protect the interests of the debtors; and I'm thrilled that this voice is here, Professor

Spector as well, but what you're talking about and the restrictions, additional provisions that you're suggesting would end up making it much more difficult for the credit industry to function and collect debt, and so aren't you going to end up in a situation where your clients are going to be in a worse situation because they won't be able to get credit? They won't go -- no one is going to lend them money. No one is going to give them credit cards, and that's part of, I think, what we need to look at, a process that works for everyone involved.

MS. WHITLEY: I think that the credit card companies need to look carefully at the people to whom they grant credit and their abilities to repay that, but once they've entered into that agreement a debtor has a right to know that he is being sued by someone who has the right to collect that debt, someone who actually owns the debt, and I think that's just a basic right of a creditor to that -- that someone who has bought some interest in an account is not suing him on the speculation that he's going to default and we never have to do anything else.

MR. LEVY: When you're in a lawsuit and you're contesting it, you ask for that in discovery, and you probably go to the court from time to time and fight over what they're required to give, but that's adversarial process. That's the system. We don't require that level

of proof in other commercial contract cases and shouldn't -- if we're going to have a higher proof requirement, isn't that an issue for the Legislature to define in terms of consumer protection statutes versus a procedural issue like rules?

MS. WHITLEY: I can see where the Legislature -- it would be good if the Legislature would mandate that, that sort of level of proof.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Only I just -- you said your clients don't know they've been sued, and they have a judgment against them. I take it they're all fraudulent judgments. You can't get a judgment if your client hadn't been served. I don't understand how that could be.

MS. WHITLEY: Well, right. It's a fraudulent judgment, and I can usually go in on a bill of review if it's within four years.

MR. MUNZINGER: So the client has not actually been served?

MS. WHITLEY: Usually not.

MR. MUNZINGER: Wow.

MR. TUCKER: We've also had -- we had testimony from our judges, the best example, our judges also do the death investigations, and our -- I had a judge get a return of service indicating that the person had

been personally served. The judge had performed the death investigation on that same person who was allegedly personally served before the date of alleged service, so those things are occurring.

CHAIRMAN BABCOCK: Or it was a faulty investigation.

MR. TUCKER: That is also a possibility.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: I understand you to be saying that in these breach of contract cases you need the actual agreement, and that's ordinary -- an ordinary requirement, like a suit on a note requires you to have the note --

MS. WHITLEY: Yes, sir.

PROFESSOR DORSANEO: -- or at least some very acceptable substitute for a suit or, you know, under a retail installment contract one would expect that same kind of thing, and that does -- that does appear to be at least a pleading requirement, but what does happen in the default context? Are you asking for a different kind of default rule or --

MS. WHITLEY: No, no, I'm supporting the default, as long as it's the actual contract. I believe what it says, "a copy of the contract, promissory note, charge-off statement, or an original document evidencing

the original debt." Just a charge-off statement is not going to show us what the actual terms of the contract was.

CHAIRMAN BABCOCK: Richard, question.

MR. MUNZINGER: Would it be your legal opinion that -- would it be your legal opinion that the actual contract would be required in a liquidated debt situation, or even an unliquidated debt situation, in a county court at law where it's a default judgment?

MS. WHITLEY: Yes, we need the contract.

MR. MUNZINGER: Proper service, default.

PROFESSOR DORSANEO: Is that because the default -- is that because the default -- even a default judgment requires proper pleading of a claim?

MS. WHITLEY: Correct.

PROFESSOR DORSANEO: Okay. So you can't just not plead that and then therefore not prove it because liability has been admitted. There's still a pleading requirement for default judgments.

MS. WHITLEY: Correct.

PROFESSOR DORSANEO: That's what I'm trying to understand.

MS. WHITLEY: Yes.

CHAIRMAN BABCOCK: Justice Moseley.

HONORABLE JAMES MOSELEY: Since the

charge-off statement doesn't provide anything about the original terms of the agreement, why does the plaintiff under this proposal need to plead the charge-off date and amount?

MS. WHITLEY: Oh, you need the charge-off date and amount to figure what the actual damages are, because those will often change.

HONORABLE JAMES MOSELEY: For purposes of computing interest?

MS. WHITLEY: Correct.

HONORABLE JAMES MOSELEY: Does that need to be an element of pleading? In other words, can they even -- right now they couldn't even get to court unless they could specify that? What if they weren't seeking post-default on the debt interest?

MS. WHITLEY: Well --

MR. TUCKER: If I can -- I'm sorry, if I can address kind of how we put the rule together, Justice Moseley. The idea is if the defendant answers they don't have to have anything of that because we're going to now have a contested hearing. Those requirements, if you look at the -- at 578 --

HONORABLE JAMES MOSELEY: I understand. I just don't think it's relevant whether they answer or not. The date that the bank charges off the debt, not the date

of default or the day of the last payment, but the date that the bank charges off the debt is just an internal function at the bank.

MR. TUCKER: Yeah, and I --

HONORABLE JAMES MOSELEY: I don't know why that's relevant in terms of a pleading or in terms of proof in the lawsuit unless someone can explain that.

CHAIRMAN BABCOCK: Justice Moseley, Professor Spector has not suffered enough abuse, so she wants to answer your question.

PROFESSOR SPECTOR: I think --

HONORABLE JAMES MOSELEY: I have another one.

PROFESSOR SPECTOR: -- the date of charge-off, how it -- it's not determinative of when limitation starts to run, but it is a factor that helps the debtor know how old this debt is, and the charge-off date, like in the example I gave of the client who had communicated with the bank, that may be a factor that means something to a particular debtor, and you know, as we all know, when limitations begins to run is not always an easy thing to determine, so it's a factor.

HONORABLE JAMES MOSELEY: So it's a factor, although it won't explain the date that limitations might begin to run, it's helpful in terms of trying to help the

defendant who might answer come up with an affirmative defense of limitations. Is that the only reason it's useful?

MR. TUCKER: And calculation of damages.

MR. PERDUE: Maybe that's -- that language is in the creditor's bar proposal.

HONORABLE JAMES MOSELEY: If I -- the other provision is that the name and address as appearing on the original creditor records. Is that the name and address as of the date the account was set up, or is that the last name and address that the original creditor has?

HONORABLE RUSS CASEY: Hearing the lady earlier I understand that it may be a little problematic with our exact language on there. We -- and it is possible that it could be interpreted to be the name and address when the account was originally created. We meant for it to be when the account was ended, I guess. It's possible that you have a credit card for over 30 years before you go into a default, and you may have moved during that time at some point in time, so it was not the -- it was not the intention of the committee to seek the original address of when it was created but the address of when it was --

HONORABLE JAMES MOSELEY: My general comment, and then I'll close, is generally speaking it's

always helpful to provide more information, if information is cost-free. It's not. So the question is what kind of information provides the most benefit in terms of the cost benefit analysis, how costly is it to get the information you're seeking either in terms of the petition or in terms of documentation that the rule would require for proof? I'm concerned that some of the testimony we've heard is that the type of -- some of the types of information that the proposal is seeking is going to incur enough costs that it's going to materially impact credit markets or credit resale market.

CHAIRMAN BABCOCK: Let's cut off this right now because Tracy has been up there a long time, and we have other people lined up -- no, David, it's you I'm talking about -- who wants to speak, but you can ask him your question.

PROFESSOR DORSANEO: Okay.

CHAIRMAN BABCOCK: David, I'm surprised you're back after --

MR. FRITSCHE: It has been fun. It's been a fun ride. Mr. Chairman, Justice Hecht, and members of the committee, Marisa, my name is David Fritsche. I've been practicing for over 25 years in San Antonio with a concentration in commercial litigation. A lot of that commercial litigation is real estate litigation, and a lot

of that real estate litigation is representing commercial and residential landlords in a lot of eviction cases. I served with Bronson Tucker for seven years on the faculty of the Justice Court Training Center teaching clerks and JPs across the state landlord-tenant law in evictions. I was fortunate enough to serve on the task force that wrote the draft for Rule 737, and I have been privileged to be working with Elaine Carlson and her ancillary proceedings task force for the last four and a half years, and hopefully we're close to being finished on that.

CHAIRMAN BABCOCK: We might.

MR. FRITSCHE: But I am here today solely representing the Texas Apartment Association because I am a member. I am an owner of rental property, and I am the outside general counsel to San Antonio Apartment Association. A little bit about TAA, it's the largest statewide trade association representing rental owners in the country. They represent over 1.8 million rental housing units that house over 4.5 million Texans, so obviously I am going to be talking about evictions and the proposed eviction rules. Historically TAA has been asked to sit on the task force that -- any task force that deals with landlord-tenant matters. TAA general counsel Wendy Wilson was invited as a guest to the first task force meeting, but TAA had no further representation during the

rest of the task force meetings and did not -- was not aware of the extent -- of the potential extent of the changes in the eviction rules until after the committee supplied its report to the Supreme Court Advisory Committee. At that point after they reviewed it they reached out to five of the most experienced landlord-tenant lawyers in the state of Texas representing over -- or roughly about 150 years of experience, and those condensed comments were provided on May 31st by TAA to the committee along with the 17-page side-by-side rule -- rule-by-rule comparison between current rule, proposed rule, and recommendation.

We certainly appreciate the -- all of the work that the task force has done to put these rules together, especially on such a short time period. We've had a lot more time on ancillary proceedings, and I can appreciate --

CHAIRMAN BABCOCK: Now, now.

MR. FRITSCHE: I can appreciate being under the gun, but I ask you to think about two separate questions as you go through all of these rules and particularly the eviction rules. First, what deficiencies, if any, in the current eviction system, the current eviction process, are necessary to be corrected? We have over a hundred years of jurisprudence in Texas

dealing with evictions under some form of the current rules, and most recently I was fortunate enough to be before the Texas Supreme Court in 2005 on a residential eviction case that was heard by the Supreme Court. We have a long body of jurisprudence regarding some form of these rules.

Second, are the changes that are being proposed are -- are they going to create unintended consequences that no matter how deliberative we are and how forward-thinking we are, are they going to create deficiencies that we can't anticipate, and are we replacing one set of consequences for another? And our position, from our position, the eviction rules are not broken, and I want to go back to something Justice Christopher said that -- Justice Christopher made a point right before the lunch break that I want to drill down to, and that is what was the legislative mandate in HB 79 and what was the charge of the Court to the task force, because we believe that the mandate, both the legislative mandate and the charge of the Court, were far exceeded, but it goes back to what Bronson touched on very early on. There are two courts sitting in justice court. There are justice courts with a higher standard of Rules of Procedure and Evidence. There are small claims courts with a very low standard regarding rules and evidence.

In fact, the Office of Court Administration, their most recent report for fiscal year 2010-2011, of the 3.18 million cases reported out of JP court only 43,287 were small claims. 1.4 percent. There were 225,000 evictions but only 43,287 small claims cases. This is important because the Legislature did not abolish Chapter 27. The Legislature abolished Chapter 28, which established small claims courts. They left Chapter 27 vesting jurisdiction in the justice courts in place and merely added a new section at the end of section 27. This is important because a lot of people don't realize how broad justice court jurisdiction is, how many types of cases they handle.

27.031 of the Government Code says, "In addition to the jurisdiction and powers provided by the Constitution, justice courts have original jurisdiction of civil matters which exclusive jurisdiction does not exceed $10,000, cases of forcible entry and detainer, foreclosure of mortgages, and enforcement of liens on personal property," and it goes on, and a lot of you I bet did not know that justice court has concurrent jurisdiction with a district court to construe restrictive covenants. That's 27.034 of the Government Code.

Now, what we have done and what these proposed rules in general do, they are combining every

type of justice court proceeding into essentially a small claims proceeding by the operation of 502 and 504, and I'm hoping that the horse is not so far out of the barn on 502 and 504 to readdress what that means in justice court proceedings as opposed to small claims court proceedings. House Bill 79. When you look at the mandate, the Supreme Court was very, very careful in reiterating the mandate to the task force in their charge appointing the task force. What it said was -- and it quoted House Bill 79 for the Court to promulgate rules to define, define, which cases are small claims cases, Rules of Civil Procedure applicable to small claims cases, and third, rules for eviction proceedings. There was no legislative intent to combine rules for eviction proceedings into these -- these Rules of Procedure that have been proposed.

Because essentially what we're losing in the justice court system is if we don't have Rules 93, 94, and 95 regarding pleading, that is very important in commercial eviction cases. If I am -- if I'm evicting Best Buy from La Cantera because of nonpayment of rent, that type of case is going to have exclusive jurisdiction in the justice court, and there needs to be some sort of formal rule procedure because that case may be -- may be appealed trial de novo to the county court or the justice court may require and set an appeal bond far in excess of

their jurisdictional limit, which they can do, and that may end the eviction at the JP court level, and so merely -- you may hear some argument that, well, there's a de novo appeal out of justice court to county court for any purpose, and that's the remedy that every defendant has or every plaintiff for that matter has, and what matters in justice court, you know, what we do with these rules may not matter. It does matter, particularly in commercial eviction cases.

So let me talk also about -- just to reiterate, House Bill 79 and the Court's charge had no statement in it that reflected a combination of small claims rules with eviction rules, and that's what is before you today. As I mentioned, the Office of Court Administration reported out these 225,000 eviction cases in Texas, only 4,100, about two percent, were appealed de novo to county court. They ended in justice court. Our position is we believe with the fact that there may be no Rules of Procedure, limited Rules of Evidence, based upon whatever the Court decides, there's not only going to be very diverse opinions and very diverse manners in which a court from justice court to justice court handles these cases. For instance, Harris County has 16 JPs, two JPs in eight different precincts. You could have very diverse results from one JP precinct to another when you start

thinking about how disruptive that can be. I think that there is a good likelihood that instead of having 4,100 de novo appeals to county court with no specific eviction rules in place that are similar to the current system, we are going to see a much greater number of appeals to county court de novo.

CHAIRMAN BABCOCK: David, you're at 10 minutes.

MR. FRITSCHE: May I wrap up?

CHAIRMAN BABCOCK: Yeah.

MR. FRITSCHE: All right. Let me just point out the four quick items we are most concerned with. Number one, the removal of the bond for immediate possession because the removal of the bond for immediate possession takes away a remedy of the landlord, a remedy of the landlord to post a bond that only is effective to give the landlord a writ of possession if the tenant does not show up for trial. If the tenant shows up, the bond for possession means nothing, the case is tried, and the tenant has the right to appeal, as does the landlord.

The second problem that we see or that these modified time periods would heighten potential for delay, because eviction case trial dates are set and triggered based upon the filing date. The eviction rules that are before you today say that the JP court must try the case

within 14 days of the filing date with no reference any longer to the date of service. When you look at the substituted service provision of that, of these proposed rules, it is almost going to be impossible for substituted service to be effected before the trial date, which will require a continuance or for the plaintiff to attempt to obtain a continuance.

And then finally, you know, we talked about 502 and 504. Without the specific rules that are in place today, which we do not believe are broken, landlords and tenants are not going to know from court to court how to proceed. Finally, there's mandated ADR, which have never -- you know, mandated ADR in eviction cases has never been a rule. It's in Chapter 154 of the CPRC in all courts may apply mandated ADR, but we do not believe it's an appropriate place -- it's appropriate to place it in a rule in the eviction rules. I would be happy to answer any questions about our concerns. Thank you, Mr. Chairman.

CHAIRMAN BABCOCK: Any questions? Yeah, Buddy.

MR. LOW: All right. You say the present eviction rules are proper, we don't need to do anything. What does the Supreme Court -- I mean, what does the Legislature mean when they say, "Not later than May 1,

2013, the Supreme Court shall do the following," "prepare rules for eviction." If we already have the rules why are they telling the Court to draw some?

MR. FRITSCHE: Well, TA talked to the author and the sponsor of the bill, Senator Duncan, and our understanding is they did not intend for the eviction rules to be rewritten, and Buddy, what you may remember is that there was a task force, I believe chaired by Judge Lawrence, some years ago that redrafted the eviction rules.

MR. LOW: Yeah, that was 2002.

MR. FRITSCHE: Pardon?

MR. LOW: 2002.

MR. FRITSCHE: 2002. And we worked on those rules, but -- and I think it's important to note that the Supreme Court has not adopted those rules. The rules are working fine.

MR. LOW: I know, but the Legislature met. Surely people talked to them and they must have been told that you have rules and they're adequate, and yet after all the knowledge the Legislature has they come out and now tell the Supreme Court to draw rules. They're telling us something.

MR. FRITSCHE: I agree, but if you look at the manner in which HB -- 5.07 of HB 79 is drafted, there

is no legislative intent for those eviction rules to become small claims rules.

MR. LOW: They do away with that. Second question is do you have any comment on House Bill 1111?

MR. FRITSCHE: Yes.

MR. LOW: On -- we talked about appeal.

MR. FRITSCHE: Absolutely.

MR. LOW: Didn't that tell the Court we have to do something, 1111 on appeal?

MR. FRITSCHE: It did. House Bill 1111 is a new pauper's affidavit bill that was passed by the Legislature that included mandate for the Supreme Court to issue additional rules regarding appeals for pauper's affidavit defendants. When a tenant defaults and a default judgment is taken or they lose in court they have two manners in which to appeal, by filing an appeal bond, which perfects an appeal to the county court de novo, or by filing a pauper's affidavit, an affidavit of inability to pay costs on appeal. Both filings perfect the appeal to county court. House Bill 1111 elaborated on the new procedures that have to be followed by the court regarding deposits into the registry of the court to perfect the tenant's right to possession during the pendency of the appeal. In fact --

MR. LOW: I didn't really want a lesson on

that, but what I wanted to tell you was that the Legislature must have thought the rules weren't adequate as far as that and you already had rules that were adequate and yet they come in and pass a specific rule. Why would they do that, again, if the rules are adequate?

MR. FRITSCHE: Buddy, what the task force proposed is essentially almost verbatim what is in 24.053 and 054, which I think is a little bit dangerous because the Legislature next session may come back and change it again.

MR. LOW: Well, I'm not going to guess what they're going to do, but, all right, you've answered my question.

CHAIRMAN BABCOCK: All right. Judge Wallace.

HONORABLE R. H. WALLACE: Okay. Before HB 79, as I understand, eviction cases were brought in JP court and the Rules of Evidence and Procedure applied.

MR. FRITSCHE: Correct.

HONORABLE R. H. WALLACE: And HB 79 said we're going to abolish the small claims court, and we're going to make rules, the discovery rules, and which discovery rules under civil procedure and Rules of Evidence, you can't require them to apply. Correct?

MR. FRITSCHE: I think what you have to look

at, they are saying that the Supreme Court must first define what constitutes a small claims case. That's number first, number one. They didn't say combine all cases into small claims, and the section that you're referring to only applies if the Supreme Court has defined that existing justice court case or a new justice court case as a small claims case under the HB 79 mandate, and then that rule kicks in.

HONORABLE R. H. WALLACE: Right. And by saying then later that the Supreme Court will promulgate rules for eviction proceedings, seems to me to leave room for the interpretation you could have a complete different set of rules just for eviction.

MR. FRITSCHE: I agree. I agree, and I think that's what the Legislature intended.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: David, on the -- with respect to the immediate possession bond and your reference to, what is it, HB 1111, HB 1111 did not add anything new to the law substantively. It has been the law, correct, for a long time that if you're a tenant and you lose, you want to appeal to county court, you've got to pay rent as rent becomes due while an appeal is pending or the court issues an immediate -- I don't know how immediate, but a possession bond, or a right of

possession, dispossesses you and the landlord gets the place, right?

MR. FRITSCHE: Temporarily until a judgment for possession.

HONORABLE STEPHEN YELENOSKY: Right. Right.

MR. TUCKER: But --

HONORABLE STEPHEN YELENOSKY: It's been the law for sometime that the tenant can't just stay in the premises while an appeal is pending without paying rent, right, and that hasn't changed.

MR. FRITSCHE: Correct. What --

HONORABLE STEPHEN YELENOSKY: Wait, wait, wait. That's all I want to know right now. That's correct. Okay. The second part of the question is with an immediate possession bond under current law it only applies under current statutory law, right? It only applies if there's a default.

MR. FRITSCHE: Only applies to --

HONORABLE STEPHEN YELENOSKY: If there's been a default, the judgment is by default.

MR. FRITSCHE: That is correct. 24.061 -- 0061 via the Property Code, only if a tenant doesn't appear.

HONORABLE STEPHEN YELENOSKY: Right. And so subpart of that question is do you think that that allows

immediate possession bond if the judgment is by default, yet the tenant then appeals to county court?

MR. FRITSCHE: The tenant always has the right to appeal even if they default with a bond for possession having been filed and they lose possession. That's where --

HONORABLE STEPHEN YELENOSKY: Well, but my question is do you think they lose possession if they appeal, because my understanding is some justice courts interpret that differently?

MR. FRITSCHE: They lose possession during the pendency of the appeal, but if the landlord does not diligently prosecute their case to a final judgment for possession or if they, at their own peril, nonsuit the case --

CHAIRMAN BABCOCK: Hey, David, hang on for a second. Hey, Bill, she is having trouble reporting, sorry.

PROFESSOR DORSANEO: No problem.

MR. FRITSCHE: If the landlord nonsuits the case after obtaining possession on a bond for possession just because they've had possession and it's been appealed then the landlord does so at their peril, and there's a 1942 Supreme Court case on wrongful evictions, and if I could just circle back around to the one substantive

change of existing law in House Bill 1111, up until House Bill 1111 the only court having jurisdiction to issue any sort of writ of possession for failure to pay into the registry of the court was the county court.

HONORABLE STEPHEN YELENOSKY: County court, right.

MR. FRITSCHE: House Bill 1111 shifted that to the JP court for five days. The JP court gives the notice as to how much has to be paid, the JP court could issue the writ of possession.

HONORABLE STEPHEN YELENOSKY: Well, in the task force report, although there wasn't a report per se, there was commentary within the proposed rule, and the comment on the immediate possession bond was there was a dispute in the task force about whether to eliminate the immediate possession bond entirely or propose this new Rule 742 that provides yet a different type of possession -- a possession bond and a counter-bond that would not apply just in default situations, to raise the question how you can do that consistent with the Property Code, but in any event why do you need an immediate possession bond if the law requires that the tenant pay rent to remain in?

MR. FRITSCHE: Well, Nelson Mock is my friend and adversary, who we disagreed vehemently on the

immediate bond for possession. The bond for immediate possession is rarely used to begin with. Rarely, if ever. When it is used it is because of exigent circumstances, somebody has discharged a firearm, there's a threat to persons or property, the tenant or an occupant has gone into the office and threatened the management with bodily harm. In those types of situations landlords file suits for possession, file evictions with bonds for possession, but it's really -- when I teach this it's really an 80-dollar bet with the court. It's an 80-dollar bet that the tenant will not appear because if the tenant is served, appears at the trial, the bond for possession is useless. The only time the bond for possession is effective in allowing the court to issue a writ of possession is if the tenant fails to appear at the JP court trial, and even if they do, they have the right to appeal. They can still file their appeal bond or pauper's affidavit. They haven't lost an automatic trial de novo at the county court level.

HONORABLE STEPHEN YELENOSKY: But they lose possession.

MR. FRITSCHE: They lose possession.

HONORABLE STEPHEN YELENOSKY: And so you would agree the 742 proposal is inconsistent with the current Property Code?

MR. FRITSCHE: The new bond for possession?

HONORABLE STEPHEN YELENOSKY: Yes, the proposal.

MR. FRITSCHE: Yes. Yes.

HONORABLE STEPHEN YELENOSKY: Okay. Thank you.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I'll defer.

CHAIRMAN BABCOCK: You're done? Okay, David, thank you very much.

HONORABLE RUSS CASEY: May I say something in regards to that real quick?

CHAIRMAN BABCOCK: No. No, go ahead, Judge, I'm just kidding.

HONORABLE RUSS CASEY: I think that you were mingling a couple of things there that weren't necessarily meant to be mingled. 1111 had to do with bonds for possession, not -- but during an appeal process when rent hadn't been paid to the court.

HONORABLE STEPHEN YELENOSKY: Right, nonpayment of rent.

HONORABLE RUSS CASEY: And a bond for immediate possession is not that. A bond for immediate possession is under Rule 740 currently and has to do with taking -- the landlord taking immediate possession during

the waiting period for the appeal and during the appeal itself. So I think that you're mingling a couple of things.

HONORABLE STEPHEN YELENOSKY: Well, I am mingling them. I know they're different. The reason I'm mingling them is because I think one obviates the other.

HONORABLE RUSS CASEY: Okay.

CHAIRMAN BABCOCK: Is there anybody else waiting to speak besides Judge Ridgway? I've got you. Dee Dee, can you hang on for one more speaker?

THE REPORTER: Sure, yes.

CHAIRMAN BABCOCK: We've been pressing her pretty hard. And while judge is coming to the podium, Justice Brown, do you have anything?

HONORABLE HARVEY BROWN: I just had a question. How does the ADR work? I'm trying to understand why you oppose that. Is there a cost that's associated with it? Is it a delay? Is it done that morning before an afternoon trial? How does that work?

MR. FRITSCHE: Well, you've got to go back to 1984, *McLaughlin vs. Cleburt*, which is the seminal Texas Supreme Court case that evictions are supposed to be -- evictions in justice court are supposed to be summary, speedy, and inexpensive cases to determine who has the right to immediate possession. The possibility of being

ordered to mediation in a justice court proceeding, particularly with this 14-day time period triggered by the date of filing, a trial date triggered by the date of filing is going to be well nye impossible unless on the date of trial the JP orders mediation to occur with maybe a mediator that's sitting in the courtroom, but if it is intended and it is used to delay the date of trial, notwithstanding that the task force's intent to keep the JP cases for eviction speedy, if it delays trial, we thwart -- we thwart that speedy trial in JP court, much like the fact that you can't tell which rule -- which series 500 rules apply over in the JP court rules for evictions.

There is no bright line distinction about which ones apply and which ones don't. It appears to me for the very first time in eviction cases there is a right to file a motion for new trial after a default judgment or a dismissal, and there is a current rule in place that says in line with *McLaughlin vs. Cleburt* a speedy, inexpensive termination of the right to possession. There's a rule that says there are no new trials -- motions for new trial that can be filed in JP court after an eviction. The idea is speedy, get to a judgment, and if a tenant, or the landlord for that matter, wants to appeal they can take it up. The danger with the ADR part

is are we delaying the process even further?

MR. TUCKER: And I would just -- Rule 750 explicitly says, "In appeals in eviction cases no motion for new trial may be filed."

CHAIRMAN BABCOCK: All right. David, thanks so much.

MR. FRITSCHE: All right.

CHAIRMAN BABCOCK: Helpful as always.

MR. FRITSCHE: Thank you.

CHAIRMAN BABCOCK: Judge Ridgway.

Hang on for 10 minutes or less, Dee Dee.

THE REPORTER: Okay.

HONORABLE RUSS RIDGWAY: The clock starts.

CHAIRMAN BABCOCK: The clock starts now.

HONORABLE RUSS RIDGWAY: Justice Hecht, members of the Supreme Court Advisory Committee, and others in attendance, I was one of the 16 lucky members of the task force that helped promulgate the proposed rules, and so I just want to add a few things about these. I am a justice of the peace in Harris County. Our precinct in Harris County is the largest justice of the peace precinct in the State of Texas, and so because of that our two JP courts are among the two largest -- two or three largest in the State of Texas year in and year out. I want to address several points. One is we have approximately

16,000 cases per year filed just on evictions, okay, in our two courts. So about 7,000 of those are mine and 9,000 in the other court. In addition we have about 1,500 justice court cases in my court and another 1,500 small claims court, so but we get to see a little bit of everything and a lot of kinds of cases including credit card cases, and one of the things that we had to face in our task force is that we had both large courts and we had small courts involved, and we tried to develop proposed rules that was going to accommodate both the issues of small courts as well as large courts, and so there was some compromise made there.

One of the things I want to talk about are the different kinds of eviction cases we see. We deal with commercial, residential, and multi-unit cases, and unlike perhaps some of the other courts a lot of our cases are not only for nonpayment of rent but they're possession after nonjudicial foreclosure sales, cases to evict for criminal activity as a breach of the contract, excess number of occupants. We have the highest density of apartment complexes in the State of Texas in our precinct. Also, parties choosing not to want to pay the rent because they asked for repairs to be made but they didn't follow their contract or allegedly did not.

The current rules for eviction I want to say

generally work very well. We really haven't had any problems with it, but understand our task force was mandated with coming up with something, and so we've tried to adopt as much as we can in the current rules. The only elements of these rules that I'm somewhat interested in to have practice follow law is to allow the judges to develop the facts of the case, and part of that reason is that we have both tenants and plaintiffs who can't articulate what really -- even though they made the petition, the filing, they can't articulate the details of the case, and so having the judge do that helps move the cases along. An example, yesterday I had over 40 eviction cases, of which 12 of them were contested, and it took us three and a half hours to go through that. Okay. But those cases do move along.

And the other comment I want to make is in the proposed rules there's a suggestion about making fax filings of eviction cases, and I'm really opposed to that because what it does is it causes us to have to match up the moneys received with the fax filings, and if they aren't on the same day, what do you do? How does the timetable begin at that point?

What else? I believe that keeping the eviction rules separate from the small claims rules was intended. I propose that we continue to do that. I want

to talk a little bit about credit card cases, but my main point is I want -- I want -- as a practice have the right of the judge to develop the facts of the case in eviction cases. I can't overemphasize that one enough.

On credit card cases, we've dealt with thousands of credit card cases, and we obviously want the plaintiff to demonstrate that they should prevail by the burden of proof, by the preponderance of the evidence as required by law. One of the issues that we see, and I think it's been addressed a number of different ways here today, is what we see of the number of direct debt cases, that being Discover Bank, Chase Bank, whoever it is, are now filing more and more direct debt cases from which Rule 185, sworn accounts, and the like applies, and it's making those easier. The number of cases that are going through assignments is decreasing, but they're the ones that create the biggest problem, all right, and some of the reasons they create the biggest problem has to do with requests for admissions and request for admissions if not challenged are, quote, judicially accepted, but what if they're conclusory in nature, what if they say to the defendant that -- admit that this person or this company is the owner of the account? And there's no tracking how they got that account or whether they're the rightful owner of that account or not. They're just asked to admit

it.

One of the cases that I had on a bench trial, could have been a jury trial, but it was a bench trial that was really fascinating. It was a case where the assignment had been made four times, and there was a request for admissions, and it was challenged by the defense attorney in the case, and when they challenged it they were able to prove up that the assignment between the second and the third assignee occurred after the third party assigned it to the fourth party in the proceeding. I don't know how you're supposed to match up -- as the judge I don't know how you're supposed to match up what's right and what's wrong in those except when the evidence becomes clear. One of the bigger problems that we see in trying to do default judgments is when we get a petition that states one amount and then the motion for judgment, default judgment, has a different amount in it and then the proposed order submitted by the company has a party -- has another amount. So all at once we've got three different amounts. I am not going to sign off on those as a default judgment without a hearing. We'll call those to come in and prove up their case and explain why there are differences. Some of those differences probably occurred because of the issue of prejudgment interest, whether additional interest should be applied by the party that

took the assignment.

Last comment on mediation, I do send all cases that are going to either bench or jury trial to mediation on the date of trial, and frankly, mediation works extremely well in our court. Some of the provisions say you're supposed to go through arbitrations first. Most parties say, "We want to waive arbitration because we're going to get a judgment quicker and we're going to feel more comfortable about it than spending the money to go through arbitration."

The other issues I think we've had to deal with are appellate issues, and this goes back to what kind of cases do we hear in small claims and in justice court. This is kind of an aside to everything else, but it's been addressed. Some of the kinds of cases we deal with actually have prescribed law for them. For instance, in a malpractice case, you would think that doesn't happen in justice or small claims court. It does, and so there are rules for expert witnesses. Do we apply those? The answer is, yeah, we do, because we want to make sure that we're being consistent with what at least the Texas Rules of Civil Procedure provide, even if it was filed in small claims court. So when you give a judge the discretion to make a decision to -- how to rule on a small claims case and whether you apply justice rules or not, I ask that you

give us some benefit of the doubt, trust our judgment. We're not going to apply the rule willy-nilly. We're only going to apply when we believe the cases require it.

CHAIRMAN BABCOCK: Great. Thanks very much. I want to give her a break, so can you -- are you planning on staying around, Judge?

HONORABLE RUSS RIDGWAY: I will at your request.

CHAIRMAN BABCOCK: Well, we're going to break for our afternoon recess somewhat belatedly. We'll be back on the record at 4:15, at which time you can ask questions.

(Recess from 3:58 p.m. to 4:22 p.m.)

CHAIRMAN BABCOCK: All right, we are back on the record down on the home stretch today, and Richard Orsinger, who is the law oracle of our committee has done research over the break and has found that the record needs to be corrected because there was an error in it and -- two errors.

MR. ORSINGER: Thank you very much. That's not exactly correct, but Judge Estevez was showing me how to use my new iPad, and she showed me that the Government Code, in fact, section 57.002, provides for the appointment of an interpreter by the court on motion and filed by a party are requested by a witness in a civil or

criminal proceeding in the court. That means that Judge Estevez' previous retraction of her original statement was, in fact, wrong and she has asked me to retract her retraction, so that we will return --

HONORABLE ANA ESTEVEZ: He's my champion, so I appreciate it.

CHAIRMAN BABCOCK: So she was right but then she was wrong and now she's right again.

MR. ORSINGER: Yes. She was right all along. We just didn't realize it.

HONORABLE ANA ESTEVEZ: No, I didn't realize it.

CHAIRMAN BABCOCK: Okay. Well, thank goodness the record has been --

MR. ORSINGER: And I can prove it because I now know how to find the Government Code on my iPad.

CHAIRMAN BABCOCK: That's another benefit of being here today. All right. Judge Ridgway has waited here for his beating, so who has questions? Anybody have questions? Justice Brown.

HONORABLE HARVEY BROWN: The ADR process, you were saying at the break that you send people to ADR the day of the trial usually.

HONORABLE RUSS RIDGWAY: Well, if it's on the original date. If it's been served, it's six days

later, they come in, there's no mediation on those. It's only if -- usually if it's going to a jury trial.

HONORABLE HARVEY BROWN: If it's going to a jury trial and it's going to be one of the small claims suits?

HONORABLE RUSS RIDGWAY: No, I'm talking purely on evictions. I'm trying to focus that purely on evictions.

HONORABLE HARVEY BROWN: Okay.

HONORABLE RUSS RIDGWAY: On small claims and justice court cases for both bench trials and jury trials, I send all of those cases to mediation on the day of mediation -- on the day of trial, at no cost. At no cost.

HONORABLE HARVEY BROWN: No cost.

HONORABLE RUSS CASEY: Can I add a comment on that? A lot of people may not know this, but a justice court or a justice of the peace is prevented by law from charging a jury, and we had actually even continued that on in the rule, but in an eviction suit the only issue is who has the greater right of possession. In a jury trial a lot of people like to make it anything other than that, and so a mediation in that particular situation is almost invaluable.

CHAIRMAN BABCOCK: Great. Richard.

MR. ORSINGER: I wanted to ask some

questions about the commercial evictions and this issue about dispensing with Rules of Procedure and Rules of Evidence. Three short questions. How many of your 17,000 eviction cases a year are commercial rather than residential, would you say?

HONORABLE RUSS RIDGWAY: Good question. Commercial only, probably -- I get less than 15 percent.

MR. ORSINGER: Okay. And then of those, how many of them have lawyers on both sides?

HONORABLE RUSS RIDGWAY: I would be guessing, because the numbers are so big when I start thinking about it.

MR. ORSINGER: Well, is it typical to have lawyers on both sides in commercial eviction cases, or is it usually two pro ses or one lawyer against one pro se?

HONORABLE RUSS RIDGWAY: Depending on how big a commercial issue it is. I mean, when I had an eviction involving 450,000 square feet of a high-rise there were attorneys on both sides easily. When they were trying to evict critical care patients from a hospital as subtenants, there were 15 attorneys on that. Best attorneys you could find in Houston, Texas.

MR. ORSINGER: My third question is if there's really money or important rights at stake, do they show up with lawyers and do they appeal, whoever loses?

Does it usually bounce into a county court where they're going to get a trial of record?

HONORABLE RUSS RIDGWAY: I don't have -- I'm not sure how to answer the question. On eviction cases very few are appealed except under pauper's basis, but of the ones that are appealed on eviction cases about 90 percent of those are appealed on a pauper's affidavit basis.

MR. ORSINGER: And those are usually residential evictions?

HONORABLE RUSS RIDGWAY: Yeah or multi-unit evictions.

MR. ORSINGER: Out of an apartment complex?

HONORABLE RUSS RIDGWAY: Yeah, apartments and homes.

MR. ORSINGER: But the large square footage commercial lease kind of situation, is your court usually the court of last resort for that decision, or is it usually the county court, or can you say?

HONORABLE RUSS RIDGWAY: Probably the first resort.

MR. ORSINGER: First resort, but not last.

HONORABLE RUSS RIDGWAY: Yeah. I used to track how many of my cases were appealed and what happened on appeal, and I know for five years I never had a

decision overturned at a county court. I quit tracking it because it was taking too much of my time to figure it out, but the -- you know, I've got to say both small claims, justice court, evictions, our courts, you know, people respect what's going on in our courts, and unless they ever feel like they've really got solid grounds for an appeal, I ask the question, did you -- "do you feel like you had a fair trial, did you get to present all of your evidence?"

"Yes, I did, but I didn't like the answer." I mean, you know, I can't help it if they don't like the answer. As they say, 50 percent of the people go away unhappy.

MR. ORSINGER: Or is it a hundred? In my field it's a hundred.

CHAIRMAN BABCOCK: Okay. Any other questions? Yeah, Justice Gray.

HONORABLE TOM GRAY: You made the comment, and I just want to make sure I understood what you said, that on the direct debt cases where they've -- the banks are starting to sue on their own account, that y'all are treating those as a suit on a sworn account?

HONORABLE RUSS RIDGWAY: In some cases they are giving us those as a sworn account, yes.

HONORABLE TOM GRAY: Because I just know

that all courts don't agree that those are --

HONORABLE RUSS RIDGWAY: I know. Rule 185 will direct that. If they ask for it as a suit on a sworn account, direct debt, we honor that. I could speak for my court. I can't speak for all the other JP courts.

CHAIRMAN BABCOCK: Okay. Anybody else? All right. Well, Judge, thank you so much. Appreciate it.

HONORABLE RUSS RIDGWAY: Thank you.

CHAIRMAN BABCOCK: And you're obviously welcome to stick around, and since you're a member of the task force if you've got anything you want to talk about, just let us know.

All right. What we're going to do now is go to Section 8, the debt claim cases, and after we're done with that we're going to go to Section 10, the eviction cases. So let's go to Rule 576, and I didn't hear any comments at all about the scope, but let's look at 576 and talk about that. Anybody have any comments on 576(a), what the section does apply to? Judge Casey, did you want to talk about what the --

HONORABLE RUSS CASEY: This basically mirrors the language that was sort of put in the legislation. Now, I mentioned earlier that Chapter 28 had a provision against businesses that are in the interest -- or in a business of lending money at interest of filing in

small claims. Now, one of the things is the wording of that particular rule or law in Chapter 28 also prevented like a bank from suing someone over a broken window, and that wasn't necessarily what the intention was, so we did try to change it a little bit to say that as long as it's, you know, pertinent to these type of cases.

CHAIRMAN BABCOCK: Thank you. Any comments? Frank.

MR. GILSTRAP: In (b) it doesn't apply to a regular person who is trying to collect a debt?

HONORABLE RUSS CASEY: It does not.

MR. GILSTRAP: Okay. Where do they go?

HONORABLE RUSS CASEY: Well, they would still be in small claims. It's just this subsection do not apply to those cases.

MR. GILSTRAP: All right.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: I didn't find a definition for "consumer debt" in the list of definitions. Was there a reason for that?

CHAIRMAN BABCOCK: You're talking about 576(a)(2).

HONORABLE RUSS CASEY: Well, to go back over the definitions, I guess --

MR. STORIE: I mean, if I'm a business

consumer, am I a consumer?

HONORABLE RUSS CASEY: You mean under the definitions under Rule 500?

MR. STORIE: Yes.

HONORABLE RUSS CASEY: Rule 500, we have a lot of people that come in and they don't quite understand the difference between a plaintiff and a defendant. Even some lawyers seem to have some trouble with that. We had decided that we wanted to define certain things, and that was not one of the ones that we decided to define.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: But you define "debt claim cases," right? And but that's not used in the rule. It's only used in the title of the section, and so do we -- do we want that definition, or do we want a definition of a term that's actually used in the rule, which is "consumer debt"?

MR. WOOD: We're not saying that we shouldn't have a definition of consumer debt. We probably should. That would be a good idea. We tried to put in what terms we could think of were important, and I'm sure we left some out, and that's probably one.

HONORABLE STEPHEN YELENOSKY: Well, but the point is if you're going to define "debt claim case," one might think that that is intended to describe what's

covered in that section, because it does -- I mean, it defines a debt claim case, right?

MR. WOOD: Yes.

HONORABLE STEPHEN YELENOSKY: Even "can't exceed 10,000 in damages," and so if it's to be operative at all the only place "debt claim case" is used is in the title, right?

MR. TUCKER: No, there's a part in Rule 5 -- at the start, 501, that says, "Debt claim cases shall be governed by Section 8." So that's where it ties the application of those rules directly to that definition.

HONORABLE STEPHEN YELENOSKY: Well, there needs to be -- I think there needs to be some effort to make sure that that definition is what you mean when you say "consumer debt" as well, if all the cases are being guided there by that definition.

HONORABLE RUSS CASEY: And I think that's a very valid point.

MR. TUCKER: Sure.

CHAIRMAN BABCOCK: Okay. What else? Richard?

MR. MUNZINGER: Along with what Judge Yelenosky just asked, the way I would interpret this then is all the rules under Section 8 apply only to a claim for recovery of a debt brought by an assignee of a claim, a

debt collector or collection agency or a person or entity primarily engaged in the business of lending money at interest, and the rest of the rules in Section 8 -- I mean, all of the rules in Section 8 apply only to that group of people, so if I loaned money to him, I'm not one of those, I'm the plaintiff, these rules don't apply to me. Which rules do?

MR. TUCKER: The regular small claims court rules, the chapter -- Section 5 rules.

MR. MUNZINGER: I think it ought to be made more clear somewhere that that is the case, aside in just the definition.

HONORABLE RUSS CASEY: So as in addition to --

MR. TUCKER: Well, and again, that's laid out explicitly in Rule 501 that says, "All cases are governed by this set of rules. Additionally debt claim cases are governed by this set of rules, repair and remedy cases are governed by this set of rules, and eviction cases are governed by this set of rules."

MR. MUNZINGER: Well, but the way you have that written, Rule 501(a), "Small claims cases in justice court shall be governed by Part V of these Rules of Civil Procedure," and I looked for Part V, and I go and here's Part V. It's on the first page, and that tells me that

everything in this document is Part V, but then the next sentence, I mean, you keep reading and I think that's -- at least it threw me. It's not clear to me that Rule 576 and following applies only to these cases where we're concerned about who the original creditor was and that problem. It isn't clear.

HONORABLE RUSS CASEY: And that's where (b) comes in. 501(b).

MR. MUNZINGER: I understand that. Just as a member of the committee my statement to the Supreme Court is I am confused by the way these were written. I imply no criticism to the committee, don't question their bona fides. I'm just saying I'm confused by it, and I don't think I'm the only one.

HONORABLE RUSS CASEY: Okay.

MR. MUNZINGER: Just for example, Rule 509 I believe talks about pleading. Is it 509? Yeah, Rule 509 talks about pleading. It tells you what's in the petition, but then so does Rule 577, and a person who is using these has to go back to the definition and look at the title to find that that definition applies and limits these rules beginning at 576. It just isn't clear to me, and I apologize for taking your time.

MR. TUCKER: That's a good point.

CHAIRMAN BABCOCK: No apologies necessary.

I'm trying to figure out how this works. If the small claims in justice court are governed by Part V, they would be governed by everything in Part V, including Rule 576 and 577.

MR. TUCKER: Those are in Section 8.

CHAIRMAN BABCOCK: They are in Section 8, right.

HONORABLE RUSS CASEY: But they're still in Part V.

CHAIRMAN BABCOCK: But they're in Part V.

MR. MUNZINGER: That's my point.

CHAIRMAN BABCOCK: That was the point you were making.

MR. MUNZINGER: Yeah.

MR. WOOD: Small claims courts are not governed by 576, 577, 578 because we define small claims cases to be something other than what falls into the category of what we call debt claim cases.

HONORABLE RUSS CASEY: No, we didn't. We include them all.

CHAIRMAN BABCOCK: Is that because it's in the definition?

MR. WOOD: Well, we see the debt claim cases in 576 talking about the scope. It says, "This section applies to part (a)" and then it lists it out, and so

that's what we intended to do anyway, was say that only these kind of cases are impacted by Section 8.

MR. TUCKER: Right, and we can put in language -- yeah, I see the point or the problem. What probably needs to happen is some sort of heading needs to go on the general rule, rather than say "Part V," give it "Section 1" or whatever the section would be. Then it would be "Debt claim cases shall be governed by Section 8 and also by Section 1 of these rules. To the extent any conflict, Section 8 applies." Basically we have a set of general rules that apply to all of these cases, and we have specialized rules that apply to the specialized subset, and if there's conflict between the specialized subset and the general the specialized subset controls, so however that can be worded to make that clear, I mean, we're --

CHAIRMAN BABCOCK: That's what you're trying to get at.

MR. TUCKER: That's what we're trying to do. Yes.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Under the five sections under subsection (a), the first three all have the word "alleged" in them with reference to the -- kind of the what the claim is about. The next two do not. Is there a

reason that the word "alleged" is in there and not in the last two? The last two simply read better.

CHAIRMAN BABCOCK: The question, I guess, was there a reason not to make them parallel?

MR. TUCKER: Yeah, I don't think there was any explicit thought given to that. It was just the way that they were drafted.

CHAIRMAN BABCOCK: Because it's sort of assumed that when a lawsuit starts it's just allegations. It's not --

MR. TUCKER: Right.

CHAIRMAN BABCOCK: So, Justice Gray, you would suggest taking out --

HONORABLE TOM GRAY: Conforming the first three to the pattern of the last two, just take out the word "alleged."

CHAIRMAN BABCOCK: Right, rather than the other way around.

MR. TUCKER: That still would absolutely comport with what we tried to do.

CHAIRMAN BABCOCK: Okay. Good. All right. What other -- Pam.

MS. BARON: This is also just a minor parallel issue, which is (a) refers to "this section" and (b) refers to "this chapter," and I think the same word

needs to be used in both.

CHAIRMAN BABCOCK: Good point.

MR. TUCKER: Yep.

CHAIRMAN BABCOCK: What is it?

MR. WOOD: Section.

MS. BARON: And the same is true on 577(a), and it may be elsewhere, but --

MR. TUCKER: Yeah, we would agree.

HONORABLE RUSS CASEY: Yeah.

CHAIRMAN BABCOCK: Okay. What else? Let's stick to 576 for the moment. Anything else on 576? Going once.

All right. Now let's get into the good stuff. 577. We're already going to call it a section, not a chapter. Yeah, Richard.

MR. ORSINGER: Is that what we're going to do? You're going to change the word "chapter" into "section"?

CHAIRMAN BABCOCK: Yeah.

MR. WOOD: Right.

MR. TUCKER: Yes.

MR. ORSINGER: What is the charge-off date? That's a term of art, and it's used throughout, and I don't know. Everything is driven by a charge-off date or a charge-off document, and what does that mean?

HONORABLE RUSS CASEY: We have -- okay, first off there is Federal law that is applying to the companies that are involved in this an awful lot. We also have Texas Finance Code that is applied to an awful lot of this, but they have basically specific rules on how to charge something off, and I'm not smart enough on that, so what I -- what has often been used in regards to how to determine when the contract ended or when there was a default or when -- and particularly how you are calculating statute of limitations, the charge-off date, the date that the company said, "We're charging this off" has often been used as an anchor for that, because you may have had a default three years ago but then you kept going with the card or they never closed the card. If you had a late payment, that's technically a default of the contract, so, you know, it was trying to set as an anchor point of here's when the account ended and so they're going --

MR. ORSINGER: So the reason to require service of the charge-off statement here on the next rule is so that the defendant knows whether limitations has run or not? Is that what the charge-off statement does? It gives you the limitations starting date.

HONORABLE RUSS CASEY: Ancillary to that, I mean, it is sort of one of those things that sort of helps

the defendant by determining what the debt is. You may have had two or three Capital One credit cards over the years, and you know, that helps you figure out which one we're talking about. It is ancillary that the charge-off date could be used to help your position, and they would be required to get that, but that wasn't the reason behind it.

CHAIRMAN BABCOCK: Justice Frost.

HONORABLE KEM FROST: It seems to me that on item (6) and (7) -- and I believe Justice Moseley may have referred to this earlier -- but the relevant information would be the account balance and the date of default, because while charge-off might have some legal significance bank-to-bank or transferring from one assignor to an assignee of a portfolio of loans, the charge-off date and the charge-off amount I do not believe to have legal significance between the collector of the debt and the debtor. Statute of limitations under the case law is typically triggered by an event of default, which is -- such as failure to pay, but not by an internal accounting entry that the bank does, but rather what the debtor does not to comply with the contract. So it would seem to use the charge-off date might be confusing to a judge or jury or to others because it would imply that the charge-off date is the balance due under the legal

obligation when you -- you know, usually those are two different amounts.

CHAIRMAN BABCOCK: Okay. Richard Munzinger.

MR. MUNZINGER: I raised my hand when you said going once, going twice, on Rule 576. I wanted to go back to 576. You didn't call on me.

CHAIRMAN BABCOCK: Sure.

HONORABLE JAMES MOSELEY: Shame on you.

MR. MUNZINGER: So I'm back on 576.

CHAIRMAN BABCOCK: Okay.

MR. MUNZINGER: I'm looking at subdivision (a)(4), "This section applies to any original creditor who extended credit on a revolving or open end account and seeks to collect on that debt." So then I go and I look at the definition of "debt claim cases," and the definition of "debt claim case" does not include a person as described in subsection (4) because such a person need not necessarily be someone who is engaged in the business of lending money at interest and seeks to collect the debt, and so now I have a problem because this rule applies to more than just what was said originally.

I have another problem with it. Is "a resolving or open end account" a word of art that everybody in the profession knows what it means, or does it require a definition under the circumstances of this

amendment and change in our practice, which is substantial? Secondly, the same question is applicable to an original creditor. We have sat in the room today, and we have all understood what original creditor means because we are talking about the context of assignments, but if a debt claim case isn't limited to assignees as it first appeared in its definition, do we need to define "original creditor"? Again, I'm confused by it.

CHAIRMAN BABCOCK: Okay. What are the -- any way to solve Richard's confusion?

MR. TUCKER: Yeah, I would think probably the best way to address that would be to expand the definition of "debt claim case" to include that class of plaintiff.

MR. MUNZINGER: So it would include anybody who had loaned money to another person who is seeking to collect if and only if it involved a revolving or open end account?

MR. TUCKER: Yes, sir.

HONORABLE RUSS CASEY: If they are in the primary -- or they are primarily engaged in the business of lending money at interest.

MR. MUNZINGER: But it doesn't say that.

HONORABLE RUSS CASEY: Oh, okay.

MR. WOOD: I think we would agree with you

also that we can define those terms, "revolving or open end account." They are not particularly clear to people who aren't in the industry. I think it would be a good addition to define them.

MR. MUNZINGER: But again, my point also is that subdivision (4) is not limited to a party who is primarily engaged in the business of lending money at interest, et cetera. That's subdivision (5).

HONORABLE RUSS CASEY: That's a very valid point.

MR. TUCKER: Yeah, and I agree with that, and that's why I was saying we could expand the definition to include that. I guess in practice there's a very tiny amount of people who are going to be extending credit on a resolving or open end account that aren't lending money at interest, but your point is well-taken that that does leave that loophole there.

CHAIRMAN BABCOCK: Frank, and then Lamont.

MR. GILSTRAP: As we go through 577 and 578 we're going to keep bumping into this kind of policy difference between what the first group of speakers talked about and the last group of speakers, and that is on the one hand the creditors saying, "Look, we need to make this simple, we need to make it easy, and we need to be able to sell our accounts," and the debtors are saying, "Well,

look, we need this information to make sure it's us or that, you know, that we're getting some type of fair process here," and we're going to bump up against that again and again. Justice Frost's comment, you know, dealt with that concerning the charge-off date, and maybe we want to get that out in the open and talk about it or maybe we just want to kind of get into it every time we talk about one of these provisions, so let me talk about one of the provisions. (1), address appearing in the original creditor's records. The first speaker said we really don't need that. Do we need it?

CHAIRMAN BABCOCK: Yeah, that was Trish Baxter who said we don't need that.

MR. GILSTRAP: Right. Right. Do we need it?

CHAIRMAN BABCOCK: Well, they think we need it.

MR. GILSTRAP: I understand, but --

HONORABLE RUSS CASEY: The purpose of this was to help the defendant identify the debt.

MR. GILSTRAP: Okay, that's the reason.

MR. TUCKER: And to help provide a fail-safe of these situations of it's just "John Smith" and what John Smith it is, it helps to tie -- it helps to narrow that down.

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: In terms of identifying the correct debtor, which is a most valid concern of everybody, everybody is concerned, especially the default situation, and I know that Social Security numbers are not to be included in pleadings and what have you. Is there any solution other than the original creditor's records or something that would let you identify the person with specificity in some way, using a Social Security number or other, quote, ironclad, close quote, identifier? Because that is one of the basic problems that everybody has with the default situation. I think that's part of the thrust of Justice Bland's questions. We want to make sure that the state doesn't hurt an innocent person.

HONORABLE RUSS CASEY: We kind of looked at different ways on that, and of course, you know, one of the ways that came up was "account number ending in such and such digits." Most people don't, you know, memorize what their account number on their credit cards are. So we -- when we're -- the purpose of this was to try to, you know, identify the person, their address, who the original creditor was. I mean, that was -- the whole purpose of this is so someone can identify debt. If we didn't do it perfectly, I don't know if there's a better way to do it.

CHAIRMAN BABCOCK: Lamont.

MR. TUCKER: And we thought that the addresses were more likely to be in their possession and also don't create that problem of being in an open court record that anybody can get it.

HONORABLE RUSS CASEY: And the other thing, we also talked to creditor's bar about when they buy these accounts what information is provided to them. We didn't want to deviate a whole lot from information that they don't already get.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: Okay. It seems to me like the idea behind these categories is so that the defendant has the ability to verify that he's being sued over something he was involved in. Right? I mean, I don't know see any other purpose behind at least some of this stuff.

HONORABLE RUSS CASEY: Because the --

MR. JEFFERSON: And then if you take that goal and try to match it up against the goal of a default judgment situation, including like a Social Security number or an account number is going to do no good, because the plaintiff will have put that information in a petition, but there's going to be no one there to dispute it, so it's not going to help at the default judgment

situation, so I want to just concentrate on what's helpful at this stage when you're actually writing up the petition, and it seems to me that if the idea is just we want as a matter of fairness for a debtor to be -- to be able to recognize what debt the debtor is being sued over, it doesn't require a whole lot of information, and the charge-off date seems to be completely unrelated to educating a defendant about whether he's the right defendant for the debt. Just like the address. It seems like you would need very little information. You'd need the name of the defendant. You would need an address. You would need the name of the account, and generally speaking that's going to be enough. You know, and if there's a purpose besides letting the defendant know that he's the right defendant on this debt, then I guess I need to understand what that is because I don't see the value of adding all of the other information or making all of these other items required in a pleading to notify a defendant that he's the right defendant.

MR. TUCKER: Well, one of the -- the other aspect in the default situation is, again, these are the things that are going to start allowing the plaintiff to get a default judgment with no hearing whatsoever based only on the items that they have filed with their petition, and so our thought was what can we have the

plaintiff file that will allow the judge to be able to look at this and say, "This is prima facie proof that this is actually the right person, this is actually a valid debt, let's give you a judgment without you ever coming into court at all."

MR. JEFFERSON: And, again, I think we're talking about two different things, though. At the pleading stage we're talking about what do you have to put in the pleading to sustain the claim, and then at the default judgment stage, if there's going to be a hearing or if there's not going to be a hearing, there's going to have to be some sort of a submission to support a judgment, and that will be I guess either at a hearing or some electronic way or by some other filing means, and at that point you can -- then we're talking about a different set of issues about what you have to do to prove the validity of the debt, but at the pleading stage it seems like the idea behind this rule is just what I said, just so that the defendant can verify that he's the right defendant.

HONORABLE RUSS CASEY: A lot of this we put together in sort of in collaboration with a lot of people, and I can understand your point, but we are also wanting to limit the need for discovery at the same time. These were sort of -- except for the exceptions that were

pointed out that basically everybody thought was a good thing to have, so it's not normally necessary in order to plead a case, but we thought it was sort of good information for everybody to have.

CHAIRMAN BABCOCK: Jim Perdue.

MR. PERDUE: Like most people on the committee, I don't do this, but I've got the side-by-side of the task force with the creditor's bar proposal, and so I'd ask y'all, I've gone through this, they've got a redline of yours plus theirs in the booklet they gave us, page 11 under Tab B. Other than a slight form difference as to the source of the address of the defendant, I don't see anything substantively different between the creditor's bar other than this issue regarding a certification on the bond. I mean, is there language in the creditor's bar proposal? I mean, we can talk about charge-off dates, but the creditor's bar doesn't have a problem with that. I mean, they don't seem to have a problem with having to identify the amount, so other than the issue with the bond and the creditor's bar proposal who actually do this for a living all the time, is there anything else that is subsequently different between the Creditor's Bar Association proposal and that of the task force other than the source of the address?

MR. TUCKER: And the date and amount of last

payment, but --

MR. PERDUE: But doesn't that get you, in their language, to No. (7)? If you combine (6) and (7) out of their language.

HONORABLE RUSS CASEY: Yeah, I mean, we're real close on that.

MR. PERDUE: So I --

PROFESSOR HOFFMAN: Jim's question is can we -- can y'all adopt the creditors' report? Is there any reason we can't just go to right side of the page and substitute that?

MR. PERDUE: Other than they wrote it and y'all didn't, but I just kind of would like to fast forward a little bit, that's all.

CHAIRMAN BABCOCK: That would not be our style, Jim.

HONORABLE RUSS CASEY: The bond was kind of a sore subject.

MR. PERDUE: Okay.

HONORABLE RUSS CASEY: You cannot file suit in any court in Texas as a debt collector unless you have that bond. Some people don't, and there has been a couple of cases that went out there that kind of had various results. One said that, well, if you get the bond after someone complains about it, it's okay, and the other one

said, no, you can't do that. But the Finance Code requires that they have it, so we thought we would put it in that they have it if they want to use our court for these type of proceedings.

MR. PERDUE: Chip, could we ask the creditor's bar why they have an objection to that requirement?

CHAIRMAN BABCOCK: Yes, creditor's bar. Anybody want to speak to that?

MR. SCOTT: The generic creditor's bar It's one of those complicated pieces of information. I mean, I have, you know, six digits worth of files in my office, and it's just one of those complicated pieces of information that I would have to keep as to every file, and there's -- I would I think disagree with whether I do not have authority to collect. I currently subject myself to substantial civil liability if I don't have a bond, but the law firm has a bond because we are a debt collector under the meaning of the act, and our clients typically have bonds. I don't verify every one, but for me to go through and say, "Okay, well, here's the bonding date, 2007 for this client, 2009 for this client," for every claim is just an opportunity for me to screw it up, and once I screw it up in this industry I get sued, and so that's why if it's not necessary we would prefer it not to

be in the rule.

PROFESSOR HOFFMAN: But is it a statutory requirement or a condition precedent in order to recover?

MR. SCOTT: I don't believe it's a condition precedent. I think that it's a statutory requirement for debt collectors within the state, and there are civil liability attached if you don't perform to the provisions of the Finance Code with respect to debt collection, but I don't believe that it deprives me of a -- deprives me or my client of authority. There are other circumstances where under debt collection in connection with automobile loans where it does deprive the party of authority, but not with regard to debt collection.

CHAIRMAN BABCOCK: Richard Munzinger. I'm sorry, Tracy. I'll get you.

MR. MUNZINGER: Why would it be prompted -- not all debt collectors are -- operate their business as you do. Why would it be improper for a rule to require that a person who is a debt collector affirmatively allege that they have complied with a law enacted by the Legislature and signed by the Governor that says you can't come sue people for money if you're a debt collector if you haven't filed a bond with the Secretary of State? Why don't they just say, "I filed a bond with the Secretary of State." I don't have to worry about six numbers over five

years, but I do have your promise or your colleague's promise that he did what he's supposed to do, and if he didn't he's in trouble.

MR. SCOTT: Understood, and we certainly see those things in other states. We see various states require like a military affidavit or certain indication of the type of suit and where we see pleading requirements that say, "I certify that this person is not in the military, I certify that I am fully licensed to conduct this collection practice in the State of Texas." Those types of statements are simple, and we could certainly support that. Where we have problems with the language of the proposed rule is the specificity with which it wanted us to allege compliance.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: A couple of things. I think the main difference between the creditors' version and the task force version is that they add the word "if known" after most of this information, which I actually support doing because that would seem to cure a lot of the problems. If a JP saw a pleading with a bunch of "not known," "not known," "not known," that would make me suspicious as a judge and, you know, less likely to grant a default judgment and so that's -- you know, unless they gave me some proof in the affidavit.

As to the name and address appearing on the original creditor's records, I think that would be useful as opposed to just a current service address for the defendant because people move; and if you want to know if you've got the right John Smith and they put "John Smith at X Street," you're like "Oh, yeah, I lived there, you know, they're talking about me." If they put "John Smith at X street" and you've never lived there then you might start to think to yourself "This is the wrong person, I should do something about it."

With respect to the account number that we have said put in here, all right, this contradicts the e-filing rules in appellate -- in the appellate courts. Okay. You're never supposed to put account numbers and things anymore. You know, at some point we are going to have to take the bull by the horn and quit putting all of this personal information in trial court records.

Finally, I think it would be useful if we're really interested in sort of alerting the debtor as to what the case is about that the style of the case should include the name of the original account holder. So, you know, so you would know this is my Bank of America account, it's not hidden in the 8th paragraph or the 10th paragraph or the, you know, 13th paragraph of this petition. You will know right up there at the top that

Jane Bland is suing me because of my Bank of America account.

MR. TUCKER: So it would be just be "Unifund, assignee of Bank of America vs. John Doe."

HONORABLE JANE BLAND: Right.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: One of the concerns I think that's stated here is to be sure you have the right defendant, and I'm not sure that either one of these pleadings guarantee or even give the judge a basis to determine whether they have the correct defendant.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: How do we police that at the rule stage, or is it somebody named John Smith just going to have default judgments taken against him all year around?

MR. TUCKER: I think a big part of it is the things that we put in the default part, there has to be some tie to that person; but I think the benefit of this part right now is so when I get this piece of paper and I'm John Smith, it's impressed upon me that, yeah, this is talking about me; and what happens in a lot of these cases is they think it's some sort of scam or junk mail because they've never heard of this other company that's -- what is this, this looks like -- you know, "I don't know what

this is," so it makes it more likely that they understand, "Look, this is -- we're talking about you, this is something you better respond to or there's going to be consequences." So I think a lot of this is -- it's helpful for the judge, but it also alerts the defendant, "Look, this is you, this is not some fishing scam or something like that. This is a legitimate lawsuit."

HONORABLE RUSS CASEY: And let me point out that though we have some differences in their language and our language, it's in everyone's best interest that the defendant know that they're talking about them or that they're talking about somebody else. It's in the grantor's best interest, it's in the court's best interest, it's in everybody's best interest. So I see their suggestions, and like I said, you know, and like you said, a lot of these are good ideas, but that's what we're wanting to do.

CHAIRMAN BABCOCK: We're going to take a comment from Justice Moseley, and then we're going to quit for the day and come back tomorrow at 9:00.

HONORABLE JAMES MOSELEY: When I was in law school I lived at 2912B Madison Drive and let's say --

CHAIRMAN BABCOCK: It's now on the record.

HONORABLE JAMES MOSELEY: -- that a finance company is foolish enough to give me a credit card at that

time, and at some future point in time I default and I get sued, and the plaintiff mistakenly puts 2914 Madison Drive. What's the effect of incorrectly stating the defendant's name and address? I make that point to illustrate the idea that this piece of information isn't relevant to the claim being proven, and typically, although we may be straying away from the idea of notice pleadings here, whether or not they got me right at 2914 or 2912B isn't terribly relevant as to whether or not I owed this claim or am liable under the claim, and I think we ought to try to keep away from putting in this type of extraneous information in order to allow the -- for example, in this case a defendant from looking at it and saying, "Oh, they're looking for the 2914B guy, not the 2912B, me."

CHAIRMAN BABCOCK: All right, with that --

MR. PERDUE: Then you claim that it has no basis in fact.

CHAIRMAN BABCOCK: There we go. It's not plausible, is it? With that we will be in recess today and start up again at 9:00 a.m. tomorrow, and Bill Dorsaneo has promised that he will be here, so we will see.

(Recessed at 5:06 p.m., until the following day as reflected in the next volume.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 22nd day of June, 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 $ 1,972.50 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 14th day of July, 2012.

D'Lois L. Jones

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