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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

June 23, 2012

(SATURDAY 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 23rd day of June, 2012, between the hours of 8:57 a.m. and 11:38 a.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

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No votes were taken by the Supreme Court Advisory Committee during this session.

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CHAIRMAN BABCOCK: Well, welcome, everybody. Just for planning purposes, we're going to continue our discussion on Section 8, the debt claim cases, and then we're going to go from there to Section 10, eviction, and we're going to recess a little early this morning at 11:45, my problem, but since it's my birthday I can do it if I want.

MR. HAMILTON: So only 15 minutes?

CHAIRMAN BABCOCK: Huh?

MR. HAMILTON: Only 15 minutes?

CHAIRMAN BABCOCK: Only 15 minutes.

HONORABLE STEPHEN YELENOSKY: He's got to be at Chuck E. Cheese at noon.

CHAIRMAN BABCOCK: That's the thing, I have all my little buddies at Chuck E. Cheese. All right. Judge, you said that you wanted to talk a little bit about 577 and 578. Judge Casey.

HONORABLE RUSS CASEY: Well, we talked about 577 yesterday, and I think that if anyone has any questions we could address those, but I wanted to go over 578 and what we were doing in 578.

CHAIRMAN BABCOCK: Yeah, good.

HONORABLE RUSS CASEY: We had a direction of the Legislature for basically a separate set of rules for

debt collection cases, and I'd like to remind everybody that this is more than just credit card cases. These are payday loans, Chapter 94 loans, which are when they send you the nice little check in the mail. "Here's a thousand-dollar check, cash it, it's yours." These are other things that would fall under these same guidelines other than just credit cards, and so I tried to make the wording on this sort of encompassing in all of those different types of cases, but the first section (a), default judgments, describes a default judgment without a hearing.

Currently in justice court there is not a procedure to have a default judgment without a hearing. So this is something new that we were trying to take -- to set in of what would be required to have a default judgment without a hearing. Basically what my goal was on this was to put together in my own mind what I felt would be necessary if you were preparing a motion for summary judgment and serving that to the defendant with the citation as part of the requirement of having a default judgment without hearing.

So No. (1) is a copy of the contract, promissory note, charge-off statement, original document evidencing the original debt, which must contain a signature of the defendant. The signature of the

defendant is referenced back to the original document evidencing the original debt, not the other things, and this document shall be supported by an affidavit from the original creditor; and if the claim is based on a credit card debt or other such signed writing evidencing the original debt and no such writing evidencing the original debt ever existed then a copy of the card member agreement in effect at the time that the card was charged off, a copy of the contract, and copies of documents generated when the card was actually used; and I didn't really do my wording real there, but I'll get back down to the next part and kind of discuss that. "Must be attached and supported by affidavit from the original creditor."

So we're wanting to give them that evidence. We're wanting to serve that on the defendant when they are served. Basically, here's what you've got, this is everything against you. You know, if they do not answer in any way then we can have a default without a hearing.

Then the section (b) is just for a default judgment in any case to get a default judgment with a hearing. We decided what was the bare minimum in a court that has really no Rules of Civil Procedure and really no Rules of Evidence, what is the bare minimum that should be required to show to get a default judgment, and we decided that in a case where a breach of contract, that it may be

nice to have someone have an idea that there was actually a contract that ever existed, so in order to do that we have one of three things, either "a document signed by the defendant evidencing the debt or the opening account." That's really in reference to where I signed this check for a thousand dollars, you know, that they sent me in the mail. "A bill or other record reflecting purchases, payments, or other actual use of the credit card or account by the defendant." So basically something showing that they actually used a credit card at some point in time, they either paid it, on it, or they made a charge on it. That's the only thing requiring that there was ever a credit card in existence.

"Or an electronic printout or other documentation from the original creditor establishing the existence of the account and showing purchases, payments, or other actual use of a credit card or account by the defendant." So if they don't actually have an actual bill, they have an electronic printout or other documentation, that's all it takes. This is an "or," "or," or "or." We really do not think that this is an overburden on the defendant. We do not think this is an unreasonable thing, and we do not think it's going to shut down the banking industry in Texas to have someone actually show that there was a credit card used at some

point in time before they render a default judgment.

On the requirements of the affidavit, this is just basically spelled out. I don't think we're adding in any requirements of an affidavit that are not already there. And then the last part of 748 -- or 578 rather -- is what do we do at a default hearing if a defendant shows up. "I got this notice that I had a hearing." It happens a lot. They don't answer anything, but then they show up at their default hearing, and on that we have it that if they show up then if both parties agree we can go ahead and have a trial or if both parties don't agree we can reset it for another day, and that's basically all that's saying. Then we also have a post-answer default. If they answer but do not appear at trial then the court may go ahead and hear that case at that time.

CHAIRMAN BABCOCK: Okay. What about the sort of a threshold issue that I think Michael Scott raised yesterday in his presentation to us that we've created two sets of rules for Texas courts, I guess one for JP and then a different set for all the other courts?

HONORABLE RUSS CASEY: I would argue that there's a different set of rules for every single court in Texas. Supreme Court, appeals court, district court, county court, and yeah, we did. We set a different set of rules. I think the intention of the -- I think the

intention of the Legislature was that since we are such a informal court they wanted to set a special set of rules for these types of cases. There is an evidentiary standard here that I do not think is unburdensome, but I think that there should be some sort of evidentiary standard of some kind when you're dealing with cases that are very complex in nature, the -- and of course, you know, what that evidence should be. There has been many different and varied appeals court decisions regarding evidence in these types of cases, what is considered evidence and what's not, especially in business record affidavits and things like that.

So we came down to what is the bare minimum, the bare necessities, as we would say, and we felt that due to the informal nature of the court and to try to keep it informal, the bare minimum is to prove in some way, shape, fashion, or form, that a contract actually existed at some point in a breach of contract case, and that's -- I think that -- I think that anyone who actually looks at the leniency of what we use to describe a multipage interstate contract of just a bill existed at some point in time showing a purchaser payment is really about as low as we can go to have an evidentiary standard of any kind. It's -- it's -- I don't think that we can get any lower than this and still have any reason to have these rules

whatsoever. If we're going to set them apart then we need something to set them apart, and this is what happens.

CHAIRMAN BABCOCK: Okay. Let's take 578(a), and Professor Dorsaneo.

PROFESSOR DORSANEO: Well, just to make sure that I understand, in my head when I think of default cases I think of, you know, the rule that's existed for district and county level cases that a default admits, you know, liability and doesn't require any -- and the default hearing doesn't require anything that would look like proof of the liability part of the case. Your rules here are -- say that that's not the rule for these cases or it's not exactly the rule.

HONORABLE RUSS CASEY: Exactly.

PROFESSOR DORSANEO: And we want you to show us some things that somebody might at a district or county level court say that that's a liability thing, where the default admits it, and I think that's a good policy choice for these kinds of cases.

HONORABLE RUSS CASEY: That's exactly what we're saying. We understand we're setting up something different, and what is the -- what is the bare -- you know, what is the bare minimal that we can set up as different, and this is what we came up with.

MR. TUCKER: Right, and I think a big part

of this is, you know, the current -- the way it is right now we don't have to have a hearing if it's liquidated damages. We do have to have a hearing if it's unliquidated damages, and intrinsic in these type of cases to show -- to prove up unliquidated damages, just like you mentioned yesterday, those issues kind of blend together. It's like can you really prove the damages without any semblance of evidence whatsoever that there was ever a contract at all? Otherwise, we feel like that that's conclusory. If an affidavit just says, "I looked at my records and my records say it's $5,000," does that prove damages? And we thought not really.

CHAIRMAN BABCOCK: Judge Yelenosky.

PROFESSOR DORSANEO: Or it's not enough.

MR. TUCKER: Right.

HONORABLE STEPHEN YELENOSKY: That question and answer is helpful. The part that I'm still confused about is if you're going to make that policy choice, and therefore, in order to get a default judgment without a hearing you have to have these certain things and you don't have those certain things, then you have a hearing on the default, right? What's the point of that? If they couldn't present those things before, what are they going to do at the hearing, and if it's something less, why is that a good policy choice?

HONORABLE RUSS CASEY: Like we say, right now we do not really have a way to have a default judgment without a hearing and, in particular, in credit card cases because they are unliquidated damages. We are trying to set up a standard that --

HONORABLE STEPHEN YELENOSKY: Well, no, I understand you're trying to set that up. My question is, so I'm the creditor. I don't have these documents, so I don't get the default without a hearing. I get default with a hearing, and I come to the hearing, I don't have these documents. If I had them I would have done it without a hearing, so what happens at that hearing, and can I get a default without these documents simply because now I've had a hearing?

MR. TUCKER: I can, for example, offer sworn testimony at the hearing, but that's not contemplated there, but I can offer sworn testimony about what the practices are, why we don't have these documents, what the process was, and then the judge can evaluate that.

HONORABLE STEPHEN YELENOSKY: Okay. So there is a possibility that you get a default with less than what's required without a hearing, but it's not specified what that less than is. That's just left up to the judge.

MR. TUCKER: Well, I think that's what (d)

says when it says, "Plaintiff does not file with the court and serve on defendant the documents above and the defendant answers" we go as normal. If the plaintiff does not file those documents and the defendant fails to answer, the case will proceed under 525(c), which is the standard default judgment hearing.

HONORABLE STEPHEN YELENOSKY: Right, I've looked at 525(c), and it doesn't give you any specificity either, so other than -- other than having to go into court -- it's just unclear to me if all of these things are necessary without a hearing --

MR. TUCKER: Right.

HONORABLE STEPHEN YELENOSKY: -- and I can't get an affidavit from the original creditor --

MR. TUCKER: Right.

HONORABLE STEPHEN YELENOSKY: -- then I'm going to come to a default hearing. Default hearing, so there's no one there to question it. I'm going to bring the original creditor, or you're going to let my testimony, not the original creditor, because it's live testimony even though it's not from the original creditor, it will suffice? It's just unclear to me. You seem to be setting a very high standard without hearing and then no standard at all with hearing.

MR. TUCKER: Well, and I think what the task

force thought was, is if we're going to talk about something automatic where the judge doesn't really have the ability to evaluate the evidence then that bar should be high, and then we said, look, if they don't have that, how much strictness do we want to place on a judge over a hearing that they are evaluating, you know -- you know, they are evaluating the in person testimony. Traditionally judges get a lot of leeway in evaluating the credibility of live sworn testimony. So we didn't want to completely pigeonhole things in that sense of, you know --

HONORABLE STEPHEN YELENOSKY: But in the without a hearing you seem to be setting, as Professor Dorsaneo said, certain requirements which may be a good policy choice. You've got to have the original creditor, and that policy choice is not one about credibility. That's about what's competent evidence, and once you've established what's competent evidence, I mean, if you don't have that competent evidence credibility doesn't become an issue. So that's why I'm confused.

HONORABLE RUSS CASEY: Well, okay, and let me go back a little bit on that. I guess let me remind you that of the 840 JP courts in Texas less than 50 are attorneys?

MR. TUCKER: Yeah, about 70.

HONORABLE RUSS CASEY: Is it 70 now? About

70 are attorneys. Due to the extraordinary number of cases involving what is evidence, what is not evidence, especially in regards to these cases with different courts of appeals differing even on that subject instead of the JPs trying to keep up with what's today's decision somewhere and what constitutes evidence, we put together a list of what we feel constitutes evidence, and, yeah, it is a high burden, but we feel that there should be a high burden if we're not going to have a trial on the case.

MR. TUCKER: Well, and to address what else they might have at this hearing, I might have the original business -- I'm Unifund, I might have Bank of America's business records. What we say for no hearing is you need to have Bank of America proving those records up. If I show up at a hearing with Bank of America's records the judge can evaluate those records. We're not under the Rules of Evidence. The judge could say, yeah, these are clearly Bank of America records. I'm going to give you a judgment based on that, but we're not going to let you have it automatically unless we've established somebody that made those records with personal knowledge proves those up, otherwise the judge needs to prove up those records.

HONORABLE RUSS CASEY: Yeah, what he said.

HONORABLE STEPHEN YELENOSKY: My last point

is just a drafting thing on that. If you do intend that those documents not be required, it's not clear from the way you've written it that it should go to default, because it follows -- default with hearing follows --

MR. TUCKER: Right.

HONORABLE STEPHEN YELENOSKY: -- those requirements when -- it's unclear, though, because it says "these documents are required."

MR. TUCKER: I think --

HONORABLE STEPHEN YELENOSKY: So I don't want to get into specifics, but it's not clear to me --

MR. TUCKER: Sure.

HONORABLE STEPHEN YELENOSKY: -- that whether those documents are required in a situation where you do have a hearing.

MR. TUCKER: I understand and I would certainly support an addition to say something like "To support a default judgment under subsection (a)," which is the part without a hearing, "these documents must include," because that was the intent of the drafting, was, you know, (a) says here's what you need to have without a hearing, (b) says to support a default judgment these documents referring back to the ones in (a), but I definitely -- your point is very well taken that it needs to be explicit.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: Well, I think we could probably debate whether it's a good policy choice to require more in a JP court than we require in district court, but it seems to me this is a little ironic because these rules are supposed to be simpler and more efficient than in district court. I don't think of going to justice of the peace court and having to do more than I have to do in district court. I think I have to do less, and this is doing the exact opposite, so this creates an incentive to file in district court rather than JP court if you're the creditor, and that to me seems problematic.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Judge Casey, it seemed like that one of the major concerns with the creditors bar was not so much the documentation that was required, but the fact that the affidavit was required from the original creditor, and my question for you is if the current holder of the debt can produce an affidavit that says, "I acquired this debt in this transaction," produce evidence of that transaction, produce the records that accompany the debt as a result of the transaction, can produce all of the things that you have listed in either (1) or (2) -- and I don't know if (1) and (2) are supposed to be alternatives under (a), (a)(1) and (a)(2)

-- then don't you have the same sort of indicia of trustworthiness that you would from a business records custodian from the original creditor, and the -- and the real world example I can think of is I've had a Foley's credit card for 20-some years. Somewhere back in that time I signed a statement that I'd be liable for the debt on my revolving charge account. I can't believe no one ever had a revolving charge, y'all don't shop enough.

HONORABLE STEPHEN YELENOSKY: Poor representation on this committee.

HONORABLE JANE BLAND: So Foley's became Macy's somewhere along the line. You know, somewhere along the line they sent me a new card that now says "Macy's" on it instead of "Foley's," and in addition I constantly am getting letters that some other bank has now purchased the credit card arm of Foley's, Macy's, so it's -- you know, it's been several different banks over my tenure as a charge customer of the store. So the idea that somebody would have to go back and get the affidavit from a records custodian either of the original bank that held the charge accounts for Foley's or from Foley's because it may have done it itself back then, you know, as long as somebody can say, you know, Foley's became Macy's and, you know, this bank became this bank and this bank became this bank and can trace the title, the chain of

title of the note --

HONORABLE RUSS CASEY: It was our intention --

HONORABLE JANE BLAND: -- why are we requiring -- why are we defining who the affiant must be? Why don't we just require that the affiant have enough -- provide enough information to us, because one custodian of records is not necessarily going to be more knowledgeable than another about the whole chain of my 20-some-odd-year relationship with a charge account at Foley's.

MR. TUCKER: I think a big difference in that situation and the way these cases normally work is that you have a contractual agreement currently with Macy's.

HONORABLE JANE BLAND: Well, I didn't sign anything.

MR. TUCKER: Well, but your actions of using your Macy's card create --

HONORABLE JANE BLAND: Right, but there's no contract.

MR. TUCKER: Hold on. There is. There is an implicit contract, and there is not a contract between Joe Consumer and Unifund. Joe Consumer has no relationship with Unifund, and our concern was there are splits in the court of appeals right now about can a

company testify to the recordkeeping practice of another company. Some courts say "no" because that's hearsay.

HONORABLE JANE BLAND: Right, but what I'm saying is I don't need somebody to talk about the recordkeeping practices of another company if I got all of their records and I started keeping them in the course of my business and they're the records I rely on in my business, and -- and there's indicia of trustworthiness of those records that a judge can make a decision about, and so, I mean, and I don't think that the original affiant is going to have a better handle on --

HONORABLE RUSS CASEY: I guess --

HONORABLE JANE BLAND: They have a good handle on the time -- on the time I might have made my first charge and have my implied contract, but not necessarily over the course of however many years, like a lot of these cards are.

HONORABLE RUSS CASEY: What you're describing is not exactly what I meant to do, and let me tell you what I meant to do here is when I talk about the original creditor, you're talking about you had an account that changed hands during the course that that account was still current, and that's what I consider as being an original creditor. What I'm talking about as not an original creditor is a debt buyer, is someone who --

MR. TUCKER: Assignee.

HONORABLE RUSS CASEY: -- was not -- or an assignee of claim, holder in due course, whatever you want to call them, is someone who was not in that business at all who bought that debt and now wants to testify that, you know, "So-and-so told me this is how much they owed them, and so that's what I'm testifying," and that sounds silly but that's what we get everyday, is that --

HONORABLE JANE BLAND: Right. That doesn't sound --

HONORABLE RUSS CASEY: -- someone told me this is what they owed.

HONORABLE JANE BLAND: -- silly to me at all. That sounds normal. I think people are buying portfolios of debt all the time, and I think that's what's happening with my credit card. I get a statement that somebody has purchased my account and the new servicer is X, and I know what you're saying. You're saying there's a secondary market that's not maybe as -- not as reliable of a market as a bank or maybe not --

HONORABLE RUSS CASEY: Maybe what --

HONORABLE JANE BLAND: -- as regulated.

THE REPORTER: Wait, wait.

HONORABLE RUSS CASEY: -- better is servicer of the account.

CHAIRMAN BABCOCK: Hey, guys, don't talk over each other because Dee Dee can't get that.

HONORABLE RUSS CASEY: Okay. Sorry.

MR. TUCKER: To me I think the bottom line comes to -- like I said, again, when Unifund comes in with Bank of America's business records, those business records start out as hearsay, right, until somebody can prove them up under the hearsay exception, right? And so the question that courts have not answered definitively is can Unifund testify that Bank of America's business records were kept in the ordinary course of business, recorded at the -- contemporaneously by somebody with personal knowledge, because what knowledge does Unifund have of Bank of America's business keeping -- business recordkeeping practices? Arguably none, and some courts have said that, that you can't prove up -- I can't as Unifund say, "Oh, well, this is how Bank of America kept those records. We're not part of that company, but we're going to swear this is how they kept those records." Some courts have said "No, that's not acceptable." Some courts have said, "Yes, it is acceptable," and we recognize that --

HONORABLE JANE BLAND: I looked yesterday. There were seven cases that --

MR. TUCKER: Sure, but --

HONORABLE JANE BLAND: But I have to say, none of those courts, including ours -- we have gone the other way in other cases by reviewing the records themselves. I mean, the affidavit is not as important in a lot respects as the documents themselves and what evidence the documents themselves to a trial judge who within his or her discretion can make the call --

MR. TUCKER: Right.

HONORABLE JANE BLAND: -- about whether or not they are trustworthy.

MR. TUCKER: But I --

HONORABLE JANE BLAND: Hang on.

MR. TUCKER: I'm sorry.

HONORABLE JANE BLAND: I completely agree with you that the -- a single line redacted from some computer spreadsheet and a two-sentence affidavit should not carry the day.

MR. TUCKER: And I -- and I agree with you, but I agree that the trial court can make that call, and that's why it needs to be at a hearing if we don't have an affidavit from the original creditor. If the trial judge doesn't get to make that call then that affidavit from the debt purchaser saying this is how they kept the records is not sufficient to establish reliability of those records.

HONORABLE JANE BLAND: I don't see the

difference in a hearing. All you need to do is deny the default. If the records don't get -- don't prove up -- don't prove up the amount owed, don't prove up what you're getting at here, you deny the default.

HONORABLE RUSS CASEY: Is it helpful to say that we rarely ever get records, all we get is an affidavit?

HONORABLE JANE BLAND: That's very helpful, because in Unifund and all the other -- the cases that you're talking about, they all have -- you know, I looked, there are 25 pages of records attached.

HONORABLE RUSS CASEY: You get records. I get an affidavit.

HONORABLE JANE BLAND: Right.

HONORABLE RUSS CASEY: That's all I get.

HONORABLE JANE BLAND: That's very helpful. I did not understand that at all, and I think that's a problem, but it seems like your rule fixes that because it requires records.

HONORABLE RUSS CASEY: We're trying to.

HONORABLE JANE BLAND: Yeah.

CHAIRMAN BABCOCK: Richard Munzinger, and then Judge Wallace, then Carl, then Orsinger, then Dorsaneo, and then some people back there and some people over there.

PROFESSOR DORSANEO: Pick who you like.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: But the Legislature has said not to apply the Rules of Evidence in these cases.

MR. TUCKER: They didn't say that.

PROFESSOR DORSANEO: They didn't say don't apply any rules of evidence.

MR. TUCKER: They said the cases we define as small claims cases, and then they say "provide special procedures" for these type of cases.

MR. MUNZINGER: The statute says "or the Texas Rules of Evidence be applied except to the extent the justice of the peace hearing the case determines that the rules must be followed to ensure that the proceeding is fair to all parties," but your rules are imposing a requirement for a business records affidavit. The whole discussion between you and Justice Bland is the business records affidavit, but the Legislature has said in this class of cases don't do that.

Another point and then I'll let you respond, and I -- it's anomalous to me that in a default hearing a person has to bring in the original records. Presumptively the justice of the peace honors his oath and looks at the records and satisfies himself that the records are, in fact, what they claim to be. He doesn't

just simply look at a stack of papers an inch high and sign a judgment. He looks, studies, says, "Okay, everything's here," and he signs the judgment.

Why is that not a hearing? I don't understand that that's not a hearing. The judge has engaged his mind to the level of proof that's been presented to him and enters a judgment. What's the difference between that and a fellow coming and saying, "I don't have these, Judge, but ABC Collection Company bought this from so-and-so." If I'm a justice of the peace, I'm going to say, "Wait a second, I couldn't even give you a default judgment on this. How can I give you a judgment in a hearing? You don't have any evidence. The evidence you've got to give me is the same I have to have on a default hearing." I think you're causing a tremendous amount of confusion with that level, and I also believe that you've ignored the Legislative mandate that you not impose in these cases a rule of evidence.

MR. TUCKER: Well, if I could just briefly respond, House Bill 79 says "except as by provided by subsection (c)" we may not impose those. Subsection (c) says "create special rules for these type of cases." So that excludes these type of cases from the mandate that the Rules of Evidence not apply.

Secondly, what we tried to do was create a

compromise between what the creditor industry needs, protecting debtors, and making things straightforward for judges. So, again, right now the creditor industry is very interested in having default judgment without a hearing. It makes things quicker. It makes things cheaper. We understand that, but to do that without the judge having the ability to, for example, ask questions of the creditor, we said, "This is the standard for no hearing," just automatic, automatic judgment. Here's the standard, which the current standard is liquidated damages for automatic judgment, so we created a system that's similar to liquidated damages. So that's automatic judgment.

If you can't meet that standard then we're going to give the trial court discretion to evaluate what you have. If I have Bank of America's records but I don't have anything from Bank of America saying, "Yep, those are real business records," we're going to let the judge evaluate that, ask questions, "How did you get these records?"

"Okay, I feel confident that these support a judgment." Judgment. So we felt there is currently a two-tier standard for default judgments in justice court, liquidated damages versus unliquidated damages. We wanted to move to something less explicit because courts, again,

disagree as to what liquidated damages mean. Some courts say credit card debt is liquidated. The majority say it's unliquidated, so rather than get into this amorphous zone of do we need a hearing or not, we said, "Look, creditors, here's what you need to know. If you want a judgment automatic, do this." Otherwise we're going to put the discretion on the trial court to evaluate what you brought in and see if it supports a judgment.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, admittedly they are an original creditor, I assume, but Citibank files lawsuits in district court, at least in Tarrant County, by the hordes, 2,000, 3,000, $4,000; and what they have to do to get a default judgment, I submit, like Justice Brown says, is a lot less onerous than what you're requiring them to do in the justice courts, because -- and probably 50 percent of them are default judgments, maybe more. But, you know, because at least in the district court, and I understand we're not playing by the same rules --

MR. TUCKER: Right.

HONORABLE R. H. WALLACE: -- the allegations of petitioner are admitted if they default. So all they've got to do is come in with an affidavit and say, "Here's a statement it hadn't been paid" --

MR. TUCKER: I understand.

HONORABLE R. H. WALLACE: -- and default judgment.

MR. TUCKER: And I guess the only thing I can say is these are more onerous than what they have to do in district court. They're less onerous than what they have to do in justice court to get a default judgment without a hearing, because in justice court under the opinion of most courts of appeals they can't get a default judgment without a hearing at all because it's unliquidated damages. The current rule is unliquidated damages must have a hearing. We're carving out an exception if you can prove up your damages to a certain level of reliability.

CHAIRMAN BABCOCK: Carl, then Orsinger, then Dorsaneo.

MR. HAMILTON: I'm not sure if my question has been answered, but as I understand it, the person can file a pleading under 577, and they must set forth certain things. If they don't set them forth, I'm not sure what happens, whether they get dismissed or what, but let's assume they can set all of that information out. That doesn't get them a default judgment. Then if they want a default judgment they have to go over to (b), and then they have to put those documents into evidence at a

hearing; is that right?

MR. TUCKER: No. They can submit them with the petition.

MR. HAMILTON: No, no, no, I'm not talking about the petition. I understood Judge Casey to say (b) was a hearing requirement.

HONORABLE RUSS CASEY: Yes, they can submit it at some point in time.

MR. TUCKER: Yeah. If they can -- if they submit the documents that are listed in (b), they don't have to have a hearing whatsoever.

MR. HAMILTON: When do they submit them?

MR. TUCKER: Frequently with the filing. The way that most of these cases come, when they file the suit they will include their exhibits, they will include a request for default judgment. All this stuff is filed initially.

MR. HAMILTON: Okay, but the documents that were listed in (a) are not exactly the same documents as in (b).

HONORABLE RUSS CASEY: Okay. In (a), to get a default judgment without hearing, those documents had to be submitted and served with the citation. So they have been served on the defendant with the citation. Under (b) they do not have to be served with the citation, but at

some point in time they're going to want to submit documents to the court if they're wanting a default judgment.

MR. TUCKER: And (b) also explains what the documents in (a) have to look like, what the standard is for those documents.

MR. HAMILTON: Why do they not have to submit them to the defendant under (b) when they do under (a)?

HONORABLE RUSS CASEY: I think it is a little bit burdensome for them to prove up their case before they serve the citation just for any default hearing. We were wanting a default hearing with -- if you wanted a judgment without default hearing then they needed to be served on the defendant with the original petition, original citation, and if you just want a default hearing, they just have to submit it to the court itself.

MR. HAMILTON: Shouldn't the documents be the same whether they're going to be attached to the petition or whether they're going to be submitted later?

HONORABLE RUSS CASEY: On whether they have a judgment with a hearing or without a hearing?

MR. HAMILTON: Yes.

HONORABLE RUSS CASEY: We felt that there was a different burden to have a judgment without a trial

at all or without any kind of hearing at all than there was with having a prove-up hearing.

CHAIRMAN BABCOCK: Okay. Richard Orsinger, then Dorsaneo, then Marisa.

MR. ORSINGER: Maybe a little differently from what some of the other committee members that have spoken, I'm not at all offended by this burden, extra burden, for a default judgment with no trial in the traditional sense as long as you can get an affidavit from an original creditor. Is that feasible in the industry in today's world to get that affidavit?

HONORABLE RUSS CASEY: For the -- they could answer this better than I can, but it's my understanding that they can get that now. It is our encouragement that this will save them a whole lot of money and so that they would put more pressure to make sure that they have that in all cases.

MR. ORSINGER: And would that have to be done -- if you're buying a hundred thousand -- a hundred thousand accounts around the country, is that going to be one person that's going to be sending that affidavit, or does every single bank or office or originator of credit, you have to chase down that local office to get that affidavit?

HONORABLE RUSS CASEY: I don't think that we

are establishing what the requirements of that original affidavit be here in this rule, and --

MR. TUCKER: My thought would be if they purchase a portfolio from Chase then they could get an affidavit from the custodian of records referring to that portfolio, proving up those portfolio as Chase's business records, that affidavit would serve to satisfy any collection suits regarding that portfolio debt.

MR. ORSINGER: Well, I see this as a kind of a modern parallel for old Rule 185 or current Rule 185 for the suit on sworn account process, and I haven't done a lot of this since the 1980s, but in a sworn account, you would have a credit card account and you would attach an affidavit, and the only thing that this affidavit doesn't require that that affidavit did require was an assertion that all just and lawful offsets have been made. You don't really require that, and I'm not sure we shouldn't because I think someone should go under oath saying that we have given you credit for all of your payments, but the suit on sworn account rule won't apply because it's written as if the creditor who originated the debt still controls the debt and is trying to collect the debt. It's written as if it's all personal knowledge, and that's not true in today's industry, so we have to find a substitute for an affidavit with someone with personal knowledge and

kind of going the business record affidavit route is probably the only practical way to do it, to say that there has been some kind of chain of custody of these business records and here's what it is and if you can prove that then you're entitled to take a judgment.

Let me say, though, especially when you say that so few of the JPs are judges, this -- I think this rule should be written to the judges as well as to the lawyers who are filing the plaintiff suits, and it should say something about the fact that they don't have to grant a default judgment if they don't want. For example, when you require the requirements of the business record affidavit are all here, just like they are in Rule of Evidence 803.16, except you leave out the provision that's in the evidence rule that the court can reject an exhibit if the source of information or method or circumstances of preparation indicate a lack of trustworthiness, and I could foresee a justice of the peace saying, "I'm familiar with this collection agency, I think they have a lot of robo signers that sign, you know, a thousand affidavits a day, it's not possible that that could be legitimate, so I'm just going to kind of uniformly reject the affidavits I get from this collection agency."

There's nothing in here telling these nonlawyer judges that they're free to reject the default

judgment, and if I read this and I was not a lawyer I might think, gosh, if you meet all of these criteria of Rule 578 then I have to give you a default judgment, so I would suggest that there be a direction in there that the court can grant default judgment -- cannot grant a default judgment if this is missing but is not required to grant a default judgment if this is present. And then last point is, is I'm not at all offended by having a higher burden of proof when there's no trial. I know in some courts, in Federal court, they call a trial a trial when it's really just in chambers, but in state court I'm used to a trial being where they call the case and they call the name out in the hallway to see if somebody is there, you know, because they don't know to file an answer, sometimes they show up at 10:00 o'clock on Monday expecting to try their case, so it seems to me like an elevated burden of proof for a case with truly no trial is warranted.

CHAIRMAN BABCOCK: Have you ever had anybody show up when they went out in the hallway and called the name?

MR. ORSINGER: Yes, I mean, it happens in family law all the time. It really does.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo.

PROFESSOR DORSANEO: Well, a lot of things

have been said since I raised my hand, but with respect to Harvey's statement that this should be more simple than the procedures that might be required in district and county level courts, and at least before Richard's raised his point it seemed to me that the required documents requirement does simplify things because it says exactly what will do, and it's not so easy to draw the distinction between liability and damages, you know, in district and county level courts in a great many cases. I mean, it's not as simple a matter, especially in cases like these as we tend to think of it because we've memorized those rules and we can repeat them.

Richard's point I think is a good one about but it makes it a little more complicated, saying this will do but you don't have to buy into the probative nature of the bill or card reflecting purchases indicating that this particular debt is owed. I think that's a good point, but that detracts from what I just said, that this simple rule is a -- is, you know, perhaps better for these kinds of cases than our normal default procedures in the higher level courts.

The second thing, I think it's obvious after all of this discussion that there needs to be a definition of "original creditor," need to say who an original creditor is, and you know, that would improve this quite a

bit. I didn't think of this when I had my hand raised, but the difference between (a)(1) and (a)(2) and particularly the "ever existed" language in (a)(2) concerns me a little bit. You know, I mean, if (a)(2) is actual use, okay, actual use is a substitute for a copy of a contract supported by affidavit from the original creditor. If actual use is adequate, why isn't it adequate even if a signed writing, you know, may have existed, as Justice Bland said, you know, I signed this thing years ago with Foley's and no one will ever be able to find that. And I'm sure she probably -- if she's like me she didn't retain a copy of it when she signed it, or if she did it -- from moving from house to house over the years it just disappeared. So why the "ever existed" is my next question.

HONORABLE RUSS CASEY: That's a good example. It's now Macy's with her, so there was no thing that ever existed with Macy's, but it existed with Foley's.

PROFESSOR DORSANEO: Oh, well, that's the definition of original creditor then.

HONORABLE RUSS CASEY: So that's what I'm trying to do, and let me also just say real quick, we were trying to get some uniformity in what's required in these cases --

PROFESSOR DORSANEO: Yeah.

HONORABLE RUSS CASEY: -- for all 840 of our courts. That was another goal of this, was right now the -- they have problems with each different judge in all 840 requiring different things, and we wanted to have some uniformity.

PROFESSOR DORSANEO: Well, you understand my last point --

HONORABLE RUSS CASEY: Yes.

PROFESSOR DORSANEO: -- that the definition of original creditor is -- and it needs to relate to this "ever existed" because it wouldn't have occurred to me that the one that she signed with Foley's didn't exist because they're now called Macy's. Okay. Or have been replaced by Macy's.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I don't know if this is a good policy and if it is a good policy then it should be a good policy to extend to the district courts as well, and the reason is I don't know that they file any of these in JP court, and I think I know why right now, because you stated there are no default judgments, and I don't think they want to travel to Amarillo for a live hearing, but you know, if that's how you have to do it in JP court then they probably always file theirs in district court for

that reason. And I had some policy concern. The first one is we are trying to protect the consumer or the debtor, I believe, from these -- with these statutes or rules, but they get a -- my understanding, I guess, first, a question, don't they get a free appeal? I mean, they don't have to prove anything to get an appeal; is that correct?

HONORABLE RUSS CASEY: Exactly.

HONORABLE ANA ESTEVEZ: Okay. But when we shift them so that now they're going to want to go to district court because they will have a lower burden, I mean, I get defaults every week, quite a few of them every week from creditors, that they didn't attach all these things. They attached an affidavit. There's liability. The affidavit proves up the damages. They didn't have to show up. I read everything, make sure they're served, make sure it's been 10 days. I do everything, review it. There's no one there complaining that it's hearsay. I have to take it. They've waived all their complaints. I take it as true. I sign it.

We're shifting -- we're going to shift them all to the district courts, and there's no policy reason to do that. If we really have a true policy concern then you need to do it in all the courts, and this is the rule for credit card debt, not just credit card debt under a

certain amount. They're already in our district courts, and then if you're concerned about that debtor, now they have to prove something higher to get a new trial. I mean, they don't just get an automatic appeal. They have to prove why they didn't answer, and they didn't have to do that in JP court. They got their -- so the creditor, it's an easy forum shopping question. It's a no-brainer, and I don't think that's a good -- I think that's enough reason not to adopt these, either make it the same standard so they don't have an extra incentive to go to district court or increase the standard and the burden of proof for these types of cases in the district courts as well.

CHAIRMAN BABCOCK: Marisa, did you have a comment before?

MS. SECCO: No, I retract it.

CHAIRMAN BABCOCK: She retracts the unstated comment. Judge Peeples, and then there are a whole bunch of people up there.

HONORABLE DAVID PEEPLES: I have a couple of observations and then some clarification questions. I'm not interested in arguing or trying to convince you of anything. Okay. In 577, it seems to me a very important thing for the judge and the defendant is to have the math laid out in writing and not just a bunch of attachments

that you've got to dig through, and I don't think 577 says that. It says "date of the last payment and amount of last payment"; but as I read this it doesn't tell me, the judge, or me, the defendant, you know, you've run up this amount of bill and you've made these payments and the net that you owe us is so-and-so plus interest or whatever; and I think it would be helpful to have that and a good discipline for the plaintiff's lawyer to have to go through, instead of just saying, "Here's a bunch of attachments, read them," to go through the math; and I don't think it does that. If it does, it's not clear to me.

Now, I have a question now about 578. (a) is default judgment without hearing, and (d) is default judgment after hearing. Is it your intention that (a), (b), and (c) cover the without hearing?

MR. TUCKER: Yes.

HONORABLE DAVID PEEPLES: I don't think that's clear, and you might want to fold all of that into an (a) with some subparts.

MR. TUCKER: That would make sense.

HONORABLE DAVID PEEPLES: Yeah. And when you say without hearing, I know you've got telephone hearing in 525, but could the plaintiff -- if the plaintiff goes through all of these, you know, steps

through the hoops, can the plaintiff send it in by mail and just expect the judge to grant it?

MR. TUCKER: Yes.

HONORABLE DAVID PEEPLES: Okay. So default without hearing might be by mail.

CHAIRMAN BABCOCK: That was yes.

MR. TUCKER: Right. All of the -- as long as the court has those documents listed there and if the defendant fails to file a timely answer, the plaintiff is entitled to a judgment without any further action.

HONORABLE DAVID PEEPLES: Okay. Now, my next comment, take a look -- I'm looking at sub (1) and (2) and then also (b), required documents. It seems to me we're in the default judgment without hearing, and sub (1) and (2) deal with the kinds of documents that have to be attached and then (b) says, you know, "to support a default judgment these documents must include," and it's a little confusing as to why you've got two subsections that talk about what documents you've got to have, and I think it would be helpful to have a list. I mean, just a list, (a), (b), (c), (d), and you can do (1) or (2) or whatever.

MR. TUCKER: Sure.

HONORABLE DAVID PEEPLES: But it's just a little confusing to say in sub (1) and (2) you've got to have these and then in (b) you've got to have these. I

just think they ought to be folded together and be consistent. And that's just a suggestion.

Now, I think I said a minute ago that a very important thing to me, much more important than did the defendant originally sign something, is the question of have -- has the defendant gotten credits for payments or have there been payments and all that kind of thing, and so I'm looking -- I know we're not -- this is all together, and I know we're talking about (a), but in (b), (b)(1) has nothing about payments, but (2) and (3) do, and so (1) just doesn't get there. If I'm expected to do this by mail, there's nobody for me to question, I've got to know what the original debt was and they made payments or they didn't and there's interest or not. I just think that needs to be laid out and proved, and I don't think that all three of those in (b) do that.

And then a final point, I know I've talked a long time, look up in sub (2). As I read this, it says if you're suing on a credit card debt you've got to -- copies have to be attached of documents generated when the credit card was actually used, and that means my 15-dollar bill at Luby's and my gas, the things that I signed, and I can't believe that you've got to do that. Much more helpful is a computer printout that says "Luby's, $15.23," "Citgo Gas," so-and-so, and they ought to be able to

generate something like that, but if this is intended in sub (2) to say that the plaintiff has to find and attach --

MR. TUCKER: Yeah, definitely not. No, no, no.

HONORABLE DAVID PEEPLES: But it says that, doesn't it?

MR. TUCKER: Well, no.

HONORABLE DAVID PEEPLES: If it doesn't say it, fine, but --

MR. TUCKER: Yeah.

HONORABLE DAVID PEEPLES: -- when I read "documents generated when the credit card was actually used" that sounds like the ticket I sign and stick in my pocket, and I just hope that's not intended.

HONORABLE RUSS CASEY: My wording was probably very poor on that.

HONORABLE DAVID PEEPLES: Okay.

HONORABLE RUSS CASEY: It was not my intention.

HONORABLE DAVID PEEPLES: And just the final point, Justice Bland I thought raised a good issue, to me on who --

HONORABLE JANE BLAND: A solution.

HONORABLE DAVID PEEPLES: -- is the proper

affiant, and we're talking about time has gone by and the number of these transactions is huge. There's not a person alive that's going to have personal knowledge of all of this stuff, and so to me to require that it be the original -- someone with the original creditor as opposed to somebody now, we just need to look at that because they need to be able to find an affiant that says these are the records and so forth, but that's just a different question.

CHAIRMAN BABCOCK: A whole bunch of people up here. Judge Evans I know has hand his hand up, Justice Bland, Justice Christopher.

HONORABLE DAVID EVANS: I urge you to consider a substitution for affidavit for original creditor. It strikes me as too burdensome, especially if the assignee has copies of the credit card statements. They should be trustworthy enough to show you, you know, Russ, and these things can get pretty foolish. I had someone tell me that there had to be an affidavit from the Cracker Barrel people who actually encoded the charge before I could prove up a business record on a credit card one time, and so I just think that maybe there's a reasonable substitute that has trustworthiness there and urge you to consider that, and the committee.

CHAIRMAN BABCOCK: Sorry. Justice

Christopher, you had your hand up at one point?

HONORABLE TRACY CHRISTOPHER: I did, but Judge Peeples said what I wanted to say.

CHAIRMAN BABCOCK: All right. Good. Justice Bland then.

HONORABLE JANE BLAND: Okay. My proposed fix, I see where you're coming from even if I didn't acknowledge it enough, but I apologize for that. Your concern is the affidavit is going to lack trustworthiness unless it's from the original creditor. Affidavits lack trustworthiness for lots of reasons, and that could be one of them. So why don't we say -- I think you've solved a big trustworthiness problem by requiring the documentation. That's going to help a lot. Why don't we say "shall be supported by affidavit," period. "If the affidavit lacks trustworthiness, the trial judge may deny the request for default judgment."

HONORABLE RUSS CASEY: I like that very much.

HONORABLE JANE BLAND: And then you're not saying who the affidavit has to be from --

MR. TUCKER: Right.

HONORABLE JANE BLAND: -- but you are signaling to the judge that --

MR. TUCKER: Right.

HONORABLE JANE BLAND: -- it has to be a trustworthy affidavit.

MR. TUCKER: And I guess that's just a balancing act between how much discretion we want to give the judge and how much predictability and consistency that the credit industry says that they would like to have. So, yeah, no, I don't have -- I don't have any inherent objection. I think the credit industry would be upset by that because they're going to say, "Well, when we file these cases in rural areas a lot of times they're just going to say, 'Well, no I want you to stand in front of me and tell me,'" and we're trying to kind of eliminate that situation, but I have no -- I have no -- I think that's a perfectly reasonable outcome.

CHAIRMAN BABCOCK: Sofia, you had your hand up a minute ago. No? Frank, I know you did.

MR. GILSTRAP: Okay. When I read 578(a) and (b) it looks like we're talking about two kinds of claims. One is a claim where you have an instrument signed by the debtor. The other is an account, usually a credit card account, but account which doesn't have to be signed. Now, when I flip back over to 576 and I look at the -- 576(a) and I look at the universe of claims that are covered by Section 8, they talk about consumer debt, revolving or open-ended account, or borrowing money at

interest. My question is, are there other kinds of claims in 576(a) that are not -- that don't qualify as a document -- as a claim where you have the original signature or an account? Is there -- is there a larger universe of claims that aren't covered by the default judgment provisions in 578?

HONORABLE RUSS CASEY: It was our hope that there's not.

MR. GILSTRAP: That was the -- that's where you're trying to get to?

MR. TUCKER: Yes.

MR. GILSTRAP: Because it seems like the language in 576 is so broad that, you know, I can imagine some other type of transaction where there's no signature --

MR. TUCKER: Right.

MR. GILSTRAP: -- it's with a consumer where a contract arises. Maybe those things are just so uncommon you can't get a default judgment on them. That would be my concern.

MR. TUCKER: Yeah, we just felt it was going to be pretty rare that it's neither a credit card debt or a situation where there's some documentation of the original --

MR. GILSTRAP: Signed documentation.

MR. TUCKER: Right.

HONORABLE RUSS CASEY: And I guess I would say that if it is in that weird of a case that there's absolutely that little information that maybe JP court is not the best place for that.

MR. GILSTRAP: Yeah, and maybe Section 8, maybe they don't belong in Section 8 because you're getting a pretty tight procedure here for certain types of claims, and maybe you need to limit 576 to those kind of claims.

MR. TUCKER: Well, and the other aspect is under 578 if we're in this kind of area where there's not any signed documentation, it's not a standard credit card, then maybe also a hearing is a good idea, which would be what it would fall into.

MR. GILSTRAP: You just couldn't get a default judgment in those kind of cases.

MR. TUCKER: Right, you're going to have to come in and get a default after a hearing where you show the judge, "Hey, this is my proof."

CHAIRMAN BABCOCK: Okay. Professor Hoffman, and then Kent had his hand up a long time ago, and then Marcy, Judge Estevez.

PROFESSOR HOFFMAN: Okay. So I guess I wish to speak in favor of consistency.

CHAIRMAN BABCOCK: Well, you're out of line.

PROFESSOR HOFFMAN: I'd also like to say, for those of you who like Chip and like to sit next to him, this is a terrible place to sit if you actually want to speak.

CHAIRMAN BABCOCK: My peripheral vision is not what it used to be.

PROFESSOR HOFFMAN: So the first place that I think there's an issue that we need to think about, and that is the inconsistency between submission and hearing, this goes back to Judge Yelenosky's point. So in 578(a), (b), and (c), as David Peeples says correctly, that's, you know, without a hearing, and so what your rule says is you've got to have an affidavit, currently says from an original creditor, but we think that's a separate policy issue, but it says you have to have an affidavit, and it says you need some documents. And again, as Judge Peeples correctly said, that's another inconsistency problem, which is that the documents you need in 578(a)(1) turn out to be not the same documents that you've listed in 578(b), and in particular (2) and (3), so we have another confusion about which documents you actually need, but leaving all of those, the big consistency problem is to get a default judgment without a hearing -- this goes back to what Judge Yelenosky said. You need an affidavit from,

right now, an original creditor, and some of these documents, not clear what you need.

Now, what do you need if you don't have those documents,and so you've got to have a default judgment with a hearing? 578(d), well, what it says is you go to 525(c), so if you go look at 525 it's part of the rules in Section 3 on trials, and it says what you do if the defendant doesn't appear, and it's actually not totally clear to me even what 525(c) applies to since it says it only applies if (a) and (b) don't apply, but again, leaving aside that I'm a little confused about that point, when you finally get into 525(c) what it says is talking about a default judgment with a hearing, and what it says is the plaintiff to win, the creditor to win, has to, quote, "provide evidence of its damages." What the heck is that? And is that the same thing as 578(a)'s affidavit -- you know, testimony in this case from the original creditor and then a certain document? And if so, what documents?

And so -- so anyway at the end of the day my point is it seems like there's policy questions we've got to decide, but there are also a whole bunch of inconsistencies. And then finally on Judge Estevez' comment, which is if we're going to do this and change the rule -- and I'm of mixed mind still, although I must say

I'm inclined to think it is a good rule to have a liability standard for these routine cases that we don't just assume liability away because the defendant didn't show up, we're going to have to do that in the other courts, too, because otherwise there's just going to be issues there.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: I just wanted to ask a couple of very practical questions. Number one, and maybe I missed this earlier, but do we presume the changes that are being proposed here will significantly increase the volumes of these sorts of cases filed in JP courts? To put it another way, are these sorts of cases in which there's a high anticipation, a high likelihood, shall we say, of default judgments resulting, are they currently being filed in district courts because it is cheaper to file them in district or county court because there's no -- perhaps not the same sort of hearing required?

CHAIRMAN BABCOCK: Anybody know the answer to those?

HONORABLE RUSS CASEY: I would think that they would be the better person to answer, but it's my understanding that most of the cases that are under the jurisdictional limit are filed in JP courts where they're comfortable having counsel go to and in district court

where they are not comfortable having counsel go to, if that makes any sense.

CHAIRMAN BABCOCK: Okay. Marcy, and then Judge Estevez.

HONORABLE KENT SULLIVAN: Let me ask one more question before I let him go --

CHAIRMAN BABCOCK: Sure.

HONORABLE KENT SULLIVAN: -- that I think an important practical question. I'm not entirely clear, maybe other folks are, on exactly what sort of notice I can anticipate if I'm a consumer that's the subject of a default judgment in JP court. I know what happens in district court, and I'm entitled to get, you know, written notice. What exactly happens in JP court?

HONORABLE RUSS CASEY: There is no requirement of any notice right now.

MR. TUCKER: Well, they have to mail a default judgment.

HONORABLE RUSS CASEY: They have to mail a default judgment.

MR. TUCKER: Yeah.

HONORABLE KENT SULLIVAN: What? I'm sorry.

HONORABLE RUSS CASEY: We have to mail the judgment when it happens, but we don't have to have any notice of a default hearing.

HONORABLE KENT SULLIVAN: Okay.

CHAIRMAN BABCOCK: Marcy.

MS. GREER: It seems to me there are two things that are being accomplished by (a), (b), and (c). One is where a default judgment should be automatic, it shouldn't be something the court has to give thought to, and since we're giving guidance to nonlawyers, that's important; and two, where we don't need to have a hearing but we might want to give the judge some discretion to look at the documents, to Justice Bland's point, and if they are sufficient and show reliability, they would have discretion to go ahead and grant, which would include some of the (b) type documents and maybe others that could be significant. In that situation the judge would always have discretion to say, "I really need a hearing. I need to talk to these people. I need to see more. I need to understand more," but what -- it might be a way to do would be to say, "The judge shall grant a default judgment if the following are included" and then set those standards.

Again, I agree with all the comments about defining original creditor and making that a lot clearer and maybe giving some flexibility on, you know, a sufficiently reliable affidavit a chain of custody, but then the second category would be giving the judge some

discretion to decide whether to grant on the documents before him or her or hold a hearing, and then so I know we're running up with kind of three levels, but the way to do it would be say here's how you can get a default judgment without a hearing, and if these things are provided then it shall be granted, and then the judge has discretion if the lesser category is met, and that would get a lot of -- that would solve your hearing problem and kind of delink the two, the automatic and the hearing.

MR. TUCKER: So if I understand, what you're saying is kind of keep what we have right now for where it's a "shall" but then if they don't have that, leave it to the judge's discretion to grant it without a hearing or require a hearing if they think it's necessary.

MS. GREER: Exactly.

HONORABLE RUSS CASEY: And I guess let me revisit again the difference here. What my intention was, was that if you are going to have a default judgment without a hearing, you need to supply information that would be necessary, like in a motion for a summary judgment.

MS. GREER: Right.

HONORABLE RUSS CASEY: This is -- this is -- if I'm preparing a motion for summary judgment and I'm wanting to end this trial right now, this is the type of

information I'm going to supply to the court, and this is the list that I came up with that. It was my own list, and, in fact, I'm not an attorney, but this is what I felt was good. If you guys think that the list should be different and accomplish that same goal, love that idea, but that was the intention of having a default judgment without a hearing, is this is a -- this is the standard that you need to meet, and then you have a default judgment with a hearing, bare minimal, you know, this is that, and that was the intention.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I have two things. The first one has to do with the terms. We keep saying with a hearing, without a hearing, and some judges may consider us reviewing a default as a hearing, so I would like to suggest to add the word "live hearing" just to help those that -- you know, I think you brought it up, too. It is a type of hearing when we're considering things, so I would like you guys to consider that after the words "default judgment" "without live hearing" and then judgment -- "default judgment after live hearing."

The other thing has to do with another difference in the courts based on these rules and the default rules. Another reason to go to district court after these rules would be adopted would be that they

could -- a litigant could then attach request for admissions to their default. They don't answer. They don't answer the admissions. They've now admitted everything. There are no documents. Once again we've got a default with everything, cheaper, faster, and they're going to recover all their fees no matter which court they go to, so there's not a money issue at the end of the day if they really truly believe they're going to recover money.

HONORABLE RUSS CASEY: I think Clark has kind of overridden that.

HONORABLE ANA ESTEVEZ: Clark?

MR. ORSINGER: Is that a case?

HONORABLE RUSS CASEY: Yeah, out of Austin. Clark, what is that?

MR. TUCKER: I can't -- I can't recall the citation off the type of my head.

HONORABLE RUSS CASEY: Basically it said that admissions alone are not good enough, you have to support with some evidence.

HONORABLE ANA ESTEVEZ: Oh, yeah. Well, they may not have risen -- you know, somebody has to argue that, and I don't know what the Seventh Court of Appeals has done, so I'm not going to go one way or another. I mean, admissions will do it if they answered, then it does

for summary judgment, so --

MR. TUCKER: Just to address the "live," my only concern with adding that, and I understand what you're saying. My concern if we add the word "live" is that some people will then read that to mean that trumps the other part where we say --

HONORABLE ANA ESTEVEZ: You can appear by phone.

MR. TUCKER: -- you can appear by phone or electronic means, so I'm good adding some descriptor, but I'm afraid "live" specifically would say, oh, that means you can't appear by phone or electronic means.

CHAIRMAN BABCOCK: Judge Ridgway, who is a member of the task force has had his hand up for sometime.

HONORABLE RUSS RIDGWAY: Couple of comments. First, it's remarkable that default hearings, how many times we see for the first time a bill of sale that establishes the chain that was involved. It wasn't in the petition, so the hearing actually ends up being the first time that we actually get to see it all. The second thing is the reason for these hearings ends up a lot of times when the petition had one amount of damages, one amount of attorney's fees, and when it comes to the motion for default judgment the number had changed, and we want to have some understanding of or reconciling of how that

happened, and so I'm always asking the question "Have there been any credits, offsets, adjustments, allocation, payments, or anything to reduce the amount," but sometimes the amount in the motion for default judgment went up and went over what was in the original petition. So those are the kinds of things that we have to address in these hearings.

CHAIRMAN BABCOCK: Thanks. Frank.

MR. GILSTRAP: One of the categories of claims are creditors who are lending money at interest, and presumably these people have signed promissory notes, and you know, the -- in the classic case the person goes to court, says, "I'm the owner and holder of the note. Here's the note, it's attached," and you get default judgments. That's all you've got to do, and your safeguard was, well, here's the note. It's right here. It's not going anywhere, but, you know, when we started using photocopies we got away from that, and now a lender comes in, says, "Well, I'm the owner and holder of the note," and they still get a default judgment. I think that's a bad rule, but it looks to me like this is going to change that, that the lender can't just come in and say, "I'm the owner and holder. Here's the note." He's got to do a little bit more than he normally -- he's had to do in the past.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: I maybe should have mentioned this earlier and yesterday, but I'm trying to figure out -- and I'm talking about from the starting point in 577.

HONORABLE RUSS CASEY: Okay.

PROFESSOR DORSANEO: Looking at that initially and then saying, well, does that really have the elements of the claim or cause of action in there right; and then I thought, well, maybe I need to look back to 509, which also applies, in order to find out whether the 509(a)(5), for example, the basis for the plaintiff's claim against the defendant, you know, needs to be in plaintiff's pleadings for 577 cases.

MR. TUCKER: Yeah, and I actually had thought about that last night, that I would agree, but I think a statement of something like "In addition to the requirements laid out in Rule 509," comma, "the following information must be."

PROFESSOR DORSANEO: Yeah, and I actually would prefer for 577 to say completely what's needed.

MR. TUCKER: And that would be fine, too. Whatever you-all think is a better construction.

PROFESSOR DORSANEO: When I was writing down I was thinking like what's needed is the terms of the

account agreement. Now, that's if there's an agreement.

MR. TUCKER: Yeah.

PROFESSOR DORSANEO: But it could be the implied contract, you know, the amount of the claim and how the amount was calculated.

MR. TUCKER: Sure.

PROFESSOR DORSANEO: Huh? Something like that.

HONORABLE RUSS CASEY: That's a very good point.

MR. TUCKER: Yeah. I a hundred percent agree, so however you guys think. If it's better to just say "in addition to 509" or list all of those things, we would agree with that.

PROFESSOR DORSANEO: Yeah, I would have some -- will have comments about 509, too.

HONORABLE RUSS CASEY: There was a couple of things that they need to sort of spell out the math there, and I think that would be great.

CHAIRMAN BABCOCK: Justice Frost.

HONORABLE KEM FROST: In this Rule 578, the default judgment rule, I did not see any reference to a nonmilitary affidavit that's typically required in a default judgment context. Is there --

MR. TUCKER: It would still be required.

HONORABLE RUSS CASEY: That's Federal law.

HONORABLE KEM FROST: Right.

HONORABLE RUSS CASEY: I didn't think we needed to address it.

MR. TUCKER: Yeah.

HONORABLE KEM FROST: Does there need to be a reference in there?

MR. TUCKER: There's not -- for example, in our current rules there's not a list -- in the Rules of Civil Procedure for justice courts it's not listed, but it's still required. Our judges are mandated to have that there. Whether or not it should be in the rules is up to you-all, but it is required now, and we certainly agree it would be required under the new rules as well.

HONORABLE KEM FROST: Well, it just seems if a plaintiff is going to be bringing it and, you know, signing it that they would need to know that that's one of the documents that they have to have. It seems like that would be the place to put it, is in this same rule.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: If I'm a creditor why would I attach documents to my petition? Why wouldn't I just wait to see if the defendant didn't answer and then if he didn't answer send you the documents at that time? What's the difference?

MR. TUCKER: Well, what we see a lot in our courts is the -- in these cases, the end goal is default judgment, so they're sending in -- they will send in petition, frequently with request for admissions embedded in the petition, and then attach any affidavits or documents that they have and a request for default judgment all at once so that when the time frame for the defendant to answer expires the judge already has in front of him everything they need to move forward with the default process. Very frequently in these cases if the defendant answers there's just a nonsuit, so that's why, again, this is kind of the process that's being sought, and so they're going to give the judge everything they need so they can get this turned around as quickly as possible. That's just the way we see it happening.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I was looking at the interrelation between Rule 525 and this default judgment rule, and 525(b) talks about the right to attorney's fees if you have affidavits to support them, and I believe that 525 subdivision (b) is relating to the default judgment with -- without a hearing, meaning necessary paperwork is attached. Is affidavits from attorneys attached to a petition that has all of the listed credit documents, are you entitled to a default judgment on these also without a

hearing, or does --

MR. TUCKER: I would say that that was the intent of the rule.

MR. ORSINGER: To me it would be clearer then if you came over here under the default judgment part and somehow mentioned affidavit for attorney's fees so that it was clear --

MR. TUCKER: Sure.

MR. ORSINGER: -- that if you're trying to go the no hearing default route that you can get your fees if you have the affidavits attached to your petition.

MR. TUCKER: Sure.

MR. ORSINGER: It's not clear to me.

MR. TUCKER: Sure, that make sense.

CHAIRMAN BABCOCK: Okay. Roger.

MR. HUGHES: On subsection (e) about post-answer default there may be a slight change from what the law is here and maybe not. The rule is the person files an answer, they have contested liability, and therefore, the plaintiff has to prove it even if they don't show up. That's the rule in the other courts.

MR. TUCKER: Right.

MR. HUGHES: This leaves it ambiguous. It just says "proceed to hear evidence." Now, you know, the usual -- a lot of people still believe that if you don't

show up for trial that's like a default like you've never answered, but that's not -- that's not in the rule. So I would suggest after the word "proceed to hear evidence" you add the words "of liability and damages."

MR. TUCKER: Sure, or "as to all elements of the plaintiff's claim" or something along those lines?

MR. HUGHES: Yes. To make it clear, because it could be interpreted to say, well, all I have to do is hear evidence of damages.

MR. TUCKER: Sure. No, and our intention was to preserve the current standard, so your additions, whatever the committee thinks is the most clear on that we definitely support that.

CHAIRMAN BABCOCK: Justice Christopher had her hand up, and then Kent, and then Frank.

HONORABLE TRACY CHRISTOPHER: May I just ask a docketing question? When cases are normally filed and the answer date is passed and you're going to have a default oral hearing, how does that happen? Does the creditor just call up and say, "I want a hearing," and you tell them "Show up on this date"?

HONORABLE RUSS CASEY: Basically, yeah.

MR. TUCKER: Yeah, and some courts -- it's a little bit unclear. Some courts, the way that it's written is that if it's unliquidated -- or if it's

liquidated it's automatic, if it's unliquidated we have a hearing. Some courts will hold the plaintiff to request a default judgment hearing. Some courts will automatically schedule a default hearing once the 10 days have expired.

HONORABLE TRACY CHRISTOPHER: So I guess my question is in terms of obtaining this default judgment without hearing, are you expecting the plaintiff to send you a motion?

MR. TUCKER: No.

HONORABLE TRACY CHRISTOPHER: Say "time has passed, please do this"? Are you expecting judges to be looking at their docket and automatically doing this?

MR. TUCKER: Yeah, automatic. Our intent was to make this procedure just like the current procedure is supposed to be for a sworn account or liquidated damages default judgment where once the defendant's time to answer has come and gone the -- the sworn proof that the judge has is sufficient prima facie to render a default judgment in the end, without requiring a motion or any further action from the plaintiff.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: I believe I heard one of the judges say a moment ago that routinely if an answer is filed that it is followed by a nonsuit. Did I hear that right?

MR. TUCKER: I had mentioned that, yes, sir.

HONORABLE KENT SULLIVAN: Okay. What do you interpret as the significance of that?

MR. TUCKER: Well, I mean, and again, the credit industry might be able to talk about that also. My thought is, is, again, you know, it's kind of a everyone is in a business to do things that are the most profitable, and you know, if there's going to be a -- have to be a trial and we're going to have to marshal evidence and we're going to have to show up and we're going to have to go through all this process and then might get a judgment that we never recover any money on, that starts to become a negative money decision to go through that entire trial process. If I can get a default judgment quickly and cheaply, then -- you know, if my judgment, if I get a judgment for $5,000 and it's actually worth a hundred dollars if I can get it by spending 80, that makes sense. If I can get it by spending 500, it doesn't make sense anymore. So that's my thought on probably why that happens, is it become as negative cost benefit outcome for the creditor.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: In 576(c), requirements of affidavit, this is the business records affidavit which has to be signed by the original creditor. I want to

steer away from the substantive aspects of that and talk about the form. In (2) it says "representative of the creditor." It probably needs to say "original creditor." I think that's implicit, but there's no reason not to make it clear. The larger question has to do with the use of the term "affidavit." As everybody on the committee now knows, I think it's Section 132 of the Civil Practice and Remedies Code allows a sworn statement, not an affidavit, a sworn statement under perjury can take the place of an affidavit. The task force is aware of this because over on page three of the definition of "sworn statement," they have the statement that instead of being signed in front of someone authorized to take oaths or a notary, a statement may be signed under penalty of perjury, which recognizes that 132 has been enacted. However, in the Rule 576 -- excuse me, 578(c) we still talk about affidavit.

That's the approach we've taken all the way through here. Yes, we know there's a -- in the other rules, excuse me. We know there is this new provision allowing use of the sworn statements, but we're just going to stick with affidavit and let the usage kind of creep in over time. I'm not sure we shouldn't go ahead and recognize that in this rule because if we do require statements from original creditors, they're probably going

to be coming from out of state, and they're likely going to be made under penalty of perjury using that form, which works except that this talks about affidavit and I'm the poor -- I'm the poor borrower who's come into court, and I say, "Well, Judge, he doesn't have an affidavit," and they say, "Surprise, he can make a sworn statement." Well, where does it say that? It doesn't say that anywhere, unless I look under the definition of "sworn statement." This might be a place where instead of affidavit we break down and use the word "sworn statement."

MR. TUCKER: Sure. We would have no objection to that at all.

HONORABLE RUSS CASEY: Forgive me, it was a very long night.

MR. GILSTRAP: What's that?

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, yeah, I was just going to respond about, you know, as you've recognized, it's self-actuating. The statute says wherever you say "affidavit" ipso facto means you can do a sworn declaration, but your argument is that here we should acknowledge that.

MR. GILSTRAP: Yeah, because I'm the pro se defendant. I don't know that. "Hey, Judge, he doesn't have an affidavit." Surprise, he doesn't need one.

HONORABLE STEPHEN YELENOSKY: Well, I guess my question would be, going to Professor Hoffman's point, I guess to be consistent then maybe the same argument would apply in all justice court references to affidavit, and maybe that's a good thing.

CHAIRMAN BABCOCK: Okay. Is anybody else concerned about Judge Estevez' point that there may be some unintended consequences here that there could be a flight of these kind of cases to district court away from JP court? Yeah. Bill.

PROFESSOR DORSANEO: Well, the only impediment would be the additional filing fees. There may be -- it may be that some of these cases are not brought because it's not economical to bring them in a district court, but if it is economical, that's where they're going to go. I mean, that seems pretty obvious. It also seems pretty obvious to me that the rules ought to be the same.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: But if you can get one without a hearing, if you keep the structure where you get the nonhearing if you get these documents up front, then it seems like you're going to have just as many in JP court. So long as you have a creditor who has the required documentation then they can start doing this by mail. They don't even have to send their attorney down there, so

I think it's only going to create disincentives for those who don't have the documentation that we require, no matter what that -- I mean, we can debate what that documentation is, but --

MR. TUCKER: Just for our edification, what would be the standard filing and service fee in a district court suit?

MR. WOOD: It's around $250 for the filing fee, somewhere in that neighborhood, plus your service of process fees on top of that.

MR. TUCKER: Okay. Thanks.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: I had some concern about that, and also about the heightened proof requirement for default, which I guess those are related, and it seemed to me that you're almost kind of creating a suit on sworn account for the justice court, which might be a good idea, and that would leave the parallelism in place, and it might provide some incentive for people selling the debt to say, "We're going to be able to sell a better product if we can track the transaction back to the origin and not just have a list of names and numbers." So perhaps I would think there might be some market benefit as well as some consistency in the legal system.

CHAIRMAN BABCOCK: Okay. Yeah, Lamont.

MR. JEFFERSON: Yeah, it seems to me that these are -- I think we're trying to fashion a rule for what ought to be a pretty routine situation, is someone owes money and they don't pay it. Everybody knows they owe the money, and everybody knows they haven't paid it, and it's just a question of how it gets collected, and I think that's why there's so many defaults. That's my guess, is that, you know, the defendant knows that "I owe this money, and yeah, I knew this was going to come. I just don't have the money to pay," and so now we're trying to come up with a way to streamline the process so that we can get to the finish line without allowing those who shouldn't be subject to the judgment being subjected to judgment, and the whole idea that the JP courts or whatever we're going to call this court -- I guess we'll call it JP courts.

I don't think that it's going to discourage filings in JP courts because, just the statistic we got handed out yesterday, and I don't know what all cases this represents, but out of 42,000 cases, 467 cases appealed. So why not take a shot in JP court, file your whatever, get your judgment. If they're going to default on answering the suit, it's very unlikely they're going to appeal the case in the next instance, and you'll get a lot of cases resolved at that point. And what we're -- so

what we're really managing here is a default judgment rule, is what proof should support a default judgment; and if everyone agrees -- and if we can solve that problem, it ain't going to matter really what's in the petition.

The only thing that's going to matter is what a judge has to have to support the entry of a judgment; and so, you know, I'm not so concerned about 577 as 578; and then we have to consider just kind of business practices, what does it mean where -- hey, this original creditor concept is new to me in law; and I don't know that the Legislature particularly had its mind on that idea of an original creditor and whether you have to have proof from an original creditor to support a judgment; but I would focus on the proof necessary to support a judgment and really not worry about anything else.

CHAIRMAN BABCOCK: Ted, did you want to say something?

MR. WOOD: Chairman, I think it would be helpful to hear from Michael Scott from the Creditors Bar Association about some of the questions that have been raised about whether cases would move to the district courts, for example. Also, I think he can enlighten us about cases where there is an answer and whether they proceed or whether they nonsuit. I think he can answer those better than those of us who were on the committee.

CHAIRMAN BABCOCK: Okay. Good point. Michael, you got any insight on that?

MR. SCOTT: Well, thank you very much. There were a couple of things said during this morning's conversation that caused me to stand up and then sit down and stand up.

CHAIRMAN BABCOCK: I thought you were just exercising.

MR. SCOTT: Well, you know, I needed some of that, too. There are some representations that have gone on this morning that are a little illusory in nature. I have been -- just from a practical perspective, I have been nonsuiting district court cases for one original issuer in cases involving $25,000 or more because I cannot get a business records affidavit out of that original issuer on a timely fashion because their systems are backed up and they are so obsessed with making sure they get it right that they will not sign something unless a certain very critical set of conditions exists, so the concept that a bank would sign a business records affidavit in mass in support of its thousands of credit card cases is just wrong. They won't do it, and so if that becomes the standard, that standard defeats the practice that we're in.

The second thing is that dismissals on

answer. I am aware of firms that have historically done something like that. I will tell you that I have a docket of over 450 cases in San Antonio next Thursday and Friday. I will be sending three attorneys down. They will stay the night, or two attorneys and one settlement specialist, so and some people dismiss on answer. That's not the practice. It's an invitation for a Fair Debt Collection Practices Act violation claim, which means I get to write a check for $5,000 if I do that, and so the industry has certainly moved away from those practices.

Now, where the industry finds itself oftentimes instead is it is in possession of an affidavit of account. That affidavit is hearsay if -- if it's hearsay and if objected to cannot come into evidence at trial, and so if I start finding opposing counsel on the other side and I cannot get my business records affidavit timely, I'm going to find myself standing in court and going through the dance where I say, "Well, I offer this affidavit."

"Objection, hearsay."

"Sustained, affidavit is not admitted."

We're done. So you oftentimes see nonsuits involving opposing counsel because we know that they know the rules, and that as almost a professional courtesy to each other I'm not going to drag them down to court, I'm not going to

waste the court's time, to go through a scenario that we know how it's going to play out. So in that regard then cases are nonsuited.

Now, part of the discussion about a cost benefit analysis, that certainly does go on. I have cases in Houston where I have 86 requests for admissions, 90 requests for production of documents, and we're on a 2,500-dollar case, but because we're in justice court and we're under district court discovery rules, it's a game. It's moving the chess pieces around the chess board, and so in that regard there are cost benefit analyses that go on, but as the industry as a whole, especially over the last three years and sort of the perfection of the industry that has gone on, we do not bring suits unless we intend to take them to judgment. Now, we will on a case-by-case basis make a determination about effectiveness, cost issues, but not as a broad spectrum do we dismiss on answer. We don't do that.

CHAIRMAN BABCOCK: Well, Michael, if this -- if these rules get adopted by the Texas Supreme Court as written, I mean, obviously they're going to be modified based on this discussion, but as written, you're critical of them, Trish Baxter is critical of them, and isn't there going to be a flight to district court?

MR. SCOTT: There's going to be a

bifurcation is what's going to happen -- well, a trifurcation actually. The original issuers are going to do what they can to meet the expectation of the rules. They may be defeated by the business record affidavit component of it, because they just will not adopt their processes to address that issue. They won't do it for a single state, and I love the state of Texas, but forgive me, they certainly won't do it for the state of Texas, because this is a low recovery state for them anyway. It's the lowest recovery state in the nation.

The debt buyers will be confronted with the problem that they cannot possibly meet the justice court rules because they will not -- they will never get an affidavit from original issuer. The thought that maybe they should do this at the sale, maybe they will starting three years from now, but in the interim the debt buyers will not be able to meet the expectation of the rules. We are concerned that the default judgment rules will set a baseline, which means the debt buyers can never meet the expectations of the court whether it's on submission, whether it's a default judgment hearing, whether it's a trial; and so the debt buyers will do one of two things. They will either not file or they'll pay the higher fee. Me just pulling a number out of the air based on my experience with these folks, two-thirds of them will not

file, one-third of them will pay a higher fee.

CHAIRMAN BABCOCK: And by paying a higher fee you mean going to district court?

MR. SCOTT: District court, $200. When you see 5,000-dollar credit card cases being pursued in district court now it is generally because you're dealing with an original issuer, somebody like Citibank who is -- they are proud of their judgment record and they know what they can get in district court. They know the rules will be applied. They view the justice courts as a little bit of, excuse the expression, crap shoot, maybe here, maybe not, you know, who knows what you're going to get; and so they -- so they choose to pay the extra money for the certainty of the application of law in the county and district courts; but the debt buyers, for them it's going to be a cost benefit ratio.

CHAIRMAN BABCOCK: But your best estimate is if we pass these rules that there will be a decrease of filings in JP court and will be an increase in district court.

MR. SCOTT: That is my best estimate, and overall there will be a decrease of filings.

CHAIRMAN BABCOCK: Okay. Justice Hecht.

HONORABLE NATHAN HECHT: With respect to affidavits, would the plaintiff present an affidavit that

the amount is due and owing?

MR. SCOTT: The plaintiff would, and our proposal when this whole process started was that the plaintiff would file with the petition and affidavit from the owner of the account attesting to the balances of the account and a copy of the charge-off statement because that statement sort of fixes the dollar amount in time. It's the point in time at which the original issuer quits assessing charges, and we know what that dollar amount is, and it's the point in time at which post-charge-off interest begins to accrue, whether it accrues at statutory interest rate or accrues at contract rate or what we're seeing more and more in the industry, it doesn't accrue at all. Everybody is setting that number to zero now, so it becomes the point from which the math can be done. You know, we can say "As of this date the balance was $5,000" and if it's accrued from that date at the rate of 6 percent until the date of entry of judgment, and we can do the math there, and we get all the accounting squared away. So the proposal of the creditors bar was, well, let's give this to the defendant up front, they can see the affidavit, they can see the charge-off statement, they can understand what this case is about, and then if they choose not to answer then we would ask the court to give us our default judgment.

CHAIRMAN BABCOCK: Okay. We're going to take our morning recess. We'll be back at 10:45, and when we come back we'll go to the eviction cases, Section 10.

(Recess from 10:30 a.m. to 10:49 a.m.)

CHAIRMAN BABCOCK: Okay. We're back on the record, and, Carl, you had a comment to make.

MR. HAMILTON: Well, just that the statute says that the Supreme Court is to write rules for three things, an assignee of a claim -- it doesn't limit the claim to debt collection claims, but we have done so, at least these proposed rules do that. Then it says "a person primarily engaged in the business of lending money" and, third, "a collection agency or collection agent." Proposed rules provide for a collection agency but not an agent, and they add some other things, and I suppose it's all right for the Court to add additional things like the open account stuff, although that's not really covered, but there are some things in the scope of debt claims that are not in the statute.

CHAIRMAN BABCOCK: And, Carl, didn't you say that whereas the statute says "person," the rule says "financial institution"?

MR. HAMILTON: Well, it says "a person primarily engaged in the business of lending money," and this says "an original creditor," which could be the same

thing.

CHAIRMAN BABCOCK: Okay. Very good. Thanks, Carl. Hayes.

MR. FULLER: Basically I think this applies to both Sections 8 and 10. There has been a lot of good work and good discussion, but I am concerned and not persuaded that we have done a thorough job of identifying all of the potential policy considerations and assumptions underlying these proposed rules. I mean, we've already identified the issues of creditor versus debtor, whether we want these cases brought in JP court or district court; and I'm sure there are others; and I'm just concerned that until we do that, thoroughly identify and discuss the policy considerations, all of the potential policy considerations, we don't know where we're going; and if we embark on this journey without knowing where we're going we are liable to end up somewhere we did not intend to go.

CHAIRMAN BABCOCK: Okay. Great. Yeah.

PROFESSOR HOFFMAN: I was going to say something else, but that's never stopped us before, but okay.

CHAIRMAN BABCOCK: Well, and frankly, I was going to say, hey, that's your homework between now and August.

PROFESSOR HOFFMAN: I was, in fact, going to

channel Richard Munzinger for just a second and express some outrage.

CHAIRMAN BABCOCK: So your inner Munzinger is coming out?

PROFESSOR HOFFMAN: Yeah. And I don't know that my outrage is directed at what you said, Mr. Scott. Have I got your --

MR. SCOTT: That's correct. Should I stand for this?

PROFESSOR HOFFMAN: But it seems to me -- so maybe the problem is with the rules, but it strikes me that I think what I heard you say, at least part of what you said, is that I get away with what I get away with unless there's a lawyer around in some cases when he or she tells me that I can't get away with that and I give up; and that leaves me with a really uncomfortable feeling; and I think what you were talking about mostly is the hearsay on -- you know, that you've got an affidavit that doesn't satisfy hearsay; and so it strikes me that either we ought to fix the hearsay rule if that's the case or raise it again, the kind of tangled web of these things, or if we think it's a good rule then we ought to figure out a way in which people who aren't represented by lawyers don't get routinely screwed because no one is paying attention; and so this strikes me as a problem that

-- again, maybe it isn't a problem with your practice as much as it is with our rules; but I wanted to at least not let that slide because that bothered me.

CHAIRMAN BABCOCK: Okay, very good. Yeah, Judge.

HONORABLE ANA ESTEVEZ: I just want to respond to Mr. Hoffman because I have that same issue with some of my criminal attorneys, and it's a philosophical problem, and it is what do we do when we have the same fact scenario but depending on who is representing who we have a different result, and it doesn't just occur here. It occurs in every area of our law. It is a question of did they both get justice, did one get justice and the other one not get justice, but it is an inherent problem in our legal system, and I don't think that this is going to make the difference. Mr. Hardin did a wonderful job. I don't know that every other attorney that would have represented the same clients would have gotten the same result.

CHAIRMAN BABCOCK: Oh, anybody could have gotten him off.

HONORABLE ANA ESTEVEZ: But it's the same issue in everything. We do not have equal -- there is no equal justice. I mean we try, but there's not going to -- we don't -- philosophically it's an outrage. I was

experiencing that issue this week when we had a trial in which we had a different result than I would expect if Mr. Hardin had conducted that trial. So I --

PROFESSOR HOFFMAN: Just to be clear, we're talking about -- I understand we can't fix it all, but what we're talking about is writing rules, and what -- that we can either enshrine a practice that apparently they think doesn't actually work when anyone is paying attention, but they're delighted to recommend as a policy that we should adopt -- the Supreme Court should adopt as a rule. So the point I'm trying to make is not obviously people without lawyers tend to do worse than people with lawyers, and people with better lawyers tend to do better than people who don't have lawyers that are as competent, but that doesn't mean we ought to adopt by a rule a practice that they're apparently acknowledging doesn't work when someone is paying attention.

CHAIRMAN BABCOCK: Yeah, this is a little off point, but it's interesting. Yeah, go ahead.

HONORABLE ANA ESTEVEZ: Is it unfair that Mr. Scott is actually recovering a debt that is owed and that other people aren't having to pay a debt that is owed? I mean, that's the overall issue. He has -- he doesn't have a way to recover it, but he does have in -- he can't meet this burden, but he really does have the

right to have that money.

HONORABLE STEPHEN YELENOSKY: No, I mean, the law defines it as not owed because it's not owed unless it's --

HONORABLE ANA ESTEVEZ: Morally. Morally. Morally owed. I'm sorry, not legally owed, but morally owed.

HONORABLE STEPHEN YELENOSKY: Right. Well, we're in a court of law. We're not in a moral court, and it's not owed unless it's proven owed.

MR. HARDIN: This is good.

CHAIRMAN BABCOCK: All right. All right, Munzinger, put a bow on this.

MR. MUNZINGER: Only the system --

MR. SCOTT: If I could --

THE REPORTER: Wait.

CHAIRMAN BABCOCK: Hold on. Hold on. Munzinger first.

MR. SCOTT: Oh, I'm sorry.

MR. MUNZINGER: It will only take me a second.

MR. SCOTT: Oh.

MR. MUNZINGER: The system presupposes an adversary system, so if there's no one there to contest what I'm saying that's what the system contemplates. It

contemplates a relaxed level of proof unless the rule adopts a more stringent level of proof. In this case, I disagree with the interpretation of the statute. The Legislature has said don't make Rules of Evidence applicable to small claims cases, including those involving the debt collection industry. These gentlemen have a different interpretation of the statute. You are superimposing something the Legislature told you not to.

CHAIRMAN BABCOCK: Michael, you get a minute to defend yourself.

MR. SCOTT: To defend my good honor, okay. I wanted to put my comments earlier in context of how the industry works, which is that I'll take in a thousand files from a client. Capital One Bank will send me a thousand files. I'll immediately ask them, I need an affidavit, I need any kind of affidavit. It's not going to be business record affidavit, but it's going to testify to the balances they've placed with me. They -- it is a burden for them to do a business record affidavit, so I won't ask for one of those until I receive an answer in a case. Okay. Once I receive an answer in a case I'll initiate a request for a business records affidavit.

My client will also forward to me as part of the placement process, they'll start streaming in the media -- what is referred to in the industry as the media

that they have, and that's charge-off statements, possibly applications, possibly a payment. I'll start getting these into my system and I'll collect them over time. Now, the one thing I cannot control is I cannot control when I have to show up at court. I mean, I can do some modifications to the court's setting of the hearing, but when that hearing occurs I have what I have. I might have the account affidavit. I might have some media from the client, but maybe not all of it, and I may not have a business records affidavit.

It's in that context that I have to make a decision, what am I going to do? If I'm headed to a trial where I know that there's opposing counsel on the other side, I know that what I have right now is not going to be sufficient, and I have to make a trial decision at that point what to do. All of the -- everybody who has been a trial attorney knows that we're stuck in that position, that I might have more coming, but I don't have it, not now, and so that's where those decisions are made. Admittedly if there's a pro se on the other side instead of me dismissing this case, giving up on the cost and probably giving up on the claim, I may decide to go on down to court and take my chances. I may offer up the affidavit. The defendant -- Judge Casey, nine times out of ten the defendant is going to tell me that they owed

the account and this is why they couldn't pay it. So those are the type -- those are just litigation decisions that we as attorneys make all the time as to how to best represent our client and how to do it cost effectively.

CHAIRMAN BABCOCK: Okay. Thank you. Now what -- yeah, go ahead.

MR. TUCKER: Would you think it would be helpful or would anyone have a thought about if we made it where it would be an automatic continuance if you filed a request for continuance showing you've requested documents from the original creditor and they have not yet responded to that request?

MR. SCOTT: The question is would that be helpful?

MR. TUCKER: Yeah.

MR. SCOTT: I mean, yes, it would be helpful. I've had continuances of 48 hours, so but the courts will have to understand what the industry is. I mean, it is not light-footed. When it needs a continuance it needs 60 days, because all of this stuff is working its way up through the system. It's a national response center from the banks, and if they're backed up they're backed up, and there's nothing I can do. I can't get on the phone and say, "No, but I have to have it by tomorrow." I have no pull in the level of -- with the

size of businesses that we're dealing with.

CHAIRMAN BABCOCK: Okay. Let's go to Section 10, eviction cases, and Judge Casey and Bronson will give us an overview, but before they do Judge Peeples has some thoughts about this and maybe what we've been talking about.

HONORABLE DAVID PEEPLES: During the break I asked Chip if there would be an opportunity just to talk generally about the changes as a whole. I ask everybody to get these statistics that were on our tables this morning, small -- go to page four, which is the summary of the JP and small claims courts for the fiscal year ending in '11 and right in the middle is "cases disposed"; and if you see at the top, this is on page four, forcible entry and detainer and that's evictions, and down at the bottom that shows during that fiscal year 214,000 eviction cases were handled or disposed; and then in the next column, cases appealed, 4,000, that's two percent. Two percent out of an enormous number were appealed, and there could be a number of reasons for that, but it just makes me remember what we have said in here so often, if it ain't broke, don't fix it, and be careful about unintended consequences, and that's just on my mind as we look at some significant changes in the whole eviction process, and it does concern me.

I know that the task force was operating under a time deadline, but when you get major changes and there's no explanation of why they changed things, it just raises a flag for me, and so I -- the question of what you do, one thing we might want to do is go ahead with the small claims rules but leave the eviction rules for further discussion. In other words, I don't think there is any hurry on those. But I just -- it looks to me like a system that is not broken. I can't say, of course, that justice is always done, but when only two percent are appealed when you've got the right to appeal de novo, that's an enormously important statistic.

CHAIRMAN BABCOCK: Great. Okay. Thanks, Judge Peeples. Thoughtful, as always. You guys want to tell us what you're trying to do?

MR. TUCKER: Sure. Yeah, and I would agree with your overall comment, and we've talked to Mr. Allen and Mr. Fritsche about this also. We didn't think the eviction process was broken, but we do think that there are certain things that go on that are not the -- not optimal, and when we're given the ability and the opportunity to rewrite rules that are currently not optimal, why not try to improve them? So we can talk about some of the things we tried to do.

The first rule is 738 in the eviction rules,

computation of time. Right now there's a conflict or a disparity in counting days in eviction suits. In most time periods in eviction suits it's calendar days. In a few time periods, including the time to request a jury, it's days excluding Saturday, Sundays, and holidays; and when we're talking about trying to make things simple for everyone involved, we decided to make it just calendar days, straight across the board. That's the general plain meaning of the word "days," is days.

We also tried to address a current problem with the mailbox rule as it applies to eviction cases. Okay. As I'm sure you're aware, the mailbox rule says if I file -- if I put something in the mail and it's received by the court within 10 days it's considered timely filed on the day I put it in the mail. Okay. Well, we have a very narrow time frame on these, and so a situation that has occurred frequently, a defendant has five days to appeal their eviction judgment. Okay. So if on the fifth day I put my appeal in the mail, I've timely filed it. The law also says on the sixth day after judgment the plaintiff is now entitled upon request to get a writ of possession, so I have mailed it on day five. On day six the plaintiff comes in and asks for a writ of possession. They are correctly granted that writ of possession.

Days later the court receives the appeal,

which was timely filed, and so now the question is how do we do this? Are we supposed to unring the bell and withdraw the writ of possession that was timely issued, or what probably I would say happens right now is it's treated kind of like the situation where they don't pay the rent into the registry, so the appeal goes up and is then contested while they're not in possession of the property, but we thought we could make that better and so what we said is, look, if you mail it, it's got to be in the court's hands by the day it's due.

Now, since we're eliminating or we're constraining the rights of the appellee, we extended it in another area and said what you can also do is you can fax in your appeal document; and if the court receives it by 5:00 o'clock on the day that it's due, that's timely filed, and then you also need to mail it. So if I don't have my appeal prepared until 4:57 on the last day, I can fax it to the court. The court is in receipt of it so they don't issue the writ of possession, and then I also mail it to the court. So we tried to fix this problem where the mailbox rule doesn't work with the time frame of eviction suits while doing no damage to the appellee's time frame. Especially, for example, in commercial evictions, I could be in El Paso, the case is in Austin, it's very hard for me to get it to Austin in the time

frame. This allows me to fax it over. The court will pause the proceedings and then can wait for the mailing. So that was our logic behind modifying the computation of time.

CHAIRMAN BABCOCK: Okay. Discussion about Rule 738? Yeah. Judge Wallace.

HONORABLE R. H. WALLACE: What -- okay. My question is very basic, and that is the Legislature abolished Chapter 28, so they say now we need to promulgate rules as to what a small claims is and how we're going to handle it. Where did this provision about promulgating rules for evictions come from? Does anybody know why they threw that in there? Chapter 28 had nothing to do with evictions, but out of the blue we're told to promulgate rules for evictions that we already have. Does any -- is there any legislative history?

HONORABLE RUSS CASEY: May I address that?

CHAIRMAN BABCOCK: Yeah, absolutely.

HONORABLE R. H. WALLACE: Surmise, guess.

HONORABLE RUSS CASEY: Okay. When we merged the two courts together we were merging two sets of rules together, and since evictions are such a high percentage of justice court cases we felt that it would be a good time to review those and how they are affected by the change of the merger of the courts. You had mentioned

earlier that the eviction process was not broken. I would suggest that it has been broken for many years and has been held together with duct tape and baling wire.

Under the current eviction process, it is under justice court, which is under the Rules of Civil Procedure. It is under the Rules of Evidence. I would suggest that less than one percent of all of my thousands of eviction cases have ever actually met the Rules of Civil Procedure and the Rules of Evidence. These are done very informally, very, very fast. It is meant to ensure a quick, speedy trial, get the facts out in front of everybody, decide what's going on, and move forward. Judge Ridgway handles 7,000 a year, 7,000 cases a year. I would suggest it would be impossible to do nothing in your court other than those 7,000 a year if every case was handled under the Rules of Civil Procedure and the Rules of Evidence. It is a monumental task that we have. We have for years, due to necessity being the mother of invention, kind of did it our own way. We have relaxed the rules. We have tried to make things work.

In here we had this opportunity. We have the merger of the courts. We are trying to make the rules match reality, and this comes from Judge Ridgway, myself. I handle a few thousand. Judge Cercone, who was on the committee, who I don't think anyone in the state handles

more eviction cases than Judge Cercone does. It was not in any way our intention to lengthen the process, to make it unfair or to make it, you know, against the landlords, make it harder for them to get an eviction process. It was meant to make it easier, faster, more efficient, and to fix some of the things that we felt the rules were not reflecting the reality.

CHAIRMAN BABCOCK: Okay. Other comments about this? Professor Dorsaneo.

PROFESSOR DORSANEO: Well, this -- you know, I looked at this calendar days, I'm looking at that and saying, now, what the -- what does that mean? I mean, a day is a day, and to say it's a calendar day, that confuses me. Now I heard what you said and I'm not as confused as I was before, but I think it's inherently confusing to call -- to use "a calendar day." Would you think people say it's just a business day or --

HONORABLE RUSS CASEY: If you look at Rule 4 when you have periods of five days or under, it does not count weekends or holidays as being that five days.

PROFESSOR DORSANEO: Okay. All right.

HONORABLE RUSS CASEY: Except if you look at the bottom of Rule 4 it has some exceptions out for eviction cases where it is actually five days, but that's --

MR. TUCKER: Except for the jury request.

HONORABLE RUSS CASEY: But that's on the post-trial area where post-trial in an eviction five days is five days; pretrial, five days does not include holidays and --

PROFESSOR DORSANEO: I guess my question is should we fix Rule 4?

MS. GREER: Yes.

HONORABLE RUSS CASEY: No, we put our own rule here.

PROFESSOR DORSANEO: I know, but would it be better --

MR. TUCKER: As a policy --

PROFESSOR DORSANEO: Is that a problem wherever it's going to be a problem?

HONORABLE RUSS CASEY: The only time Rule 4 really carved that out was for eviction cases, and so we were fixing it here.

PROFESSOR DORSANEO: I see.

HONORABLE RUSS CASEY: Instead of trying to fix Rule 4 we wanted to put it right here where evictions are. We put the rule regarding evictions and computation of time.

PROFESSOR DORSANEO: Now I'm thinking it's likely to be a problem with Rule 4 as well. Okay. So and

then the other thing that I had is you solved this problem of getting a -- it was a writ of -- bond for possession.

MR. TUCKER: Writ of possession.

PROFESSOR DORSANEO: Writ of possession, but to say "a document may be filed by mail," and you're talking about an appeal bond, right, is what you're thinking about?

MR. TUCKER: Yeah, or pauper's affidavit. Yeah.

PROFESSOR DORSANEO: "But must be received by the court on or before the due date." And that -- that's a big change unless somebody knows the reason for it, and the reason that you gave is a good explanation, is that otherwise it didn't does work --

MR. TUCKER: Right.

PROFESSOR DORSANEO: -- when you have a writ of possession that's sought and available on the sixth day.

MR. TUCKER: Right.

PROFESSOR DORSANEO: Okay. When I read it I don't know why the standard rule is not being used. Okay?

MR. TUCKER: Okay.

PROFESSOR DORSANEO: And it's because of this writ of possession being available on the sixth day. I'm not exactly sure how to word it, but to say it must be

received on or before the due date, I'm kind of like "otherwise," or, you know, some sort of a clue as to what it is that the problem is.

MR. TUCKER: Right, and --

PROFESSOR DORSANEO: And maybe if it's not received on the date that it's due, on the date that it's mailed, that's okay, if this problem isn't a problem. Like if there isn't any writ of possession sought. Huh? I mean, this is like -- does this mean that the appeal bond if it's not -- is late, and I'd have to go look under your appellate rules for the JP courts to see what happens if it's late. Is it a nullity, or do you get more time, or what happens? Okay. But this is a potentially bigger change, that "must be received on or before the due date," and over the many years that I have been on this committee we worried about whether you need to mail it on the -- you know, on the day that it's due, on the day before the day that it's due, and when does it need to be received and what happens if it's late, and it's a big bunch of issues.

HONORABLE RUSS CASEY: Yes. I don't know if I can --

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I was going to ask a question not about that rule, about something else. I'll wait.

CHAIRMAN BABCOCK: Richard Orsinger. Richard, the younger.

MR. ORSINGER: Yes, I was wondering also in the JP rules when you carry Rule 4 over into these rules you didn't carry forward that concept of the last day of the period is included for counting but the first day is not. You have excluded the first day here. It's the day of the act of default shall not be included for any purpose. In the general civil rules we say the last day is included, but if it's a Saturday, Sunday, or legal holiday it rolls over, but y'all don't say that the last day is included in that count, and that's been -- that's been an issue for me for discovery deadlines, summary judgment responses, all kinds of stuff, about how you count if you're going to -- if you file something on Thursday can you have it heard Monday, and did you do that intentionally or accidentally to remove the concept of telling people that the last day is part of the period you count, which to me is counter-intuitive? Do you understand what I just said?

MR. TUCKER: Yes, sir. Yeah. And I'm looking at our -- our 503 is our basic computation of time, and we don't have that language in there either, and it wasn't -- and I guess for us dealing with it all the time I guess it's not counter-intuitive, but I take your

point, and our intention was the last day would count.

MR. ORSINGER: I would suggest I've struggled with this and my paralegals have struggled with this about exactly what constitutes timely, filing seven days before and all of that, and to me it's helpful if you tell everybody that you don't count the zeroth day, which we mistakenly call the first day, and you do count the last day, and you make that clear to everybody, I think you're going to help people.

MR. TUCKER: Sure.

MR. ORSINGER: Because otherwise they will think that the final day is the day before the final day, and I may be saying what Bill said or I may not be.

PROFESSOR DORSANEO: No, that's a related thing, but I think it's good.

MR. ORSINGER: Anyway, I think it would be good to make that clear to the laypeople.

MR. TUCKER: And that was the committee's intent, so clarifying that to clarify an intent, sure, makes sense.

CHAIRMAN BABCOCK: Marcy.

MS. GREER: I just wondered if you had thought about other ways of getting notice to the court maybe that would preserve the mailbox rule, because the thing I worry about with fax machines, how available are

they. You go to Kinko's, it's a dollar per page, and these are not people with a lot of money and a lot resources. Would it be possible to do -- preserve the mailbox rule, which is just the cost of a stamp, and have some way of calling the court just advising them you can notify the court that this is coming and you put it in the mail or something, which would serve both purposes.

MR. TUCKER: We talked about -- we talked about issues like that and issues of, you know, are the tenants going to be able to afford that and things like that. One thing to keep in mind with these cases, these cases have exclusive jurisdiction in the precinct where the property is located, so the tenant is not going to live far from the court. We don't think the average tenant is going to take advantage of the fax filing that frequently. Generally what they're going to do is come in and give the documents to the court.

MS. GREER: If they have a car, if they -- you know.

HONORABLE RUSS CASEY: I think that the Realtors would have a big problem with that. Let me tell you why. You do not have an appeal until you have an appeal bond, whether that is a pauper's affidavit or an actual bond appeal. In these cases that is all that is required to perfect your appeal, which we'll get into

later on, but it is perfected once that bond is received. People are always trying to get more days. "I need more days." Five days is a very short time. It is -- you know, it's fast. So if all I have to do is call up and say, "Hey, I'm sending an appeal in" --

MR. TUCKER: Check's in the mail.

HONORABLE RUSS CASEY: "Check's in the mail." Is that an appeal? Is that -- and then why have I not allowed on the sixth day a writ when no appeal bond has been -- has been done. So what we wanted to do was we wanted to get a copy of that appeal bond, which could be done by fax, and then wait for the original to come in, but I need a bond. I don't need just someone telling me that it's in the mail. I need to see.

MS. GREER: Of course, the bond company can send it. It's more the pauper's affidavits that we --

HONORABLE RUSS CASEY: If it's a pauper's affidavit, I mean, I want that sheet to tell me that it's coming. I don't want someone just communicating that it's on the way.

MS. GREER: Did you consider an e-mail alternative like for pauper's affidavit?

HONORABLE RUSS CASEY: That's kind of problematic because the court itself does not have an e-mail address.

MS. GREER: Okay.

HONORABLE RUSS CASEY: My seven clerks each have their own e-mail address, I have an e-mail address, but the court itself does not, and that kind of requires us to check our e-mail.

MS. GREER: Or an online form. I'm just trying to think of alternatives, because --

MR. TUCKER: Sure. And totally understand, and we discussed this pretty in-depth because of these exact concerns, and I guess my only -- the only thing I can offer is if the tenant does what you suggest and they mail it on the day, what's going to happen is they're already going to be removed from the property, so this is just giving them an additional avenue to prevent that. Rather than increasing the chances that it's going to happen, it's giving them another avenue to prevent it, and we recognize that sometimes it's going to be difficult to take advantage of that avenue, but again, they do have the opportunity to come into the court, which must be in the precinct where they reside. So, yeah, but we struggled with that exact issue.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Presently Rule 4 says that we count Saturdays and Sundays and it talks about the -- for the Rule 749(a), 749(b), 749(c). If these rules are

adopted is that going to go away, or are you just going to change the numbers?

HONORABLE RUSS CASEY: We -- okay. We left a lot of the eviction rule numbers by number, but we modified some, but I think that if these rules are adopted it would require this committee to maybe remove that provision out of Rule 4 and say that the rule for the eviction cases here would apply in those cases.

MR. GILSTRAP: So contemplating some change in the language of Rule 4.

HONORABLE RUSS CASEY: Yeah.

CHAIRMAN BABCOCK: Okay, Carl.

MR. HAMILTON: If the document is faxed to you why do you also require that it be mailed?

HONORABLE RUSS CASEY: Have an original.

MR. HAMILTON: Just to have the original?

MR. TUCKER: Yeah, and that was just in discussing that with various -- with judges, they felt more comfortable getting the original. There could be an issue with legibility of the fax, things like that. They felt more comfortable that the original was also mailed to them.

MR. HAMILTON: I don't think we require that in district courts at all. When we accept filings by fax, I don't think we follow it up with an actual mail, do we?

MR. ORSINGER: Huh-uh.

MR. HAMILTON: No?

MS. SECCO: No.

CHAIRMAN BABCOCK: Okay. Any more comments about 738? Yeah. Justice Gray.

HONORABLE TOM GRAY: It's kind of a gnat, but when you say, "The time period is extended to the court's next business day," I can see an issue if -- would be -- well, I just would prefer that that say, "The due date is extended to the court's next business day." That way it's -- follows the pattern of referencing the due date throughout the rules as opposed to a time period.

MR. TUCKER: That would make sense, and just to -- we didn't really address that part of why we did that. We have courts, especially in rural areas, that are not open full business hours, and so we tried to eliminate kind of the due process problem of I bring in my appeal at 4:30 on the fifth day, court's closed, so too bad, you're not timely, so that's why we included that language there.

HONORABLE TOM GRAY: I wasn't going to make you have to confess that. I knew that.

CHAIRMAN BABCOCK: All right. Anymore about 738? All right. Let's go to 739, Russ. Or, Bronson, you want to talk about it?

MR. TUCKER: Sure. Some of the modification

that we made here, some of this is already the same. We included a requirement that they put the total amount rent sought by the plaintiff. I've talked with George Allen and David Fritsche from TAA about that. We would be amenable to changing that to say "the amount of rent currently due" or some language like that. We weren't trying to pigeonhole them into what they can be awarded at the hearing, but what sometimes occurs is they don't -- they file the eviction suit, it doesn't mention anything about rent, how much rent is due. The tenant goes, "Well, yeah, I didn't pay. I'm just going to go ahead and not show up at court. I'm just going to start getting out." Well, then the landlord shows up at court and says, "Oh, yeah, he owes me $4,000 in rent." The tenant would have shown up and disputed that allegation because they don't feel like it's true, so we wanted to -- this just gives the tenant a little bit more insight into what will actually be at issue in the trial.

The next paragraph just lays out what the law really currently is. It's jurisdictional. It must be filed in the precinct where the property is located. We have a huge issue with our courts with people coming in to file it in the wrong precinct and what should the court do, should the court say, "Oh, you're filing it wrong." Many people would feel that's giving the plaintiff legal

advice to say, "Don't file your complaint with our court, file it with some other court." So to kind of remove that problem, it's laid out for the plaintiff right here. If you file it here, we're going to dismiss it. You're going to lose your money, so you better be sure you're filing it properly before you file it.

The third paragraph, there was a letter opposing that, and what currently happens in many cases, if John and Mary Smith are tenants, frequently the case would be filed "John Smith and all occupants," and only John gets served. Mary never gets served. Mary is never listed in the lawsuit and then they will issue a writ of possession against John Smith and all occupants. That judgment and that writ is not valid against Mary Smith, because Mary Smith is not an occupant. Mary Smith is a tenant, and so that just addresses this issue of if you want a writ of possession against somebody, they're going to have to be named, and they're going to have to be served, and that doesn't -- it doesn't necessitate two separate citations, but the citation served at the address would need to name both defendants.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Who pays a service fee, or who does the plaintiff pay the service fee to? Is that a process server?

MR. TUCKER: Currently the rules in eviction suits do not allow service by process server. The citation currently must be served by a constable or sheriff. It does allow a judge to in a specific case name anyone to serve it who is at least 18 and an uninterested party, but process servers are not de facto --

MS. HOBBS: Okay. Can you say that -- like if they -- I don't know, on behalf of the constables who I'm sure have enough lobby that they can tell us if it's a problem, but it seems to me a problem that you're saying that the constable who has not tried to serve has to give them their money back. It seems like that's beyond your authority as a --

MR. TUCKER: And, well, you're talking about on paragraph (2) where it says they will not be entitled to refund of the filing fee but will be refunded service fees?

MS. HOBBS: Yeah.

MR. TUCKER: Well, and keep in mind that that just says if the case is dismissed before service is attempted.

MS. HOBBS: I know, but I'm saying does the person pay the service fee to the JP court?

MR. TUCKER: Yeah. They pay it all --

MS. HOBBS: Oh, okay.

MR. TUCKER: They pay it all to the court and then the court gives the filing fee to the constable. Yeah.

HONORABLE RUSS CASEY: And let me address that last paragraph again, if I can, because this is kind of a big deal. There was a lot of confusion on this. We're not asking -- and maybe our language is wrong, but we do not want separate service for every single defendant who was a tenant on the lease. They still only have to file against one, but we want everyone named on that who is going to be subject to the judgment of the court. So the thing of this is going to cost us more money was not intended. It was intended that if they're going to be subject to the enforcement of the court that they actually have notice that they're being sued.

MR. TUCKER: My rights are being terminated, I'm entitled to notice and service.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I'm confused by the last comments. Bill and Tom are not married. They're roommates, and both sign the lease. Service on Bill binds Tom under current law, true or false?

MR. TUCKER: False.

HONORABLE RUSS CASEY: False.

MR. MUNZINGER: So Tom now has the right to

be served with his own citation.

MR. TUCKER: Correct.

MR. MUNZINGER: And the same would be true if it's husband and wife.

HONORABLE RUSS CASEY: True.

MR. TUCKER: Yes.

MR. MUNZINGER: And these rules do not change that?

MR. TUCKER: Right. They just make it explicit.

MR. MUNZINGER: Now would it be possible, having listened to the complaints of the landlord group that this causes delay and what have you, would it be possible to have in the rule something to the effect that unless the lease otherwise requires or if the lease allows service on one or the other you could have that? In other words, I'm husband and wife or I'm a roommate. I agree in this lease that if I don't pay the rent, service on Tom -- and I'm Bill, service on Tom is service on me?

HONORABLE RUSS CASEY: I think that would be very good, and would -- like I said, I think our language here was bad, but that's exactly what we were trying to accomplish.

MR. MUNZINGER: But the point right now is you have to serve both parties in order to get a writ of

eviction.

HONORABLE RUSS CASEY: Exactly. And right now, generally speaking, they are only serving one and hoping that the other guy moves.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, in what other circumstance do we allow somebody on a contract of adhesion to have to agree that service on somebody else is good enough for me? I mean --

MR. TUCKER: That would be my concern also, because that would then become the de facto lease for everybody. You're not going to get to sign a lease unless you just agree that your rights are going to be terminated by us serving somebody else. Yeah.

HONORABLE STEPHEN YELENOSKY: And, Richard, as a protector of the individual rights I would think you would oppose that.

MR. MUNZINGER: I don't have one way or the other. I'm concerned about it, but at the same time you can focus on rights and ignore duties. People who live in an apartment have an obligation to pay the landlord the rent. After all, he's got to pay the promissory note and pay for the building. He's got to insure it. He's got to pay the --

HONORABLE STEPHEN YELENOSKY: Yeah, but

you're confusing an obligation with a person's right to be noticed as everyone else is under the law that they're being sued and you want something from them, and in this particular case you want their house.

HONORABLE ANA ESTEVEZ: It's your house.

MR. MUNZINGER: It is a problem, and I don't have a solution to the problem. I do see a problem where a landlord has two people and he can't find one of them, and so therefore, he can't get paid, and his apartment is being used for free month after month after month or week after week, and he has no solution because he can't find John. I don't know that that's fair.

MR. TUCKER: And if I could just -- the way that the alternative service is in evictions and remains to be is if the constable can't serve somebody within two attempts they set up a process, let's -- automatic service is either slipping it under the front door or through the mail chute and mailing it to the premises. That then becomes prima facie service, so there is not a situation where I can just go into hiding in a cave and I never got served a citation so you can never evict me, but the rule protects against that.

MR. MUNZINGER: Is that current law?

MR. TUCKER: Yes, sir.

HONORABLE RUSS CASEY: Yes.

HONORABLE STEPHEN YELENOSKY: We have substitute service, and that's what we use. People evade service all the time in all types of cases, and they have to go to court and get a order for substitute service. Why shouldn't they here?

MR. TUCKER: Right.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: The last sentence, the last paragraph, is extremely difficult. "No judgment or writ of possession shall be issued" -- "shall issue or be executed against a tenant obligated under lease and residing at the premises who is not named in the petition and not served with citation, except that a writ may be executed against occupants not obligated under a lease but claiming as tenants."

MR. TUCKER: Yeah. I would --

MR. GILSTRAP: I mean, you know --

MR. TUCKER: Looking at that as you read it, I would prefer just to say period after "rules" and then just strike "except that" and just "a writ may be executed against occupants."

MR. GILSTRAP: Something needs to be done because I can't even diagram the sentence. Also, it seems to contemplate people who are residents, and we've got commercial -- you know, if I'm a tenant, I don't have to

occupy the premises. I can lease it without occupying it. I may use it as my place of business, so maybe there needs to be some modification of language there. That sentence needs to be reworked.

HONORABLE RUSS CASEY: The purpose behind that was like let's say that the lease actually has mom on the lease, but son is living there, is that we can evict son, is sort of, you know, what we --

MR. TUCKER: That's pretty well how the contract works. Mom is a cosigner, they'll list her as a tenant even though she's in Houston and the property is in Austin. They'll frequently put her on the contract as a tenant, and we also wanted to make sure that landlords were protected against -- we are not protecting a situation where I rent a house from you and then I let my brother come in here. You have no idea he's even there. We're not going to let my brother say, "Oh, no, I didn't get personally served." No, you were claiming under me, I was the tenant, as long as I was served it's good. So people claiming under me are done just by me. People who claim under the landlord all need to be served and noticed.

HONORABLE RUSS CASEY: This is another attempt for us to try to fix something that we felt was broke.

CHAIRMAN BABCOCK: Gene, then Carl.

MR. HARDIN: Don't worry, they're not teaching diagramming sentences anymore.

MR. GILSTRAP: Oh, that helps. That helps a lot.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: Yeah, I had a question on why the suit is dismissed rather than transferred if it's in the wrong precinct.

MR. TUCKER: Because the way the law is, is it's jurisdictional, and so our thought is if it's -- if the court has no jurisdiction, the law is the only power you have is to dismiss it for lack of jurisdiction. You don't have jurisdiction over a lawsuit, you don't have jurisdiction to transfer it to another court.

MR. STORIE: I thought there was a provision in the Civil Practice and Remedies Code that addressed that.

HONORABLE ANA ESTEVEZ: They give you an extension.

MR. STORIE: Maybe that's only for limitations.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: But if you could transfer, would that be a better practice?

MR. TUCKER: Yeah. Yeah. I think that probably would help. A possible consequence of that would be landlords might get a lot more sloppy where they file it, and it would need to be clarified whether it then became a venue issue that a defendant would have to raise or an automatic transfer by the court. Yes, sir.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Are most cases filed where people come in and file them, or do they mail them in?

HONORABLE RUSS CASEY: I would say that over 90 percent -- in fact, probably even over 95 percent, they come in and file them.

MR. HAMILTON: Well, if they do that, and is it a hard thing to figure out if they're in the right court or not?

HONORABLE RUSS CASEY: No.

MR. HAMILTON: Why not just tell them they're in the wrong court and let them file it somewhere else instead of making them go through the process and then you dismiss it?

HONORABLE RUSS CASEY: We normally do, but, well, like he mentioned earlier, a lot of people have felt that that is us advising them in regards to their case.

MR. HAMILTON: But you're going to advise them later and tell them.

HONORABLE RUSS CASEY: But there's a difference between me doing it as a court of law and my clerk doing it.

MR. TUCKER: Basically a judge ruling on a case that's not pending before their court.

MR. ORSINGER: How could that be error?

MR. TUCKER: Ask the Commission on Judicial Conduct about that one.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: I was just wondering, why does the petition have to be sworn? Is that a statutory requirement of some sort?

HONORABLE RUSS CASEY: I believe it is.

MR. TUCKER: And it's the current requirement, and one of the -- one of the ways that this comes up to help with the expediency of the process is, as you'll see later on, if the defendant doesn't show up at trial the court can automatically take the plaintiff's filing as true, and so there's not a need then for the plaintiff to put on any more evidence in court, so it speeds up the process, and that is the current requirement under the Property Code rules.

HONORABLE RUSS CASEY: And that's 24.0051 of the Property Code, I believe.

MR. HUGHES: Okay.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: This 739 needs the prefatory "in addition to the requirements of Rule 509," since these are additional.

MR. TUCKER: Yeah, no -- yes, I agree.

CHAIRMAN BABCOCK: Okay. Yeah, Marcy.

MS. GREER: Is there a difference between renter and tenant?

HONORABLE RUSS CASEY: Yes.

MS. GREER: Should that be defined?

MR. TUCKER: Yeah, that came up at some point after we submitted it and then before this that had been mentioned. Yeah, that should be made consistent.

MS. GREER: What is the difference?

MR. TUCKER: Well, I think tenant -- tenant is the legal term, so that would be the preferable term to use.

HONORABLE RUSS CASEY: And *Bird vs. Fielding* goes over that. I'll let you read that one.

MS. GREER: Okay.

MR. TUCKER: Well, that's different. That's lodger.

HONORABLE RUSS CASEY: Yeah.

MR. TUCKER: She's saying because we use the term "renter" here. I agree "renter" should be replaced

with "tenant."

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: I have a process question. We've had lots of questions and suggestions and a lot of, "Yeah, that's a good idea," "Yeah, we can consider that" or "We can work on that." What's the next step? Is the task force going to meet again? Is the Court just going to take the comments? Are we going to meet again? Can we get some sense of where this is going?

CHAIRMAN BABCOCK: We're going to have another meeting with regard to these rules in August, and that will be the final meeting with respect to these rules, and the Court will take the record that has been -- that has been created and work on it.

HONORABLE HARVEY BROWN: Will the task force meet in between and try to work through some of the issues that we've come up with today, or is the task force basically finished and the Court is going to take that product and take these comments and work on them?

HONORABLE NATHAN HECHT: We're probably going to do some work in the interim to address some of these issues, and come back with some revisions in August for the -- for that meeting.

HONORABLE HARVEY BROWN: Because it sounds like you're going to have more work, including some of

these groups that felt like they didn't know of every meeting, might be helpful -- and a lot of times I'm hearing, "Yeah, that was a good idea" or "That was in a letter and we need to do that."

HONORABLE NATHAN HECHT: You've been a member a long time, and so we'll take the comment -- the Court will take the comments that it's got so far and probably visit with the task force and look at some of these changes and talk about them further next time. Then after the Court gets all of the record then we'll come up with a draft, which we might come back to the committee on. We have in the past, or we might think we're far enough long to publish it for comment.

HONORABLE HARVEY BROWN: Thank you.

CHAIRMAN BABCOCK: While we're talking about the record, the record should reflect that Marisa is slumped down in her chair.

HONORABLE NATHAN HECHT: I'm using the royal "we."

CHAIRMAN BABCOCK: Anything else on 739 on the rule on the petition? Anybody else got anything on it?

Okay. Well, this is probably a good place to stop, so thanks, everybody, for being here, and we will see you in August. The 24th and the 25th. It will be a

two-day meeting for sure, and we are in recess. Thank you.

(Adjourned at 11:38 a.m.)

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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 23rd 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 $ 826.00.

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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