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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

DECEMBER 7, 2012

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 7th day of December, 2012, between the hours of 9:05 a.m. and 3:10 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

12-20 Ancillary Proceedings Task Force Draft
(Only pages for 12-7-12 meeting)

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CHAIRMAN BABCOCK: All right. Welcome, everybody, to our last meeting of the year. It should be an interesting one. As usual we'll start with remarks from Justice Hecht.

HONORABLE NATHAN HECHT: As far as rules developments, we have given final approval to the changes in the Rules of Appellate Procedure regarding word limits, and about the same time we issued for comment rules for dismissal and expedited actions that were called for by House Bill 274, so those are out for comment for a couple of months, and they're expected to be effective March the 1st. Then we also put out the forms for uniform forms for the divorce with no property and no children, and we've got a comment period on those, although they're already being put in use, and but the Court will still respond to comments. There have already been extensive comments on those rules, so that's what we have on the rules being promulgated.

We've got -- we're working on the rules for small claims court, which this committee has finished, and we'll have those completed in -- well before the May 1st deadline set by the Legislature in the last session. So I think that will complete then all of the rules assignments that the Legislature gave during the last session.

We're pleased to have new Justice Jeff Boyd, who you all know very well.

(Applause)

HONORABLE NATHAN HECHT: Once again, membership on this committee has paid off, so we have already pressed him into service. He heard arguments this week, sworn in Monday and sat with us on Tuesday, so he's already hard at it, and we're glad to -- glad to have him, and we look forward to Justice Devine joining the Court on January the 1st.

I think that's it, except a session or so ago I mentioned that Buddy Low had gotten the distinguished alumni award at the University of Texas.

HONORABLE STEPHEN YELENOSKY: Another one?

HONORABLE NATHAN HECHT: No, no, it's the same -- he keeps trying to make it more award, but it's the same one, but at the same ceremony Nina Cortell got the distinguished award as well.

(Applause)

HONORABLE NATHAN HECHT: And I think that's all I have, Chip.

CHAIRMAN BABCOCK: Okay. And the reason you didn't mention her at the last meeting was because she wasn't here and you wanted her to be here to get the applause in person. Well, yes, Justice Peeples.

HONORABLE DAVID PEEPLES: There have been elections since we last met, and some of the people in this room won those elections, re-elections. They ought to be recognized. Justice Hecht and Bland, Lewis. Who else got re-elected? That's a big thing.

CHAIRMAN BABCOCK: It is a big thing.

HONORABLE TOM GRAY: Yes, it is.

HONORABLE DAVID PEEPLES: You, too?

CHAIRMAN BABCOCK: And by millions of votes in the case of the person to my left.

HONORABLE DAVID PEEPLES: I think that we ought to congratulate them with applause.

MR. GALLAGHER: Overwhelmingly.

(Applause)

HONORABLE NATHAN HECHT: Let me say I'm grateful for Chief Justice Jefferson joining us this morning to hear and participate in our discussions, and Jennifer Cafferty, who is the -- where is Jennifer -- who is the Court's general counsel, is also here. I think some of you do not know her, so I'm pleased that they've joined us this morning.

CHAIRMAN BABCOCK: Great. Well, the first agenda item today is to try to talk about what things we could recommend to the Court to improve the civil justice system. We -- as you may recall, we had some speakers

from Denver from one of the groups that think about these things, and we basically booed her off the stage, a former chief justice of the Colorado Supreme Court. So the people who are going to be speaking today, be forewarned that this is a tough crowd, but we -- the civil justice system, which I think everybody on this committee believes in and wants to support, is under some pressure from competitors. We know about arbitration, and arbitrations have been criticized some recently, and for those of you who haven't read it, you should read Chief Justice Jefferson's concurring opinion in *NAFTA Traders vs. Quinn*, a short but eloquent comparison between the civil justice system and the arbitration scheme, pointing out both the good about the civil justice system and some of the -- some of the shortcomings, which drives people away from us into arbitration.

I had discussions in the past few weeks in advance of this meeting and including one with Jack Balagia, who is the general counsel of Exxon Mobil, and he told me about some things that I had no idea were going on and maybe you-all do, but I thought I would share them with you. One thing is if you buy something on Ebay, you agree to a dispute resolution system in connection with that purchase. You'll never get into court with respect to anything that -- any transaction you conduct on Ebay.

That's just one thing.

HONORABLE STEPHEN YELENOSKY: And it's held in China.

PROFESSOR CARLSON: And it's held in China.

CHAIRMAN BABCOCK: There's a group in Boston, and listen to this, it's called Fairer Outcomes, and "Fairer Outcomes provides parties involved in disputes or difficult negotiations with access to newly developed proprietary systems that allow fair and equitable outcomes to be achieved with remarkable efficiency. Each of these systems is grounded in mathematical theories of fair division and of gains." They have a fair buy-sell system, they have a fair division for division of property system, they have fair proposals, and they have one on fair reputations, and there's lengthy discussion of how you can opt out of what we do into this world of mathematical certainty, I guess. So there's competition from all sides, and my opinion -- Justice Gray may dissent on some of them, I know he never dissents; but in my opinion, we've done -- or the Court's done great work; and we've had some input into it in the past few years improving our system, but we can always get better; and so today, this morning and maybe early afternoon is dedicated to try to go discuss things that we might be able to suggest that could make our system better; and I've invited, with

Justice Hecht's concurrence, a number of people to speak to us, share their views from different perspectives. Some speakers will have informational -- just informational things to share, what's going to happen in the Legislature, et cetera, and then other people will have particular perspectives.

I'm delighted that Mike Gallagher, whom all of you know is a prominent lawyer from Houston who is mostly on the plaintiff's side of the docket, has been able to be with us. He agreed to come and then I got an e-mail from his assistant saying he couldn't be here because he's got a hearing in St. Louis this afternoon at 2:00 o'clock, and I ran into him in the bar last night at the Four Seasons, and I said, "Wait a minute, you're supposed to be in St. Louis," and he said, "Well, not until 2:00." I said, "Well then, you know, you can come speak to us in the morning," and he said, "Well, if I get on first I guess I could," and we all know he'll get to St. Louis on time and his plane, so without further ado, Mike, thank you so much for coming, and share your thoughts with us about our topic. Or anything else you want to talk about.

MR. GALLAGHER: Well, the topic is broad, but its implications are really strong. What is going to happen in the next session of the Legislature and what can

this committee and its constituency and the people who are influenced by this committee do to try to bring about a circumstance in which we improve the administration of justice and at the same time improve our -- or bring more fairness to the system. I'm looking down at the other end of the table and see Judge Tryon Lewis, who was a district judge, served with distinction in West Texas and then became a member of the House and literally wrecked the responsible third party system, from my perception, but brought it into great shape from his perception.

HONORABLE TRYON LEWIS: It was a good fight.

MR. GALLAGHER: Since he had the vote he prevailed, but he brings to the table an understanding of the law practice and an understanding of the issues that affect the trial bar that, quite frankly, very few members of the Legislature have, other than you, Judge Lewis, Bobby Duncan, and a few other people. Most of the issues that are brought before these committees, as -- I think, Jeff, you've got some experience in it the last session, or Justice Jeff now -- are being dealt with by people who don't practice the way we do, and they don't understand the realities of the practice and what lawyers have to do.

I don't think there's anyone here who wants a system that provides a benefit to one side or the other. What we all want is a place where we can try our case

fairly, and I don't say that altruistically. That's not bull on my part. That's very serious. I don't want to be involved in a system ever where I can take advantage of someone else because of -- because of the law. I don't want to take advantage of a system because of the judge. I don't want to take advantage of the system because I've been able to do something that gives me a leg up over everybody else, and if either that is available or if the perception of that is that it's available then you have a system that needs to be addressed, and I'm going to say some things today that probably aren't going to be real acceptable to a lot of people here.

Most of my practice is now out of the state of Texas. The Governor, of whom I'm a supporter, will come in shortly, and maybe he'll make his speech -- God, I wish I could be here for it -- where he talks about exporting trial lawyers is one of our leading exports. That's not necessarily a good thing. Really. And he and I are -- we are good friends. We have different perceptions, but there is a perception today in the community that the case that I currently have pending in Dallas, which is a case of good liability, and I'm going to -- I think we are going to win that case. If everything goes the way it should, we're going to win that case at the trial level. The defense lawyers tell me --

and this is the perception that exists out there, and this is what is -- I think causes problems in the system. Perception is if you win it in the trial court, you're not going to keep it in the appellate system, period. It's just not going to happen. And there's been a lot of statistical work that demonstrates there is some merit for that position.

I told you this wouldn't be popular, but it's going to be true. There is that feeling, and that feeling is all pervasive throughout the state of Texas among lawyers on my side of the docket and among lawyers, Bobby, on your side of the docket, whether you'll admit to it or not. Lawyers on the defense side know, Allison, that they've got a better shot on appeal than we do. That's not good. That is not a good perception of a system of justice to exist in a state where all sides are supposed to have the same shot on appeal, and having said that, you can look at the statistical data. It is there.

There are other issues that affect and effect our civil judicial system at this time, but the most important one is the feeling if you try your case in Texas, while you can get a verdict and you can get a -- you'll get a shot in the trial court, you're not going to get a fair shot on appeal. It's going to be reversed. No evidence, whatever. And until that perception is

eliminated, you don't have a system of which we can all be proud. We have to be proud of the system. We have to be proud of each element, each component of the system, and if any aspect of the system is viewed in a way that may be -- may be real, may be a real view, may not be a real view, but regardless, if that perception exists, it's one, Chip, that needs to be addressed. It's one that needs to be dealt with, and it's one that needs to be eliminated, because that cannot exist.

The -- from a standpoint of what we can do with rules, I've never moved for sanctions in the 40 plus years that I've been a lawyer. I don't believe in sanctions. It's not my job to try to go out and get sanctions. I want my production. I want that to which I'm entitled. I want to provide that to which I'm entitled, and I'm not Alice in Wonderland. I will try to beat your brains out in the courtroom, but I will try to do it within the limits of what is fair and what is just, and right now we are seeing circumstances, particularly with out-of-state defendants, where the discovery system is being greatly abused and discovery in large cases -- I do a lot of pharmaceutical work, and there are some pharmaceutical companies that give you records right away. They give you everything that you're entitled to. Others have a format of you get a disk this week, you get a disk

next week, so one of the things I would like for this committee to address is what do you do with someone who's in the same circumstance I'm in in a very good court where we have a good trial judge in Dallas, Texas; and our discovery was propounded in May; and we're in December; and we're going down for our fifth motion to compel in which there never have been any request for sanctions to just try to get the discovery; and there needs to be more teeth in the discovery rule; and I am requesting sanctions this time, but I see that as a problem.

There is another problem that affects my practice quite a bit, and that is removal. I'm continually being removed to Federal court on the grounds that -- one time it was fraudulent joinder, which always sort of made me a little angry; but now it's improper joinder; and we're being removed on the grounds of improper joinder; and if there is a multidistrict litigation panel that has set up a multidistrict litigation judge somewhere, what happens is your case frequently then gets moved to the MDL judge who has five, six, seven thousand cases and never gets around to moving on your motion to remand; and the context in which it comes up most frequently in my practice is one in which, okay, there's a prescription drug appropriate for some people, not appropriate for others; and I sue the doctor,

I sue the hospital as a provider, because they buy the product for $800 and sell it for $2,800. I sue them also as being in the distributive chain, sue the manufacturer, have a valid claim, an expert against the doctor saying that the pill was not appropriate for this particular patient. That case gets removed. The court to which it is removed is never -- does not act on the removal. Then the tagalong order kicks in and the case goes to Charleston, West Virginia, where now I'm in with, guess what, 45,000 other cases where I don't want to be, because it's -- you know, my life expectancy ain't that long. The case will be back when my grandson will be able to try it.

But these are things that -- and from -- and when they come back -- I just got a case, Judge Fitzwater in Dallas. Justice Hecht, you know him well, I'm sure. He remanded a case of mine back to state court about two weeks ago. Okay. It's back, but there are no real sanctions available to me to deal with a circumstance in which there's been a wrongful removal, and I think there should be, because too many cases are being removed improperly. It's taking up time. It's interfering with judicial efficiency. All your discovery stops as soon as you get removed, and however long you're there, nothing happens.

One other area that is -- I would like for

this committee to address and try to bring to Justice Lewis' position, what I would call maybe some fullness to that position, and what we did during the last session of the Legislature is we permitted people to make responsible third parties after the statute had run, but we took away the right of the plaintiff to join that person, that third party who had been joined for -- as a contribution -- not even as a contribution defendant, just as a responsible third party, to have the percentage of thought mitigated by that which would be assigned to them so that you would reduce the verdict accordingly.

The old law had been, that Senator Duncan had written, that if the person was brought into the case under those circumstances, in that situation, the plaintiff would be given 60 days within which to join that party. Justice -- or Judge Lewis' position was, he said, "Mike, you need a statute of limitations on a -- a potential defendant's liability." Well, that is true to some extent, but we didn't have one anyhow, because if we had tried the case -- say I sue A and B and there are potential defendants C and D out there. They can be brought in within two years of the date they satisfy any judgment or make a settlement with a third party and pursue their contribution claim.

The -- what we tried to do, and Justice

Lewis did have a good idea, and it may have -- it may have -- I would like for this committee to consider this. It may have mitigated my concern somewhat, but right now if Buddy Low has got a potential third party defendant in the case, why bring him in before the statute runs? There's no motivation for him to bring him in before the statute runs at all. In fact, he has every reason to not bring him in until the statute has run and bring him in after the statute has run so that I can no longer join him, and then he can make a deal with that defendant, who has no liability to me to help Buddy defend the case and work against the plaintiff; and it is a defendant or a party who's participating in the trial against whom I have no remedy whatsoever, but they're there, at least in name; and they're there through the provision of witnesses. They may not have a counsel at the table, which they won't, but they will be there to work with Buddy and help him defend the case against me. That is the problem that I have.

Judge Lewis' opinion was that -- he said, okay, if somebody has reason to know of the existence of a responsible third party during the statutory period, before the statute of limitations has run, then in that circumstance their failure to join them within that period constitutes a bar to their being joined thereafter. So

that provides you with some relief, because if there's a defendant out there that you knew of or that you with reasonable diligence would have known of then you can't bring that person into the case as a responsible third party. Those are the issues that affect my practice, and the issue with regard to the appellate perception affects everybody's practice.

Having said these things, and while I'm a critic to some extent of our system, it's only because I care for our system and I'm proud to be a member of our system that I would say these things. I'm proud to be a Texas lawyer, proud to be a Texan, and I think that we have probably the best trial bar and the best trial judges in the United States, and I've tried cases in a lot of places. We just need to develop some rules and parameters that let that, I think, be demonstrated in a more visible manner, is what my concern is. Our judges are considerate, by and large they're nice, by and large they have been -- judges treat Texas lawyers well. I was in trial in another state some years back, and this judge called me up to the bench, and he said, "Mr. Gallagher," he said, "It's been my experience that Mississippi lawyers are much better than Texas lawyers," and being the hypocrite that I am, I stood there a moment, and I said, "You know, your Honor, I've heard the same thing about

Mississippi judges." Any rate, I'll take any questions anybody's got.

CHAIRMAN BABCOCK: Any questions for Mike before he's got to jet out of here, so to speak?

MR. GALLAGHER: Then I'm on my way to St. Louis and hope for justice and not just us.

CHAIRMAN BABCOCK: All right. Thanks so much. All right. That was great. Our next speaker, I don't think the Governor is going to be here, but we've got the next best thing. Michael Schofield is in the Governor's office and is the policy advisor to the Governor on judicial systems, among other things, and, Michael, could you share your thoughts with us, please?

MR. SCHOFIELD: Even my mother doesn't consider me the next best thing to the Governor, but thanks for that. I wasn't actually supposed to speak here today. We had another person designated to do that and then he had the temerity to run across the lawn, put on a robe, and take another job, so I will try to fill in. I was -- it's always interesting to try to follow Mike Gallagher, and for him to come into this audience and say that what he's going to say is unpopular is kind of odd, when I know he's speaking to the choir. Well, I know I'm preaching to the choir, too, but it may not be the choir from my boss' church, so I'll try to keep it to a dull

roar. I'm here mostly to hear what y'all think about what's been implemented and what's coming for the judiciary, both on the civil side and on the -- to the limited extent that the criminal side gets discussed here.

I do want to say a couple of things about what Mike mentioned about the tort reform bill from last session. I see it from a totally opposite perspective than he does. I doubt you're going to very often see a collusion amongst defendants where a defendant who has been time barred is suddenly participating in the trial. I could never get my codefendants to participate with me when they're active defendants, but the one thing that we did see -- from the day we passed the tort reform in 2003 I was worried about the fact that we were permitting people whose limitations had run to be dragged back into a case simply because somebody third-partied them in, and I actually gave one CLE speech where I mentioned it and then I thought why the heck should I mention that and shut up about it and tried to keep it from becoming a trend, but the hole in the law was pretty clear. You have somebody whose limitations have run, who's able to make their business planning and their practices in Texas, and they're out of it, and all I have to do to break their statute of limitations is sue him and tell him, "Unless you want to -- unless you want the full force of me on

you, you better bring him back in," and now he's back in, and his limitations is blown because I've got the defendant to do it; and that isn't just, it isn't right, and it's not good for Texas employers; and, frankly, you know, our view from the Governor's office is that we need the civil justice system, the tax system, and the regulatory system to all work together to create an atmosphere in Texas where people can feel safe coming in here and providing jobs and not feel they're going to be extorted after their limitations have run, not feel that they're going to get the bejesus taxed out of them, not feel that the regulatory system is going to change on them once they've invested all their money in trying to build a plant someplace where we need the jobs; and so that to me never felt like a really good, just, or particularly intelligent way to do business; and I was delighted when Representative Lewis filed the bill to reform the third party system; and we were very excited to include it as part of the Governor's Bill that was known as a loser pay bill.

If you read the bill, there's not a whole lot of loser pay in there, but that was -- I mean, that was a very short conversation with the Governor when we said we would like to add this to the bill. I think it took about 15 seconds, that's a great idea, and it's in,

and he backed it ever since. So I definitely have a different perspective than Mike did on that, although I enjoyed working with him on it. I never came out of a room there entirely convinced that I made any points at all after I left and then the next day I would come back and found out I made absolutely none, but as I say, I'm more -- if there's questions from you, I'd rather hear those than hear me drone on about what we intend to do this next coming legislative session so -- plus it will give Representative Lewis a chance to hear the questions before he has to speak, and he can devise answers for them that will actually make sense.

CHAIRMAN BABCOCK: Great. Any questions for Michael? Okay. We'll move on, and speaking of Judge Lewis, thank you so much for coming. Tryon is now the representative for District 81 in Lubbock in the House of Representatives and has thought about these problems and been involved with them with the Legislature, and could you share whatever thoughts you may have with us?

HONORABLE TRYON LEWIS: Oh, sure. Thank you, Chip, appreciate your asking me to be here. I'm Tryon Lewis, for those who don't know me, I am actually Odessa rather than Lubbock, but my district is 81. I'm a West Texan. I used to be a district judge for 21 years, retired so I could put my daughters through school, and

now I'm making $7,200 a year in the Legislature. I do practice law and want to publicly thank Ken Wise, a wonderful judge in Houston, for letting me off of a trial to be here. Just basically what we did last time as far as involving me, we did have that fight over the third party responsibility bill, which I was very happy to finally -- I couldn't get mine out of calendars, but I got it added onto the Governor's bill and we got it through. Other than that I won't say anything because Mike's not here, and it's not fair to do a rebuttal with him not here, so but it was absolutely a delight to work with him. It's absolutely a delight always to work with great trial lawyers, whichever side they're on great trial lawyers and really good judges like we have in Texas make things go better. They make sure both sides or all sides get represented, well-spoken, and in the public, and the system will work out fine. So it was always an honor as a judge to see what a good job great lawyers can do, and we had a lot in court and great to work with them in the Legislature.

Now, with that out of the way, let me just mention as far as other legislation, it's not all Texans For Lawsuit Reform versus TTLA around there. There are things to be done for the judiciary. Last time we had the court administration bill, which was about a 140-page

bill, which was passed in the special session. It was one of those things that died at midnight, got all the way through but died at -- well, it didn't die at midnight. It died at 12:01 and didn't get through, but luckily for us the Governor called a special issue, a special session, and we were able to -- able to get it found germane to the topics that was called and so we were able to pass a court administration bill, which is about 140-page bill that allowed us to streamline the courts and the procedures and, you know, all of these things where we had magistrates and different things, special judges, we got that all sort of streamlined and what they can do, what their duties were, what they would be called. That was a big fight.

It certainly taught me -- and I thought the only sacred topic in the judiciary was retirement for district court judges and state judges, don't ever touch that and you won't get in trouble. What I found in that bill is don't touch anything to do with justice of the peace. Just don't do it, or -- and so that was -- that was a big part of that fight, but even that, I think we got everything, and we really did, in all candor, we had some great leaders among the justice courts who helped us out on that. Carl Reynolds, your predecessor, was enormous assistance, and we got that bill passed. For the

coming session of the Legislature, I hope to be back on Judiciary and Civil Jurisprudence Committee again. In the House that's the committee that will handle these things. That's -- we don't have any funding authority, unfortunately. That's through appropriations, but it does give our committee somewhat of a bully pulpit to fight for better funding, more efficient funding for the courts, and keep the small funding that we get for courts, keep it at a level it needs to be, and that includes funding ancillary to the courts such as indigent defense and those sort of things.

I think that we'll be looking at -- what we can do on state judicial officers' salaries, I don't know. But I do know what we can do, we have been doing in the past, is talked about it, have hearings on it, accepted reports on it, get it on the agenda, and get it before the public. Texas revenues are rising fast. Texas revenues are -- sales tax revenues are rising in the double digits. We do have some money. It's a matter of where it goes, and like I say, for the few judges -- state judges that we really have and other state officers involved in the judiciary it's just a matter of getting that on the agenda, making sure that we have good judges.

Multidistrict litigation, I think that there will be some things involving the asbestosis and silicosis

dockets. The U.S. Chamber of Commerce is, you know, very active on that and pushing their agenda. In addition to that we really need to look at -- we had interim hearings on this. We need to look at those courts. Fortunate thing for us, we've got tremendous judges down in Houston, is where most of that is. We have tremendous judges, and they're absolutely fair, and nobody can argue about that, so that helps, but the problem is we don't even know how many plaintiffs there are down there.

I mean, we have tens of thousands of plaintiffs who have -- and I guess that means hundreds of thousands of defendants who have -- well, multiple defendants. I shouldn't say that, but we have certainly probably 60, 70, 80,000 plaintiffs cases that have been sitting in those courts, and some of them there's a reason for it. They have to -- you know, under the law they have to meet the markers, the test, but a lot of them will never reach that, and there's no efficient way now for that to be handled, for the judges down there to be able to go through and look and find out what the lawyers will never be presenting. The cases in which not only is the plaintiff long passed away without ever meeting the test necessary, but the lawyers and maybe the lawyers that came after those lawyers are now gone or can't be found. They can't -- you can't find the plaintiff, you can't find the

lawyers, you can't find anybody, but the case is there and cannot be dismissed.

We need to look for ways that are fair to both sides but that the cases that can never go forward can be located, can be taken care of, dismissed without prejudice, so that the -- so everybody can go on about their business. That's a huge thing. It's something that to be done fairly will take years. You have to give years really to make sure you're not tramping on somebody's constitutional rights, but it needs to be done, and the process needs to be in place, and the judges need to be given authority and their discretion, not mandated, but authority to do that. I hope to be a part of that.

Those are the main things -- or some of the things that I see coming up, and I don't know if there are any questions or anything, but I'd be happy to take them. I'm just a member of that committee. I'm vice-chair, which just means you're a member of that committee, but -- yes, sir.

HONORABLE STEPHEN YELENOSKY: Why did -- do they present a particular problem in dismissing for want of prosecution? I mean, why can't they be DWOP'ed?

HONORABLE TRYON LEWIS: Pardon me? Why do you need one?

HONORABLE STEPHEN YELENOSKY: Why can't they

be DWOP'ed, dismissed for want of prosecution?

HONORABLE TRYON LEWIS: I think the way the law is now, I think it's very difficult for the judge to enter an order. There is some question of if both sides agree -- now, I think the judges do it, but there's a question in my mind, there's a question otherwise, it's not just me, of whether even -- because the judge is barred from acting in certain circumstances, whether even a nonsuit order can be signed on those cases or an agreed dismissal could be signed.

HONORABLE STEPHEN YELENOSKY: Oh, I thought that you couldn't find anyone. In the normal course of things if you couldn't find the attorney or the plaintiff, you send notice to the last known address, and it's incumbent on them to keep the address up, so I was just curious if there's some special --

HONORABLE TRYON LEWIS: Oh, you're just saying why -- there's no reason not -- I mean, I think there's no reason not to do it, and what we want to do is make it statutorily clear in that scheme that's been set up, and a good reason to do it, that the judges do have power to have dockets out, to have attorneys come forward if they want cases kept on the docket and so forth, but remember, they're barred from -- plaintiffs are barred from taking lots of actions on those. I mean, the

plaintiffs are. It's not just like plaintiffs' lawyers aren't working their cases. They're barred from working their cases in many instances. In almost all instances, until they start meeting these markers, so it can't be that. But they -- but we do want it where the judges can have the lawyers make sure that does this case need to go on, is your client still where you can locate them, that sort of thing, in a reasonable manner, and, again, not mandate anything, but give the judge discretion, because those are great judges down there and they'll move -- they'll move those cases that cannot possibly move up and move on if we give them the discretion to do it, but the way the law is right now stated, I don't -- there's a question of whether they would have the authority to so act. So we do need to do something. Yes, ma'am.

HONORABLE TRACY CHRISTOPHER: Well, my understanding of the only reason that the plaintiffs' lawyers don't agree to dismiss those cases is because if they filed under an early version of the responsible third party law, they want to be able to keep that version of the responsible third party law if their client does develop an illness. So it seems to me that by statute you could say the cases will be dismissed, but if you had a prior lawsuit, the law in effect at that time would still be in effect when you refiled. That is why they don't

dismiss at this point.

HONORABLE TRYON LEWIS: I need you to come before that committee hopefully and testify on those. I think that those are issues -- one thing, when we got here, nobody -- all of these lawyers didn't ask to have these cases moved over there. The pure fact is we have tens of thousands of cases, tens of thousands of plaintiffs in these cases, because some cases might have a thousand plaintiffs in one case. So you say, well, how many cases are there, you know, there are X number of cases, but really every plaintiff's case is different, but you have many, many defendants on -- party plaintiffs on a single case number, but so you're asking the lawyers to do a lot. Because the plaintiff lawyers have had these cases. Now they all have this huge backup that have been put in these courts, so they do need time -- it's not like our normal process that we have. They need time. They need time, and I think the judges will give them all that time and then these issues like that need to be figured, out because you have some constitutional issues, you know, which ones, if they were under a prior law, you know, what happens to those if you barred them from moving forward, and I think that anything that we do -- that's a good point, I'm glad you brought that up. You can get constitutional issues in some of these things but you have

categories. Some of them are in that prior law, a lot of them are not, their filings, but they're all -- almost all really old, old, old cases, and the judges need to be able to start the process of going through those and finding out which ones should be kept and which ones not and start moving through these tens of thousands of cases per judge.

What -- anything else, either on that or any other topic? It's an honor to be asked to be here. Chip, thank you very much.

CHAIRMAN BABCOCK: Thank you, Judge.

HONORABLE TRYON LEWIS: Nathan and Chief Justice.

CHAIRMAN BABCOCK: Thanks very much.

(Applause)

CHAIRMAN BABCOCK: All right.

HONORABLE NATHAN HECHT: Let me say --

CHAIRMAN BABCOCK: Yeah, Justice Hecht.

HONORABLE NATHAN HECHT: Let me thank Judge Lewis for coming and Mike, too, from the Governor's office and --

CHAIRMAN BABCOCK: How about Gallagher?

HONORABLE NATHAN HECHT: He's not here. I'll send him a thank you note later, but the last 10 or 15 years the three branches have worked together to try to implement policy that the Legislature has chosen so that

it works in the real world, and that's hard in the Legislature -- in the legislative session because it's so short and there are so many things to do, and it's hard to get all of the participants there to hammer it out, but I think it has worked very well in the last 15 years to have policy set by the Legislature and then have the judiciary implement that through rule making, and this is the committee that does that, and this is a -- this is a committee that is intent on making sure that the wrinkles are ironed out and that when it gets into the field it's going to do -- the policy is going to form as it was intended. If the Ten Commandments had had to go through this committee they would be a lot clearer.

HONORABLE TRYON LEWIS: And longer.

HONORABLE NATHAN HECHT: Yeah. And this is a group that thinks very carefully about implementation and about how things are going to work, and but we very much appreciate that working relationship between the branches, because I think it's been awfully good for the people of Texas.

CHAIRMAN BABCOCK: Yeah, I'll second that. When I took over as Chair the relations between the Court and this committee and the Legislature were not all that good. Orsinger was called up to testify at midnight and got beaten up pretty good, but the next year I took over

as Chair, and I was asked to come testify and was treated very well. My partner, now Judge Janell, maybe had something to do with that, but anyway, it's been a great collaboration, and I hope we're holding up our end of the bargain that everybody seems to think we are, so that's good.

Our next speaker, who has a little bit of a time commitment comes at our issues from a much different perspective. Jason Bloom is -- founded his own company called Bloom Strategic Consulting, and he's a trial consultant. He trained under Phil McGraw, now known as Dr. Phil, but don't hold that against Jason. He's -- he has got a terrific intellect and he brings to us a perspective that is really national in scope. He consults on trials all over the United States. He sees how judges in different states administer the law. He sees how juries are treated in different states, and I thought it might be useful to have him address us and come up with any thoughts he might have that we could implement to improve our system, so, Jason, thank you for coming.

MR. BLOOM: Thank you, Chip, and thank everyone here. I look around the room, and I see some familiar faces, but what really strikes me is the amount of experience in this room and the amount of talent in this room, so, again, I thank you for taking the time to

hear me out.

I've noticed in my travels that every single jury selection process I've ever seen is different, and that strikes me. It's not necessarily a bad thing, and I know that much of it is -- if not all of it -- the discretion of the judge. Some of the differences I see are really threefold. One, in the use of the supplemental juror questionnaire, which I think is a very, very valuable tool. The more information the attorney has about the prospective juror, the better job he or she can do at selecting a juror, the better job he or she can do at weeding out biases and issues that may make someone basically unacceptable to sit on a jury, just due to some life experiences and some attitudes. I wish that more judges would allow for them. I know that one of the causes is the fact that attorneys don't ask for them, and I can't really figure that out except to say that a lot of the practitioners and attorneys fear the judges. I don't know why this is either. In other words, I hear coming back to me after I say, "Well, is this judge going to allow a supplemental juror questionnaire," "Oh, no way, no way."

"Well, have you asked the judge?"

"Oh, no, no, that would make him or her really, really mad," and I don't think that that's the way

the system should work. I don't know if this is something that you guys can handle, but I see it quite frequently.

The other is with the voir dire, or voir dire. Different judges allow different time limits, different judges allow different restrictions, et cetera, et cetera, and I'm sure all of you are familiar with that, but, you know, in my travels, probably helping maybe 20 to 25 trial teams pick juries every single year for the last 16 years, it's not consistent, but I don't necessarily think it's a bad thing. I just think that we need to somehow try to get attorneys to just ask judges for permission to do things that will help them service their clients, but perhaps what is most striking to me are the issues of challenges for cause. That's really where every single decision made by every single judge I have ever seen is quite frankly, extremely unpredictable.

In a Dallas courthouse you could walk into one courtroom, see a particular prospective juror challenged for cause, have the judge on the fifth floor excuse him, have the judge right next to him on the fifth floor not excuse him, and everything else is the same. The information about the prospective juror, what the prospective juror has said, everything else is the same, and I find that striking. Maybe it's not something that's possible to change. Maybe it's not something that we need

to change, but, again, it's pretty striking.

The other thing about the challenges for cause that's pretty striking is the criteria. And I -- looking at it from a juror's perspective, I mean, what's happening is these jurors, prospective jurors, are brought up to the center of a courtroom. There's a judge right in front of him. There's a lawyer on one side or several lawyers on one side, several lawyers on the other, and essentially everyone is asking this prospective juror if they can be fair, and what you hear back is a lot of, "I would hope so's." You hear a lot of "I think I can." You would hear a lot of "I will try to do my best to set this bias aside."

I'm not a lawyer. My training is in forensic psychology. I know that the mind doesn't work that way. I know that we just can't set aside the biases that we have, although we would like to. Maybe we can set it aside temporarily for a few minutes, but for the duration of a trial, no way. Once they get into deliberations and they dig their heels, absolutely not. We would like to think that it would happen, but it really doesn't happen. How do we make sure that our prospective jurors do not have these biases? More voir dire. Supplemental juror questionnaires. I'm more than happy to create a standard supplemental juror questionnaire for the

state courts to use if the judge would like to so the judges don't have to referee the fights between the two sides as to what should be allowed on the supplemental juror questionnaire and what should not be. I'm more than happy at any point in time to write a one-page or a two-page supplemental juror questionnaire that just provides more information and provides more about these biases.

But back to the story about the lone prospective juror basically being confronted by a judge and a series of, you know, two, three, four, maybe ten lawyers, asking this person, "Can you be fair?" Now just put yourself in the mind of the prospective juror. She does not know what's going to happen to her if she tells the judge, "I cannot follow the law. Because of my biases, because of my life experiences, Judge, I can't follow your instructions." It's highly unlikely someone's going to admit to that, but I know that these prospective jurors fear the consequences of telling a judge that they flat out can't follow the law. That's pretty scary, and that's why you're getting more of the "I think I can," "I would hope so's," "maybe's," when what I think we all want as practitioners is a "yes" or a "no," and it's very important to get that "yes" or "no." So they're really scared to admit their biases. They're really scared to

admit that they cannot be fair for fear of consequence.

The other interesting dynamic -- and some of the practitioners I've worked with in this room have heard me say this before -- there's a really big difference between asking a prospective juror if they can be a fair juror as opposed to "Are you a fair person?" So many of these prospective jurors when they are asking, "Can you be a fair and impartial juror" are hearing "Are you a fair person," and there's not many people on this planet who would like to reveal or admit to the fact that they can't be a fair person, but that's really what they're hearing. The solution to that is to preface the questions with something that says, "We understand and agree that you're a fair person, but in this particular setting, in this particular context, do you think you could be a fair and impartial juror?"

So solutions and thoughts that I have about it -- and, by the way, I'm a very, very firm believer in the jury system. There's a lot of talk -- there has been in the past about it going away. It has not affected my practice, thank God, but I really believe that jurors get it right. They really, really do, but they get it right based on the perception of the facts, not the facts, and the perception of the facts is formed by the attorneys and the witnesses. My job as a jury consultant is simply

this, to bridge the gap between what attorneys and witnesses want to tell our triers of fact, our decision-makers, our audience jurors, and what jurors really care about; and oftentimes that gap is the size of an ocean; and it's not because they went -- one set of people, the lawyers, went to law school and the others didn't. It's just what's important to the attorney and the witness oftentimes is not important to the decision-maker.

If you were to go in and buy a car and you want something that will fit, you know, your family, you, your spouse, your partner, and your three kids, and all the car salesman is doing is talking about the engine, we've got a problem. So that brings me to one solution, and that is allowing for questions, allowing the prospective jurors to ask questions. I really can't think of -- but you guys are much more experienced than I am in this regard. I can't think of a major downside to allowing this. I can think about tremendous upside. Quite frankly, the only downside might be that now we're clueing the attorneys in to the way the jury is thinking, which may cause a settlement, I don't know. But what I've found that it does in my travels when I've seen it is we've got more engaged jurors. These jurors feel like they're more part of the system, and I think that that's a

good thing. You see them taking notes more intensely. There are those natural born scribblers that will take notes on everything and then there are those that treat jury service like they're in a college classroom, but they're much, much more engaged, and they're much more into problem solving the issue, so they feel more like they're part of the process than an innocent bystander over in the corner.

I've also found in my research and my practice that the best attorneys and witnesses -- the best attorneys and the best witnesses out there are the ones who are answering the questions that the jurors are asking, quite frankly. Those are the ones that get the best feedback when you poll them in post-trial interviews; but when we don't allow the jurors to ask questions in a very formal process, we're reducing the likelihood that these attorneys and witnesses will be answering those questions that the jurors ask, and I think this is a way to bridge the gap; and again, I am -- I'm offering my time, my energy, and resources to be on a task force or to somehow study for you the effects of allowing jurors to ask questions, either the way it impacts the jury service, the way it impacts the decision-making, or the way it impacts the way the parties feel about receiving justice.

My other thoughts have to do with the jury

charge. This is very, very striking to me, too. We ask these jurors to make very, very important decisions. When we don't allow them to ask questions we really keep them powerless, too. I mean, they are the most important people in the room aside from the judge, of course, but they really have the least amount of power, but what's really striking is they don't learn what they have to decide until it's all over. Why is that a bad thing? And I certainly appreciate that through the course of a trial claims, torts, they get thrown out on directed verdict, they get thrown out in the charge conference, things like that, but I've found that they're absolutely clueless, but worse, they're thinking wrongly about what they have to decide.

Let's take fraud for example. And I did a study for -- when the State Bar was rewriting the pattern jury charges, and I see Justice Kent Sullivan in the back there, I think I do. He was part of this, too, and we were trying to test out -- and maybe this report's been furnished to you. We were trying to test out jury comprehension. We were really focused on 226a, the admonishments, and what we would do is we would have a judge or a role play judge read these instructions to, you know, 50 or a hundred people -- I think it was 50. We would then have them do a filler task, maybe it was a

crossword puzzle I think for about five minutes, and then we would give them a Q and A, a survey, and basically ask them and try to measure whether or not they comprehended what they just heard, and the reason for the filler task is we're not trying to test retention. We're trying to test comprehension, and the comprehension level was extremely low, well below 50 percent, and what's really, really interesting is on these surveys we would ask, "True or false, you are allowed to -- you're allowed to consider attorney's fees" after the judge had just read that you're not allowed to, and we would get less than 50 percent of the people getting it right on a true-false; but what's more striking is the trailer question was then, "What do you base that answer on? Do you base it on what the judge just read to you five minutes ago? Do you base it on your own common sense, or do you have no idea why you just said true or false"; and what we found when we dug into the data is that a lot of the misperceptions or misunderstandings about these jury instructions were attributed to what they had just heard the judge say, which is quite remarkable.

And, you know, I always preach to lawyers just because you say something in the courtroom doesn't mean that the jury gets it, understands it, or comprehends it. Jurors only hear what they understand, which is very,

very different than saying they understand what they hear, but we would like to believe that. We're in a world where we all think that everyone around us sees the world the same way that we do, and it's not true. With that, and this is the point I was getting to is let's just take fraud for example, and we discover this -- I'd always seen it in my mock jury studies, but we discovered this in the State Bar research, was fraud I think has four or five elements to it, and I think the jurors have to find all four or five elements are met to find fraud, but you go out there and you ask the person on the street what fraud means and it's just simply a lie, which is the first element.

So what's happening is we've got jurors who are saying, "Okay, I've got to decide fraud in the end. Fraud is just a lie," and they spend two days, two weeks, two months of the trial simply trying to figure out if the defendant lied to the plaintiff. Let's forget damages, let's forget reliance, let's forget the other three criteria, which I think, depending on which side of the bar you're on, is not the way it's supposed to work; and I think we can change that; and I have noticed in the pattern jury charges and I've also preached to some of my clients in a consequence like that preface the instructions with "In order to find for fraud all of the

following must be met" and then put an "and" after every single element because before there wasn't one, so they would just stop at "lie or misrepresentation" and say, "Okay, check please. Where is the dollar amount that I need to fill in?"

So and I don't know how to -- I don't know how to solve this except to say that if there's any way that we can clue the decision maker into how he needs or how she needs to decide the case at the out front, what they need to look for, what's important, what they're going to be asked at the end of the day, to the extent possible, if we can increase the education and information we give to them, I think we're going to get better jury verdicts, I think. I think we're not going to wonder, "Well, what happened here" when we read about it in the newspaper. Because these people, they do, they make up their mind pretty early. We wish it was different; and what happens, as many of you know, is this element of confirmation bias then sort of creeps its way into the jury box; and what's happening is these jurors are leaning one way or the other; but they're leaning one way or the other based on misperceptions about what constitutes fraud, what constitutes negligence. They substitute their common sense, and they simply say, "He should have done that, he didn't do that, so they broke the law." So I

think education is better.

There was an instance earlier this year, just an anecdote, it was a breach of fiduciary duty trial; and when we polled the jurors at the end of it we were just going through the standard repertoire of questions about what how they decided the case, what was integral to their jury decision-making; and we discovered that they spent a lot of time wrestling with the question of fiduciary duty; and when I first heard this I'm thinking, okay, well, that's because no one's ever heard the term "fiduciary duty" before, which might be true; but they were wrestling with it because they thought if they found that the defendant breached his fiduciary duty he would go to jail. They actually thought that. Now, my first reaction is let's go check the transcript and see how many times the judge said, "This is a civil trial." Let's go see how many different witnesses and attorneys talked about damages and how no one talked about jail time or punishment in that regard, but it was very, very striking to me. So that's my anecdote on that.

But, again, it's been a pleasure to be here in front of so much experience and so much talent, but if there is anything I can do for this committee, please let me know, because I really would like to help out in any way possible. I really believe in the jury system. I

don't want it to go away. I preach to lawyers all the time. I try to preach to younger lawyers because I think that might be the solution, is getting younger lawyers inspired about trying jury cases, and they get this inspiration from me rather than law partners in their firm who may not be so confident about the jury system, but I really, really, really cannot imagine a world where decisions are made by one person, decisions are made by a judge rather than a jury. It really, really scares me, so I'm here to help. I really want to, and I'd like to answer any questions that any of you have as well.

CHAIRMAN BABCOCK: Any questions for Jason? Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, first, it scares me, too, that I might have to answer some of those questions other than juries, and I'm glad you're there to do it. Do you know of other states where they read the charge at the beginning of the case?

MR. BLOOM: No. No, I don't. I don't. I can research it and find out. I'd be more than happy to do it, but --

HONORABLE STEPHEN YELENOSKY: I'm just curious because, I mean, I think you sort of alluded to that. There are practical reasons certainly why, at least where if you have a simple docket, we couldn't do that

now, but I'm asking from sort of the jurisprudential perspective, assuming you could resolve the practical questions and have some states done it. Do they -- does anybody read the charge at the beginning, subject, of course, to JNOV. I mean, anything you could deal with on a directed verdict you can deal with on a JNOV. The problem would be you don't have a question in there that it turns out you need at the end. Obviously that would be a problem, but if some other states were doing it then we could see how they had worked that out.

MR. BLOOM: I don't know. It's interesting, too, because all you would be doing if you were to read the instructions at the beginning -- at the end all you would be doing would be eliminating things rather than adding new things.

HONORABLE STEPHEN YELENOSKY: Right. Right.

MR. BLOOM: So, you know, I've seen in the criminal courts, and many of you know this, they kind of do that in their voir dire. I mean, a lot of the district attorneys are putting up on Power Points the elements to the crime and asking the jurors -- prospective jurors about it, and it gets them thinking, and you find that these prospective jurors are actually asking more questions about what the law says in the jury selection process rather than just simply talking about their life

experiences.

HONORABLE STEPHEN YELENOSKY: In the jury selection?

MR. BLOOM: Uh-huh.

HONORABLE STEPHEN YELENOSKY: Well, I'm talking about at the beginning of the trial. I do see some problems with doing that in the jury selection. You start getting questions and then information provided to the jurors about the case that then creates a problem in figuring out whether they've brought a bias or whether they've developed a bias based on the facts, "the facts" in quotes, they just heard, but I'm talking about once you've seated the 12.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: On that last point, in the criminal context you have an indictment and you can't convict somebody beyond the indictment but --

CHAIRMAN BABCOCK: Robert, speak up. They can't hear you.

MR. LEVY: Sorry. In the civil case you can even have trial amendments, so you could have an addition. I have a different question. You talked about jurors and the issue of bias. My one -- my concern is that jurors are actually becoming more sophisticated, potential jurors, so they know the things to say to get off jury

service, to say they are biased so that they don't have to serve on a jury. Have you seen that, or the trial judges, do they see that?

MR. BLOOM: I think you're always going to have a little bit of that. When you start with a venire of 50 I think statistically you're going to have a few people that do want to get off. In talking with the court personnel and just through my own travels I actually see a little bit less of it, unless they hear at the outset, "This is going to be a six-week trial," or something like that. It's sort of a civic duty thing. I don't think you could generalize it to the entire population, but the people who show up kind of want to be there more than five years ago, which is really good to see, but -- and they want to do a good job, and they really want to get it right. They truly want to get it right. My concern is are we arming them with the right equipment to do so, or can we perhaps do a better job of that? Is there a way where we can give them that equipment?

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, I mean, I think the idea of having some kind of a pre-evidence telling the jury what the issues are going to be in the case is good. I don't know how you would do a real charge other than a very simple maybe, you know, car wreck case,

how you could give the charge before you ever hear the evidence; but a lot of what you're saying I think is the lawyer's job in opening statement, is to tell -- there is a rule on opening statement; and it says, "You shall state to the jury briefly the nature of his claim or defense and what said party expects to prove." So, I mean, to me a good lawyer will accomplish what you're talking about in opening statement, if they do an opening statement right and don't just stand up and ramble on and on about everything they're going to prove. I mean, it seems to me more often than not after some lawyers sit down after opening statement you don't know if they've got a negligence case, a fraud case, a breach of fiduciary case, all they've done is talked about what they're going to prove, and if they would do that, that -- that's a lawyer issue to some extent.

CHAIRMAN BABCOCK: Richard, then Bobby, then Judge Yelenosky.

MR. MUNZINGER: Your suggestion that the jury panel be allowed to ask questions, who answers them?

MR. BLOOM: The --

MR. MUNZINGER: And at what stage of the proceeding are they asked, because now you've got the problem of getting full and correct answers under the law and, quote, poisoning the panel, close quote, if it isn't

proper.

MR. BLOOM: Yeah. The best way and the most common way and, quite frankly, the only way I've ever seen it -- and Rusty Hardin can talk a lot about this because the judge in the Roger Clemens case allowed for that, and after one of the witnesses, the star witness, there were 28 questions submitted by these jurors.

MR. MUNZINGER: In writing?

MR. BLOOM: In writing. And what they would do is they each had a note card, and at the conclusion of the witness' testimony they would write the question on the note card and hand it to the bailiff or marshal, who would then give it to the judge. The judge would call the lawyers up to the bench and would basically say, "Here's question number one from the jury panel." We don't know who it's from. "Does either party have an objection to us asking that," and if there is an objection, the judge would not ask it. If there's no objection, the judge would then ask it of the witness, and then the witness would answer.

MR. MUNZINGER: So this was during the trial, not during the voir dire?

MR. BLOOM: No, during the trial, during the trial.

CHAIRMAN BABCOCK: Bobby.

MR. MEADOWS: So we talked for hours, if not days, about the advisability of having jurors ask questions in this committee, and I loved that discussion, and I love this discussion and agree with much of what you're saying about best practices and jury selection and conducting trials, but to me we're getting the cart ahead of the horse here because in my mind what's wrong with the civil justice system in Texas and elsewhere is the loss of the jury trial altogether or almost altogether, and talking about that is what I thought -- is what I think we should focus on. I mean, it concerns me that when Mike Gallagher was exported I kind of was sent out with him. I mean, I probably spend 150 days in trial a year and in the last 10 years almost none of those have been in Texas, and none of the young lawyers in my firm are getting to try cases, and I think there's a fundamental problem with that, I mean, in terms of transparency and what our community thinks about things and the way we ought to be resolving disputes, and if courthouses are not being used in the way they should, we need to make that -- we need to change that. They need to be accessible. They need to be affordable and I think those are the things we ought to be talking about. Why don't we have disputes resolved in courthouses anymore? Why are we losing the jury trial? I would love -- if we want to, I mean, I have got a lot of

views about how to pick a jury and best practices about how selection should go, and I bet a lot of people do, but, I mean, is that what we're here to talk about?

CHAIRMAN BABCOCK: There are no parameters to what we're going to talk about today. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, that is the bigger issue, so let me go back to the smaller --

CHAIRMAN BABCOCK: Well, we want to talk about big issues.

HONORABLE STEPHEN YELENOSKY: So I'll just be quick. I think he was suggesting that, you know, opening statements the lawyers lay out what the case is about, but, of course, you might have a difference of opinion between the lawyers as to what the elements of a particular cause of action are; and if you've had a pretrial, the judge might have resolved that; and so if the judge has resolved that then in opening both the lawyers know what they can tell the jury before the judge reads the charge to the jury, these are the elements of fraud. As it is now, a lawyer gets up in opening and says, "We're going to try to prove to you that there's fraud, and I believe that the Court is going to give you the following elements." The other side may even object or stand up and say, "No, we believe the judge is going to

give different elements." All I can say at that point is, "The Court will tell you what the law is when the Court gives you the charge six days from now." So --

CHAIRMAN BABCOCK: Rusty.

MR. HARDIN: Well, you know, I don't know where to begin. I totally agree with what Bobby said, you know, as far as the jury trial disappearance, and I guess those of us who are regularly trying cases probably have as many different reasons for it as anything. I think the system has gotten now to where it thinks the most important thing in the world is settlement, so we're there trying cases, whether the defendant or plaintiff, and our practice is half and half. The pressure all along the stages is to settle the cases. You know, I end up saying a lot of times, "I thought we had that courthouse for a reason"; and somehow the system and the philosophy has gotten to where everything should be settled, we shouldn't be taking the time, you know, of the court; and I keep thinking why do we have these courts? So I think there's a philosophical approach now that says simply that the premier goal of the system is to settle.

Now, all of the sudden what's happening in Harris County, and the judges from Harris County can tell better than I, is that the number of jury trials have dropped dramatically. We actually have judges looking for

trials from other courts or situations because of this pressure in the system that somehow it's a virtue to settle and that we really don't need to be taking the time of the system to do it. I think we all know that. I think -- I hope that next year this committee will be talking about the jury trial. I mean, I think when you have people like Pat Higginbotham giving speeches bemoaning the disappearance of the jury trial, and the Federal system the same thing, I think it's the biggest problem facing the civil system as far as I'm concerned, this sort of decrease in the trials, the lack of faith that the system can actually rightly do it.

Now, I felt -- and then one other thing that I felt and I'll be quiet. Jason mentioned the Clemens trial. When we were talking about picking -- you know, having juror questionnaires earlier in the year, all of that, I wasn't a believer in it. I had some comments, and I had never done it to the degree that Clemens case did; and real quickly, if there is something in the rules that can encourage it, I am a total believer now; and just to fill in on exactly what this Federal judge did, and I -- I watched it through the trial. Now, because we won the case, maybe I liked it so much for that reason. I realize there's that, and so I haven't had a check, you know, where they were just saying bad things all along and I'm

going home and slashing my wrists each night because of the kind of questions. I realize there's an element of that, but when it was all over I couldn't see anything to criticize about it at the end of the day; and what he did was, is he did not allow recross.

So he would allow direct, cross, redirect, and then very rarely would he let it go back. Then he would stop, and he would ask the jury, "All right, do you have any questions?" They have these little three by five cards. They write out their questions, as Jason said, gives them to him, goes up to the bench. He puts on the white noise. He's the gatekeeper. I think I've been here long enough now people know this. The older I get, the longer I do this, the more I believe in the judge's discretion and the judge's -- us trusting him to make the right decision. So I want the judge to be the gatekeeper, and he was. He decides whether or not he's going to ask that question, and some questions that we would have loved for him to ask he didn't do because, I mean, if you're going to ask "In light of all the lies you've told why should we believe you," which was one of the questions. He clearly didn't ask that question, but then what happens is the lawyers go sit back down, and then those questions that the two sides agreed could be read, he would read the question to the witness, and the witness would answer the

question. If there was something that needed to be followed up, any discretionary, he would say this party or that party can ask another question or so.

I became a total believer in it, and I hope we explore next year as to whether or not there are some things there that we can tinker with as far as rules that would encourage it, because I think a lot of judges are concerned about doing it now for fear that they're going to put some type of error in the case later that the courts are going to say that they shouldn't have done this or that way, so if there's guidance that we could improve it, but God almighty, I would love -- counselor Meadows over there is at the heart -- I think his point is at the heart of the biggest issues.

CHAIRMAN BABCOCK: Rusty, did you try that Clemens case?

MR. HARDIN: No, Jason did.

CHAIRMAN BABCOCK: Well, I saw on television somebody that looks suspiciously like Jason right beside you as you're walking into the --

MR. HARDIN: My only contribution was to wear a seersucker suit.

CHAIRMAN BABCOCK: David Jackson, did you have something?

MR. JACKSON: I just wanted to throw in that

we debated that on September 17th, 2010, probably half a day, that issue about jury questions if someone wants to get caught up on what --

MR. MEADOWS: We've got a motion for rehearing, I think.

CHAIRMAN BABCOCK: Sounds like there's a motion for rehearing. Somebody has got their hand up, and, Roger, is that you or Sarah?

MR. HUGHES: I guess it's me. I had a question, getting back to a comment that you made earlier when you said that it was helping jurors that you put the word "and" after every element and the definition of a particular cause of action, and I guess my question has to get to do with the trend towards the global charge and whether this -- whether there is anything one might call juror fatigue, because what we've done instead of having a series of related questions about like different kinds of fraud, we collapse them all into one. So in their study is there anything about jurors -- something that happens when they have to answer more questions rather than fewer, regardless of how related the questions are; and, second, one of the trends in global submission, that is collapsing different issues into one question, is the proliferation of instructions; and combined with that there is the trend that like, well, we really don't need to give an

instruction on that because that's common sense, "Well, that's common sense," et cetera, et cetera, so I guess -- and the related thing is, is there an effect by having more or less questions, regardless of how related they are; and second, do jurors appreciate getting more definitions or do they -- or would they like to be left to their own devices?

MR. BLOOM: Those are two good questions. The answer to the first one about the number of verdict interrogatories --

MR. HUGHES: Yeah.

MR. BLOOM: I'll just say it, it depends on the day of the week. It really does. I mean, if it's a Friday, they're probably going to try to blow through it as quickly as possible. If it's a Monday, it might be a little different. I also say that there's a wild card in there, too, so you can't -- there's not really a universal trend, and that is the foreperson, who is really guiding it and leading it and has or can have a lot of influence there, and depending on your foreperson there could be some fatigue or there could be a lot of excitement. I've also seen -- and I know this is in one of the admonishments on the pattern jury charges, is they kind of do figure out who they want to win and then reverse engineer it; and, you know, they may hate the defendant so

much in a fraud case that if you ask them if the defendant committed patent infringement they would still say "yes." So there's a lot of moving parts to that, and your second question, remind me of it again, I'm sorry.

MR. HUGHES: Well, once again, part of having global submission, fewer questions, is then to have lots and lots and lots of definitions.

MR. BLOOM: Yeah.

MR. HUGHES: But then the counter pressure is we don't need so many definitions, they can figure it out on their own.

MR. BLOOM: I don't really know how to communicate this best, so I'll just say it. They use the definitions a lot less than we think and we would like to believe. When I do mock jury studies I'm watching the deliberations. We can't in the courts watch the deliberations, and I'll either -- you know, sometimes they'll put one set of instructions in the room, sometimes they'll give 12. It doesn't really matter, they don't use it, because a term like "fraud" is a street word. Now, some of them will use the instructions when they've dug their heels in and they're trying to argue with someone else and they want to be right. So they will say something like, "Well, yeah, but look at this instruction here," you know, and that will be their counterpoint to

something that someone else is saying. So my point is I don't think they're using the instructions the way that we would like them to, but I think they need to. I really think they need to.

CHAIRMAN BABCOCK: Jason, I know you've got other responsibilities here in Austin today, and I want to thank you so much for sharing your thoughts with us. Obviously it's provoked some great discussion, and we're going to continue on some of these same themes, but thanks for coming.

(Applause)

CHAIRMAN BABCOCK: All right. Our last speaker and before the break, who has been very patient, David, thanks for agreeing to go last because we had some other people with time problems, but David Slayton is the Executive Director of the Texas Judicial Council. He went to Texas Tech undergrad, and he's got a master's in public administration, and he's been on the job for seven months, but he's going to share with us his thoughts about our topic, the big topic of how do we make the civil justice system better in large and small ways.

MR. SLAYTON: Thanks very much. Thanks for letting me come here today. I'm very excited to be here and report on what's going on with the Judicial Council. I also serve as the Administrative Director of the Office

of Court Administration, and I've been in that job, as he said, for seven months. In case you don't really know what the Judicial Council does, many people don't know, the Judicial Council was established in 1929 to be the policy-making body for the branch; and its responsibility is to study the organization rules, procedures and practice, work-accomplished results, and uniformity of the discretionary powers of the state courts and methods for their improvement; and in order to do that the council is responsible for seeking advice and counsel from all the different judges and stakeholders across the state; and we do that regularly.

One of the things that the Judicial Council does every two years is to seek out and provide proposals for the Legislature to consider regarding the judiciary, and so this last summer Chief Justice Jefferson sent out a letter to all the different stakeholder groups from the judiciary across the state and asked them to submit ideas for what they were going to be seeking in the next session for the Judicial Council to consider. We received many recommendations and many ideas from those groups, and we tried to boil them down into a few that we thought the council could take as sort of global policy issues for the judiciary that had a major impact, and so I'm going to report on those. The council has looked at each of these

and has passed a resolution in support of the ones I'm going to be telling you about today and have passed those on to the Legislature, and we expect some potential movement on those.

The first one -- and I was glad to hear Judge Lewis mention this earlier -- is sort of a global resolution to talk about the funding for the court system. I don't know how many of you are following national trends, but we're lucky in Texas that our judiciary has not been slashed to the point where it can no longer function. Many of the state courts across the country are not as lucky as we are, but it's a risk always to make sure the judiciary is adequately funded. You may know that the judiciary in this state gets .34 percent of the state budget, and so it's always a risk whenever there are talks of potential cuts to make sure that things are adequately funded. Someone asked the definition of what is adequate. That definition is not set except for the fact that there are a number of needs, and the groups that are represented in the judiciary have asked for a number of things, and so those things are included in that resolution.

A second resolution -- and this is one that I want to maybe spend a little bit of time on because I think it will have some level of impact on you-all, which

is a resolution supporting adequate funding of the court e-filing system. I know a number of years ago you in this room -- I went back and read the transcript recently -- had a discussion about e-filing in Texas, and you-all were leaders in getting that off the ground back in the early 2000's.

That system has been in place now for over 10 years, and you may know that we just recently at OCA signed a contract to move to a new vendor that we hope will make that easier for all of you to use as well as more cost-effective. Just as an example of how much more cost-effective, the day it is implemented, on day one the cost for e-filing will go down by over 40 percent just right off the top and with increased volume over time that we hope to get through the system could go down as much as two-thirds of the way, but this resolution goes a little bit further. As you know, the current model is pretty much a toll road model. For every filing that's submitted through the system the litigants or attorneys have to pay a fee on top of the normal court costs and filing fees that are in the statutes and rules. What this resolution does and what we're asking the Legislature to do instead is to look at a per case fee. The one nice thing about that is it would be much less than the cost of one e-filing in the current system, and it also puts on a

level playing field paper and electronic filing, and so we're really hopeful that that will happen and that will move forward.

The -- we have many courts across the state increasing the amount of e-filing. E-filing is now in courts, trial courts, across the state covering over 80 percent of the state's population. It's not a whole lot of counties, but obviously a lot of the litigation goes through those courts. A couple of things that we see related to e-filing that's an impact here is that as we move more towards the electronic court that there are a number of rules that may be impacted, so different Rules of Civil Procedure and Rules of Appellate Procedure that are impacted by electronic filing and electronic storage of documents, and, you know, clerks are trying to go move towards the official record being the electronic copy, and there are impacts to that, so those are some things that we can see coming down the road for you-all.

The third resolution is encouraging full funding for the full cost of indigent defense. I won't spend a lot of time on this, but you may know that the cost of indigent defense has increased by about $200 million in the last 10 years in the state of Texas, and Texas has covered just a -- the state has covered just a portion of that, and the local jurisdiction and the

counties have covered the majority, so this is a resolution to ask the state to step up and fund more of that.

The fourth resolution deals with supporting the collection of court costs and fines beyond the period of new supervision. Currently there is an AG opinion that was issued a few years ago that says once a defendant gets off of probation they no longer have an obligation to pay their fines and court costs. Obviously this is a bit of a rule of law issue and the fact that, you know, maybe judgments don't really mean anything, and so the thought is that this would separate that obligation to say that your community supervision is one part of the punishment, one part of the judgment, and the rest is the fines or the court costs that are assessed as well.

The fifth one, which has a couple of parts, and this is one we spent a lot of time on, is dealing with the criminal court cost system. We would love to get to the civil filing fee system as well, but you may all know that that is completely a very complicated system in Texas where depending on which court you go into and what type of case it is, it's different from court to court, clerk's office to clerk's office, and we feel like that is an impediment to and complicates the system. The problem is I think everyone that has looked at this issue agrees that

we need to do something. The problem is what is that something. We spent a lot of time over the past few months trying to determine that, and we were not able to get agreement across the board. We did get a few things agreed to, such as that court costs should be effective on the same date. Right now the Legislature from time to time will make a court cost effective on -- immediately, so as soon as the Governor signs it, it becomes effective, so maybe June 18th and then that court cost will be in effect until September 1st when another one goes into effect, and so the total court cost changes again and then again on January 1st. So the clerks' offices across the state are having to keep track of this, and it is very complicated, so a couple of those things we're hopeful will be addressed.

The next one is a really big one, and you heard a little bit of discussion about this already this morning, and it deals with judicial compensation. Let me just give you a couple of facts in case you need them to talk about. The Judicial Compensation Commission is an independently appointed commission appointed by the Governor who looks at the issue of judicial compensation. They have done that, and they have issued their report just last week. A couple of their findings are that -- and just factoids are that judges in this state last

received a raise in December 2005. I'm not 100 percent sure of this because we were trying to do this check, but if Texas judges are not the longest to receive a raise, they are one of the longest in the entire nation not to have received a raise. Almost every other judge in the nation has received a raise since 2005, and the commission is recommending a raise.

HONORABLE STEPHEN YELENOSKY: Texas is bigger at everything.

MR. SLAYTON: Texas is the second largest as well, and that's in the report. Since 2005 inflation has eaten away 17.4 percent of judges' salaries. In addition, the -- obviously the salaries have not kept up with the rate of inflation, and, in fact, salaries now are lower than they were in 1990 when you factor in the rate of inflation, so judges are technically making less than they were in 1990 at this point. A couple of other things that are interesting is the data shows that there is an aging of the branch, so at the appellate court levels just 10 years ago we had a much younger judiciary, and now that judiciary is getting older. We see that at all levels of the court. I will say the Supreme Court is staying fairly level in their age --

HONORABLE TRYON LEWIS: It's mostly Hecht. If you take him out of it, it drops quite a bit.

HONORABLE NATHAN HECHT: Me and Johnson.

MR. SLAYTON: But that is an issue of concern. You know, the commission had discussions about does that mean that only old people who are later in their career are entering judicial service because they are the ones that maybe can afford it and what's the impact of that, especially as the recession turns around hopefully and the economy improves, will we have judges leave the bench, and who are we going to replace them with, so there are a lot of concerns with that as part of that.

What the commission did recommend is a increase in the compensation, and basically what they're recommending -- and the percentage is around 20 percent, just over 20 percent increase in judicial compensation. It's about the same level as what has happened in past increases in compensation of Texas judges. You may know that what happens generally is that the Legislature waits 8 to 10 years between raises and they give a significant raise and then wait 8 to 10 more years until inflation has eaten that away and then do it again, and so this has been what the history over time has been, and by the statistics and what we're seeing in the trends we're at the point where that 8 to 10 years has run and inflation has eaten away at the salaries, and so the commission is asking that the Legislature give an increase in compensation.

The nice thing about it is when in 2005 when the Legislature wrote the Judicial Compensation Bill they wrote it to where there is actually not a requirement for a bill to make this happen. It just requires an appropriation from the Legislature to pay the judges and give them an increase, so that's something I know the Legislature will be looking at.

The next thing, Judicial Council resolution that was passed, is dealing with juvenile justice issues. I don't know how many of you have been following the issue of school ticketing and school discipline. It's been a real hot topic over the last couple of years in Texas. Chief Justice Jefferson in his state of the judiciary address in 2011 brought this up as a real issue that he really encouraged the Legislature to look at. There's been a lot of -- there was a lot of looking in the last session and then during the interim, and the nice thing is that the Judicial Council has taken a real lead in this role and recommended a number of changes to the juvenile justice and ticketing system.

I'm just going to give an example because I was shocked about this. If you're a student, a 10-year-old or 11-year-old student in school, and you throw a piece of gum at the teacher, and the -- for some reason the school police instead -- and this happens all

the time. They write you a ticket, which is a Class C misdemeanor offense. You go and -- we heard of a teacher or of a woman who when she was a student did something like that, got a ticket, went and took care of it, paid the fine, went to college to become a teacher. When she graduated and she applied to become a teacher, the school district said, "I'm sorry, you have a criminal conviction, you can't teach at this school." If she would have gone through the normal -- there's two juvenile justice systems. If she had gone through the system where perhaps she committed an armed robbery, she wouldn't have had a record and would have had more flexibility. So the hope is to try to bring these two systems on an even playing field, and those have received pretty good praise from the legislators who have looked at them, and we expect there will be some movement on those.

The last one that the council has passed a resolution on and addressed is in regard to notifying the Attorney General when a state statute is being challenged as unconstitutional. During the last session the Legislature passed a bill that put that responsibility upon the courts and upon clerks to do that. If you will think about the way this gets implemented in the trial courts, it's very, very difficult for trial court clerks who are not trained lawyers, many of them, who are

processing thousands of pleadings everyday to actually find a challenge to a state statute; and so what's happening is trial courts are telling us that they're not able to comply; and so what the council is asking is that be changed, the responsibility changed to someone else; and the suggestion is that it be placed upon the party who is raising the constitutional issue to notify the Attorney General.

Those are the resolutions that have been passed so far. A couple of more that the council is looking at and will probably be addressing a resolution on is judicial selection. As you know, biannually the council has looked at this issue, continues to be an issue with partisan elections causing flip-flops in the courts. We saw in the San Antonio appellate court that just this last month, and so that's another thing that's going to be on there.

There are already some bills that have been filed. Senator Patrick from Houston filed a bill to remove straight party ticketing from judicial elections. The interesting part of that bill is it moves all of the judicial races to the bottom of the ballot, which may be a bit of an issue or concern for many, but there are others. Senator Duncan is expected to reintroduce his appoint/elect/retain bill as part of his package again

this year, and I'm not sure if you filed a bill yet. I know Judge Lewis in the past has looked at extending the terms of district judges from four years to six years, and that bill may be introduced as well.

A couple of other things that are on the horizon and may impact some of your work, we are having a significant discussion in the state and around the nation about interpreters. The Department of Justice has taken a pretty strong position and is threatening lawsuits against state courts across the country for not providing interpreters as frequently as they think -- their position and interpretation is that state courts should provide interpreters in all cases, civil, criminal, family, everything, free of charge, with regardless to ability to pay and in all matters ancillary to the court. That's a pretty broad definition, and it's a struggle that many of the state courts are having, so what we're looking at and beginning to consider is how can we in Texas do this and not -- you know, right now we're required to use licensed court interpreters, and maybe there are other ways to do this where we have qualified interpreters, which is a definition. Maybe we're able to use telephonic or video interpreters from other states that aren't Texas interpreters. There are a lot of issues, and they may have impacts in the rules as we go forward.

Another issue that we're looking at is the aging population in Texas and around the country, and the fact that this may have an impact upon our guardianship system. There are a number of issues with this. Many courts are not -- are having issues at this point dealing with those and making sure they're monitoring guardianship cases and making sure there is no abuse going on in those; and so that's something we will be looking at as well; and the last thing I'd just mention is Rule 6 of the Rules of Judicial Administration that deals with time standards. I know y'all addressed that with respect to a certain portion of that, but there is a new model time standard that was put out by the national groups, Conference of Chief Justices, Conference of Court Administrators, and the ABA to revise those standards. Texas' standards that exist in statute now have not been revised in quite a while, and there may be a desire to look at those again to implement these new standards that were adopted nationally and see what Texas might do in that regard.

Those are a few of the things that the council is looking at. I would be happy to answer any questions you have.

CHAIRMAN BABCOCK: David, thank you. Any questions of David?

HONORABLE TRYON LEWIS: I do, if I might.

CHAIRMAN BABCOCK: Yeah, you bet.

HONORABLE TRYON LEWIS: I missed the very first part when you were talking about e-filing and to what extent would that -- would there need to be legislation. What legislation would be needed? What would be the legislative solution to help move that along, because that's huge?

MR. SLAYTON: It is. It is a huge issue. The way that e-filing in Texas exists now is through the toll road model where basically everybody has to pay per filing, and what we're hoping and what -- the cost -- there is significant cost to that, and it inhibits the ability for that to be implemented in many places and attorneys to use it. What we're looking at is a way where that would be a single case fee, so it would be part of a filing fee. It's going to look like a new fee, but it's really not a new fee. It's actually shifting the fee into statute where the Legislature has control over that. Right now --

HONORABLE TRYON LEWIS: It would be uniform throughout the state.

MR. SLAYTON: Uniform throughout the state. Right now a vendor sets that fee and with DIR, Department of Information Resources, and so what we're talking about is putting it in statute, raise enough revenue to pay for

the system, and then whenever the attorney wanted to e-file there would be no cost once the filing fee is paid.

HONORABLE TRYON LEWIS: And will that be for the Legislature to consider?

MR. SLAYTON: It is ready, yes, sir.

HONORABLE TRYON LEWIS: Okay. Okay. Thank you.

HONORABLE STEPHEN YELENOSKY: Just following up on that, is there a difference between e-filing in terms of the cost to the governmental entity from paper for -- because you pay one filing fee, right, and you file your little petition in a family case and then maybe you don't have much on paper, and you pay one filing fee in a civil case and then let's say you have hundreds of thousands of pages of paper. Maybe the cost to the government isn't that much different, but to transmit those hundreds of thousands of pages is it going to cost the state more because even if you're only charging per case is the state being charged by paper or byte or something or bit?

MR. SLAYTON: No. The nice thing, the contract we signed is actually on a per transaction basis.

HONORABLE STEPHEN YELENOSKY: Okay.

MR. SLAYTON: I didn't want to get into the detail, but right now the way it works is you pay per

document.

HONORABLE STEPHEN YELENOSKY: Right.

MR. SLAYTON: What we set up with this contract is you pay per transaction, so if a lawyer wants to file seven documents at one time in one case, it's one transaction fee, and from the state's perspective there's no difference. They're counting transactions, and that's it.

HONORABLE STEPHEN YELENOSKY: So your -- the charge to the state is the same, but is that going to set the charge so high that the fee is going to be prohibitive for the smalltime filer?

MR. SLAYTON: We're expecting that the fee required to pay for this would be anywhere from 5 to $15 per case, total.

HONORABLE STEPHEN YELENOSKY: Oh. Anybody can pay that.

MR. SLAYTON: What did you say?

HONORABLE STEPHEN YELENOSKY: Anybody can pay that.

MR. SLAYTON: And if you think about it, those of you who do e-filing now know that's less than the cost of one document under the current system, so we think we have a strong argument to then -- you know, right now it's really hard to go to a court and a lawyer and say,

you know, "You need to e-file. You're going to have to pay $37 more for it"; and with the new contract, that already goes down, which is good; but we need legislative action to actually make it to where it's quite cheap actually to do it, so we're real excited about that.

CHAIRMAN BABCOCK: Great. David, thank you so much for coming. I know Bobby and I have been litigating a lot in a big state that's frequently compared to Texas, and their budgetary cuts on the judiciary have had a catastrophic effect on the judiciary and the civil justice system, and it's hurt everybody. It's hurt the clients, it's hurt the parties, it's hurt the lawyers, and it's hurt the judges, and thank goodness we haven't had to face that here through your leadership and Judge Lewis and others, so thanks very much. Thanks for coming.

(Applause)

CHAIRMAN BABCOCK: Okay. We're going to take our morning break. When we come back, I've received -- don't -- Kent, sit down. When we come back, I'm intrigued by the comments that Rusty and Bobby made, especially Rusty saying that our system encourages settlement, which it certainly does, and is that a bad thing, and should we -- should we flesh that out a little bit more, and then a number of you have sent me ideas in writing, most of which we've shared with the committee, so

we'll talk about those. After we talk about Rusty and Bobby's thoughts, I think I'll go to Justice Gray, who said he wanted to know if he was limited to only one idea; and I said, no, as many as you want, although, there are time limits. We want to get out of here before midnight tonight.

MR. LEVY: That's one of his ideas. Time limits.

CHAIRMAN BABCOCK: So be thinking about your best ideas, Judge, and we'll go to that, and then we'll go through the written ones I have, and then if people have other thoughts that they want to share with us we'll do that, but we'll take a 15-minute break right now. Thanks.

(Recess from 10:51 a.m. to 11:05 a.m.)

CHAIRMAN BABCOCK: We're back on the record, and Rusty has now moved to the head table, so why don't you and Bobby talk about the big things, the big ideas. What about settlement? Why is that a bad thing if we encourage settlement?

MR. HARDIN: I don't think it is. I mean --

CHAIRMAN BABCOCK: Well, you just said it was.

MR. HARDIN: No, what I said was is it compels settlement, and I think that's a big difference. I think all of us think that -- and the system doesn't

work if the majority of cases aren't settled. What I -- what I get bothered by is, first of all, the thing we've talked before, I'm sure it may come up this next year, is the tremendous expense. I just finished a jury verdict, got a jury verdict yesterday in a case in Harris County, and there is just no reason that case had as much discovery as it did. We went from -- I'm not saying anything that's not new. We've talked about it during the year. We've seen -- we have put up the total discovery idea, particularly with electronic discovery and everything now, is making it so expensive that the combination of that with everybody thinking we've got to go to mediation, if you don't settle at mediation you must be unreasonable, sort of hammering on litigants to always settle no matter what the issue.

Because I came out of the criminal system maybe I'm a little bit more sensitive to the fact that there are some cases that just should be tried, period; and there are cases that are legitimate to try cases that were principled; and my own experience in now 22 years -- it's not as much as a lot of y'all in private practice; but it's enough years to know that one of the things that bothers me so much about the civil system is the idea that people are just unreasonable if they want their day in court, that everything is potentially resolvable as far as

money, it's always just a matter of money; and people come into court someday and they want to be heard; and our system right now in the civil courts really just sort of thinks that is kind of crazy, and why would you want that? And I'm always thinking, wait a minute, we have those courts for things to be resolved, to try cases that can't be resolved. We're still going to settle 85 percent, but I think the jury trial is disappearing for a lot of reasons, that expense is the primary one probably, but also the fact that there is sub rosa this sort of cynical view that everything should be settled and there's no real reason for us to take the time and resources of the courts.

CHAIRMAN BABCOCK: Can you change that cynical view by rule?

MR. HARDIN: That's a good question. The cost we can change by rule. I mean, I don't know -- I don't know, Bobby, you started this.

MR. MEADOWS: Well, I did, I guess, and I do think -- I mean, I'm going to be very interested to hear what others in this room have to say. To Rusty's point about settlements, I don't think settlements are bad. I mean, I think they are important. I think what can be bad is the reason for settlement, which is what you're talking about and alluding to, and my view on that is driven by

what I think is fundamentally wrong with the civil justice system, and that is that there's a lack of confidence in it by thought leaders in the public, and it's too expensive, and if you're settling for those reasons, you don't have confidence you're going to get a fair outcome or you're settling because it's too expensive to participate then that's what would be bad about a settlement.

So I really think that if we could find a way to restore confidence in the civil justice system, jury trials, dispute resolution in the courthouse, we've got to be thinking about that. I have some thoughts about that. I mean, I think you talk about big ideas, I mean, I think that would really start with judicial election reform. We've heard a lot of people comment throughout the discussion today about the various things we've talked about, the importance of the trial judge, the trial judge really exercising discretion in the right way, the trial judge moving things along in the right way. That all has to do with the quality of the judge, and so what are we doing to address the protection and election of quality trial judges, and then the -- as to the expense -- and there are other things we could talk about in terms of restoration of confidence, but that's just a -- you said a big idea and not to take up more than my share of this

conversation.

In terms of the expense, there are lots of features of that; but my suggestion on expense, at least for certain kinds of cases, maybe all cases if we could get it right, but certainly certain kind of cases, the most effective way to address the expense issue is with limits. Limits on everything. Amount of discovery, time with witnesses, total length of the trial. You know, I'm not going to prescribe what it is, but I just think -- and I think that reveals the best lawyer. I mean, the lawyer that can figure out how to marshal his case, put it together, and put it on and in a fair amount of restricted time, you know, ought to be rewarded for that; and I think it would move the system along. I think it would cost less, and I think's' what we ought to do.

So my response to you, Chip, and joining in with Rusty, is that I think that it's a loss of confidence in what we offer, our product, and how much it costs.

CHAIRMAN BABCOCK: Okay. Judge Wallace.

HONORABLE R. H. WALLACE: Well, I was just going to ask Rusty, do you think that's more prevalent in Federal court than it is in state court, the attitude of you're a failure if you're here to try the case, or is it equal?

MR. HARDIN: Yeah, depending on the Federal

judge. The interesting thing, at least -- and mine is very limited, but if it came out of the state system they have a healthier attitude in my humble opinion.

HONORABLE R. H. WALLACE: Have what?

MR. HARDIN: Have a healthier attitude toward a trial if it came out of the state system. You know, but there's some Federal judges there in the Southern District that enjoy trial, and so there's no pressure to get people to settle. I think that -- I come back to the cost thing because -- and I see it because we represent both plaintiffs and defendants. I see the cost factor from -- this most recent case is a defense case. If the plaintiff hadn't been wanting something so far out of line our client would have ended up paying several million dollars that they shouldn't have had to pay a dime for because of the cost. The only reason we were able to get a trial on it is because the demand was so much higher than they were willing to do, but I had a client that was going to pay two or three million for something in my view they should never have paid a dime for, and the only reason they would have settled was costs.

On the plaintiff side, you know, I have to tell people the same thing, you know, as to how much it's going to cost there, and are we going to assume part of the cost, are they going to be part of the cost or

whatever. I think at the end of the day the cost of discovery is the thing. I don't think the cost of the number of days in trial is that big of deal, but I sort of -- how long a trial is, because we're not trying that many cases; and you know, if we go down to the Harris County courthouse on Thursday afternoon you've got to look for a trial. You've got to look for one going on; and I think that cost is the overwhelming thing; and that's what I mean by the pressure to settle, because the discovery is so voluminous that a defendant has got to figure out, my God, I'm always going to settle that thing; and then the plaintiff, the same thing in terms of what they're having to respond to on the other side; and it's all because the system has endorsed this idea litigants have to know everything.

The greatest quote I heard during this entire past year was whichever judge or someone on this side say, "What's wrong with not knowing everything?" You know, what was the phrase? What did you say? When we all started out people just got and knew as much as they could about the case and they went down and tried it, and we don't do that anymore; and with electronic discovery it's so prohibitively expensive for both sides; and I think in rules, their rules can be addressed there. We talked about it. I'm not talking about anything you didn't talk

about this year and years before.

I just think that the average person everyday, because in spite of people thinking if you have a case that you must have a lot of big cases and everything, our cases are regular, average small cases; and every week I'm talking to a client who goes -- when we talk about the perception of a system who is going, "I can't afford that," you know, so "See what you can do," when they shouldn't have to do that.

CHAIRMAN BABCOCK: Okay. Robert, Alistair, and then Judge Peeples.

MR. LEVY: I echo Rusty's comments, and I think it's important to consider in terms of improving the system some discussion about the issues about why discovery is so expensive and the value that that discovery system brings in terms of helping the fact finders reach their verdict or to do justice. The barriers to entry to get to trial are so, so high, and that's because of some of the issues that I think we can look at. One of them is having clarity and the definition of preservation obligations. Companies, particularly, but all litigants spend a tremendous amount of time preserving information, most of which never gets used even in the discovery process. Some experiences are that for every hundred people on litigation hold, only 10 of them

actually ever have to produce their information, and the cost of litigation holds preservation is significant. It impacts the way businesses have to run their daily operations, and cost to preserve information is part of the process.

But then when you move to the actual discovery process itself and what I think is an overbroad scope of discovery, that it ends up that we are discovering so much more information that's ever possibly going to be used by the court; and we've done some studies on this from other companies that have shown that for every thousand pages of documents that are part of the discovery process, only one page is actually used either by the -- at trial or on a summary judgment or dispositive motion; and for those thousand pages that are in discovery there are probably at least 10,000, maybe even closer to 50,000 pages, that are preserved as part of the preservation process; and so what we can do is to look at rules that both define scope in terms of what's actually going to assist in the merits of the case, the substantive issues, and not what might lead to the potential discovery of admissible evidence, what becomes a very broad and ill-defined standard, and then focus on specific standards on preservation, which can include trigger, scope of what you have to preserve, and when the preservation obligation

ends, as well as defining more clearly the sanctions issue; and I don't know whether that's going -- an issue that we can deal with in the rules or the legislative bodies to address the sanctions issue to make clear that preservation mistakes or failures to preserve should not be a gotcha game that results in satellite litigation that we waste a lot of time and money on; and I think that will help us make the cost of litigation more in line with the process so that people can actually afford to try cases and not be forced into what you described as absolutely true, settling a case that should go to trial and justice is not served by settlement in that situation. We should not be pushed into a settlement mode when the best answer is to let a jury or a judge decide the issues.

CHAIRMAN BABCOCK: Alistair, I'm going to skip you for a second because Judge Peeples has got to leave in a minute, and by the way, if anybody leaves early, stop by and talk to Angie first because she's got a Christmas present for you. Judge Peeples.

HONORABLE DAVID PEEPLES: I have a question for Rusty and Bobby. Can you identify anything that judges actually do to you if you don't settle? Because I tell people if you want to get cases settled give them a realistic trial setting and put them to trial, but do they twist your arm unreasonably to make you settle? I want to

know if there are things judges are doing that they shouldn't be doing to coerce.

MR. MEADOWS: Let me just -- because I can do this quickly. They try -- some try to. I mean, there are a lot of judges that do just what you do, and I respect that, I mean, because settlement can be a healthy outcome. It's the normal outcome. It's what happens the majority of the time, and it moves things along, and it's good. Again, unless it's done for a bad reason, and a bad reason could be a -- you know, a judge who is trying to force an outcome that he or she thinks should happen, but I just -- I just ignore that. I mean, because eventually you're going to try the case, and most judges in trial -- most, not all -- will start calling balls and strikes when it really happens, but, yeah, you can encounter a judge who is going to be punitive about those areas of discretion where he or she can be.

MR. HARDIN: You know, I'm in danger of being a sycophant for judges, I'm afraid, the more I talk about it, but my complaint is really not with judges. I may have misstated it a little bit. The pressure from judges occurs by allowing this unlimited discovery that they think they have to provide, so but I have very -- quite frankly, very -- I can't remember a judge that's punished me in his or her rulings or in the way they

conducted the trial because we wouldn't settle, but the system is operating in such a way, maybe judges feel they have to, that it imposes that pressure to settle, but I agree with Bobby. The rare occasions you run into that you just sort of go forward and ignore it. The only thing they can really do is you just can't get a trial, but my complaint is really not with judges so much as it is that the system imposes this. I would love for the rules one day to try to come up with a better way of "reasonably calculated to lead to admissible evidence." My God, I mean, that's half of our problem.

MR. MEADOWS: Well, you know, the rule really -- if you think about the rule as it's written, in the hands of a good judge it offers this control feature that you're talking about. The rule says you can only discover what's relevant. The fact that it's not admissible can't prevent you from getting it. If it's likely to lead to admissible evidence you can do it, but it still needs to be relevant. Well, that just becomes -- I mean, that could be anything, but somebody who is paying attention to the case and the issues that are going to be litigated, I mean, there is a relevance boundary, and the rule provides for it. It's just how it gets applied.

HONORABLE STEPHEN YELENOSKY: But --

CHAIRMAN BABCOCK: Alistair, I don't want to

keep skipping you, but in response to the judge's question Munzinger's arm shot up. I almost thought it was going to leave its socket. So Richard.

MR. MUNZINGER: This may take a moment, and I apologize for taking the moment.

CHAIRMAN BABCOCK: So you can't leave yet, David.

MR. MUNZINGER: I don't apologize to any judge in this room because I suspect most of you are honest and honor your oath, but I've been in front of judges who will not grant a motion for summary judgment. Why? They take an oath, "I promise God I will honor the Constitution and the laws of the State." They don't say, comma, "Except, God, I won't grant a motion for summary judgment." They don't say that, but that is a violation of their oath, and it's a very solemn oath.

I've been in the rocket docket in Northern Virginia and the rocket docket in the Western District of Texas and other rocket dockets where motions are ignored intentionally to clear the docket. Is that justice? Is that justice, for a judge to ignore a motion to clear his or her docket? Of course it's not justice. Now, what is it that judges can do that speeds settlement? That's one of the things they do that forces settlement. They ignore bona fide, valid motions to either attack jurisdiction, or

I've had judges tell me, "I don't grant Daubert motions. That is for the jury to decide." That is directly contrary to the genius of Daubert. State and Federal judges have told me the same thing. Is that justice? It's not.

And so everybody is concerned, oh, we're not having jury trials, we're not getting jury trials. Well, where did all of this arbitration business come from in Texas? I was having a conversation with somebody, it started with the Texaco case, when after the Texaco case the evidence came out that law firms were making very substantial contributions to the trial judges who were involved, and general counsel from corporations all over the country would -- in my cases would tell me, "I don't want to go before a Texas trial judge. Y'all elect your judges, and the other side can make a big contribution to him."

I listened to Mr. Gallagher this morning. I didn't -- you asked for questions to him, not comments. Had you asked for comments I would have had a comment. Yes, your perception is that you lose on appeals, but turn that back around when you're sitting telling a client, "Well, you may or may not get a fair trial in the trial courts. You may or may not get a good jury charge because the judge may or may not honor the law, because the judge

has a predilection to favor one side or the other or one lawyer or the other," but you can trust the appellate system in Texas in this -- and I'm not saying all judges are this way obviously, whether it's in El Paso or Laredo or other places that I've practiced, or Dallas, Houston. I've practiced around the state, Amarillo. You run into this everywhere, and we had this conversation this morning. At bottom, all human transactions depend upon the morality of the participants, and you can't pass rules that make people moral, I don't believe.

We can address the burden of discovery. We should address the burden of discovery. I don't know how you do it in an adversary system, but in response to the judge's comment about what can judges do to force settlement, they do it all the time by ignoring their obligations and their sworn oaths because -- and that's why there is arbitration, because the initial experience with arbitration was you could get a summary judgment, somebody would obey the law, somebody would read and trust and honor and apply the law. Doesn't happen in Texas courts always and everywhere, and that's a great shame. I'm finished, sorry.

CHAIRMAN BABCOCK: Don't apologize for that. That's what we live for, these speeches. Okay, Alistair.

MR. DAWSON: I agree with Rusty and Bobby

that the demise of the jury trial is a huge problem, and when I think about it I sort of attribute it to probably three things. One is tort reform, both judicial and legislative. The second is the rise in arbitrations, and the third I think is the cost of litigation. I think among at least the people I know who practice law most people have a belief that we've had more than enough tort reform, we don't need anymore, and most people I know believe that the arbitration system really doesn't work very well. They're very dissatisfied with the arbitration system.

So but what can we do about the cost of litigation? Rusty is right. There are a number of cases that you tell the client, "This is what it's going to cost you to defend this case through trial," and they say, "Well, if you can settle it, go ahead and settle it. If you can settle it at a number that's less than our cost of defense then that's a good business decision for me"; and so people are settling cases that if they tried them they would in all likelihood prevail; and I think that the costs of litigation to get a case to trial, in my practice there's two big cost factors, electronic discovery and depositions; and we need to impose limits on those except for good cause shown or, you know, let's have a limit on the number of hours of depositions in every case, except

for good cause shown. If you've got some, you know, humongous case and you need more than 60 or 70 hours or whatever it is, come up with a number and you can go to the trial judge and say, "Look, I know the rules only give me X many hours, but I need more and here's why"; and I trust in the trial judges to make those decisions; but if you had a limit -- and I would propose it be an hour limit so you could take 35 two-hour depositions if you want, or 10 seven-hour depositions. You decide how you want to allocate your hours.

So I think we should put a limit on the number of deposition hours in every case, and then we've got to deal with electronic discovery, and there are only two ways that I can think of. Robert probably knows this a lot better than I do, but either limit the number of custodians that have to be searched, again except for good cause shown. You put in the rules you only have to search 10 or 15 or whatever the number is, and then I would also like to see us maybe through this complex court thing that we have in the new law have electronic special masters available, so if there is disputes about what the search terms are or the length of the search terms and for a period of time you can have an electronic master available, an electronic special master available, to help rule on those.

And then my other practical suggestion is if you're going to limit the number of deposition hours, I would suggest that we force litigants to identify -- have a preliminary trial witness list earlier in the case so that people know early -- I mean, you get a pretty good idea after you've spent some time with the documents who your trial witnesses are going to be. Let's force people to identify them so the other side can get their depositions and they don't have to go try to figure it out and play the games that we play with all this stuff. You know, so I think we've got to do what we need to do to reduce the cost of litigation and that will go a long ways to helping some cases get to trial.

CHAIRMAN BABCOCK: Frank. Frank.

MR. GILSTRAP: What I'm hearing is -- here is that we're not having as many jury trials as we should, the reason we're not is because of the cost and the way the cost is involved primarily with discovery, and the solution is to limit discovery. Well, we've got a way to limit discovery in Texas. We just put it in the expedited trial rule I think that was just promulgated. It's 190.2 or level one discovery. It's got all of these limits in it. How is it working? Does anybody know?

PROFESSOR CARLSON: It's not effective yet.

PROFESSOR DORSANEO: It's not effective yet.

MR. GILSTRAP: Well, we've had the level one discovery, haven't we? We've had that for a while. Are people using it? Is it working?

MR. HARDIN: No.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: In small cases people go to trial without taking any depositions at all. They get the medical records, and they go to trial, and there's no impeachment because no one has deposed anybody. So, yes, level one cases are working. You-all don't see level one cases, but they exist and they work. I think limiting, you know, discovery is good, but not sure we can do it effectively on a rule basis. If you give the trial judge the ability to limit it in a case by case basis, it might be better, because I think it would be very difficult to have a one size fits all limitation on discovery.

CHAIRMAN BABCOCK: Okay. Let me interrupt for just one second to introduce, in case you don't know, Oscar Rodriguez. He's in the back of the room here. He is the new President/Executive Director of the Texas Association of Broadcasters, our gracious hosts month after month here. Oscar, thanks for letting us squat.

(Applause)

CHAIRMAN BABCOCK: And the broadcasting

community had a terrific loss recently. Ann Arnold, who was the longtime Executive Director, passed away in her office right behind me and had a marvelous funeral at the state capitol in the Senate chamber, attended by a lot of luminaries of our State. She was a special person, and we thank her for letting us be here for all of these years, but the association is in great hands with Oscar. He's been here a long time and he knows what he's doing. So thanks, Oscar.

Okay. Who had their hand up? Lonny.

PROFESSOR HOFFMAN: Okay. So a few points to follow up, especially on what Tracy just raised. So first I'm in agreement that what -- the little that we know, and we know very little on the state system, but we actually know a fair bit more on Federal side. We know that discovery -- out of proportion discovery costs, out of proportion to the value of the case, are not a pervasive problem in Federal cases. The data is fairly clear Federal Judicial Center stuff. So we ought not to pass a rule that limits discovery in all cases when, A, it turns out to probably not be a problem and, B, we just aren't going to know the cases that do. Indeed Rusty sort of -- you know, you're in a great position because you represent both sides, so sometimes that's going to help you and sometimes that's going to hurt you.

The notion of giving judges discretion and sort of enabling them seems like a much better way, not a sledgehammer but rather giving them the right tools to use it. A second point that follows from that, I think, at one of the breaks I talked to David Slayton about a conversation I've had with Carl Reynolds for many years about how OCA has never been able to get us good data at the state level because they don't have the resources and because we haven't had the clerks coding the right stuff over the years.

So we actually don't -- the statement I just made that empirically on the Federal side we know discovery is essentially a nonevent for everything except for maybe somewhere in the range of between 10 and 15 percent of the docket, and by the way, that number is probably inflated, but that's the extent of the problem. We know that there is a small category of cases in Federal court that have big, outsized problems. Those tend to be the cases that a number of people -- that Alistair is going to see in his docket, that, you know, Robert, you're going to see. Exxon is going to be involved in a lot of those cases, but we know those numbers are not -- but we don't know those numbers on the state level. One suggestion thus for the Legislature to think about and/or for this committee to consider getting outside funding for

is to fund OCA to do that, to have a neutral party help us come to a better understanding of what the data is so that we can make good decisions, legislative and rule-based decisions.

And then a third last point I want to make is that there's another cost component in discovery, in litigation I should say, that strikes me as a more significant one because it's more pervasive. So the problems that we're describing I'm not at all suggesting that they're not important. Again, they're only important for a small percentage of the docket, but the problems of litigation access are much, much greater when you're talking about small-dollar cases and people not being able to find lawyers to deal with those cases because it's not worth it to the lawyer to take it on contingency, and it's certainly not worth it for the person to pay them by the hour.

So funding -- finding ways to incentivize lawyers, funding public interest work, those are the sorts of kind of legislative solutions as well as to the extent we can figure out outside of the Legislature that have a much greater likelihood of impacting a wide, wide range of people, everything from loan assistance repayment programs that we've tried but, of course, terribly gutted in the last year in a lot of other settings, as well as a host of

other ways to incentivize lawyers to do that work and/or provide public assistance, and those are serious issues that affect all of society.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Back to Frank's question of whether or not these discovery limits are working that we have, our discovery control plans. I agree with Judge Christopher that there are those type of cases that people come in and try and that works. What I think might help is under level two it sets out certain limits, but Rule 190.4 reads that the court must on a party's motion designate a case as a level three case. Well, I see agreed scheduling orders all the time, agreed with the parties, to designate this a level three case; and I can look at it and say, "That doesn't need to be a level three case"; and so I think if the judges were given some leeway, you know, you don't need a level three case for a little breach of contract or for a car wreck; and that would be one way to do it because usually the length of time getting to trial in my experience is not a function of the court. It's a function of how long the lawyers take to get it to trial.

CHAIRMAN BABCOCK: Lamont, then Judge Yelenosky.

MR. JEFFERSON: So the big ideas for the --

for today and I'm going to just lay out three big ideas without a lot of details, but that I think are three components of really the same idea that I think would go a long way in all kinds of cases. First is self-disclosure of relevant issues; second is an early -- and I mean within three or four months -- hearing on the merits; and third is a liberal review of whatever the decision is at that hearing; and I think that formula works for small cases, for big cases, for every case, and then you can fill in the details with how you do it. I mean, self-disclosure I think is usually pretty obvious. If you're in control of your information, you have the ability to sift through that information in the most economical way and produce to the other side. You have a duty to produce to the other side everything that's relevant to the issue. That can be accomplished pretty easily.

The early hearing on the merits to me is the key because that will drive a settlement. Either you won't have the hearing or the result of the hearing will be enough that it will drive settlements in most cases, and people -- that's where I think the tension is because everyone feels uncomfortable going into this hearing early and without having the case one hundred percent discovered, and that's where we get bogged down in costs

and technicalities, and so if everyone could just get used to the idea of we're going to have a hearing and we're going to have it with an imperfect amount of discovery and we're going to get a decision, that will drive results. That will drive settlements, and it will drive -- drive cases to conclusion; and so the safeguard to that, the safeguard to knowing that we're going to have a hearing on the merits early that's going to be with imperfect discovery is a liberal review process, whether that's in the state court or whether it's in the appellate court, is a detail that I don't have worked out, but, I mean, the result of an early hearing ought to carry some weight going forward and so because that also drives the self-disclosure. If you can discover post the hearing on the merits, if there was some disclosure that didn't happen that should have, that ought to be the subject of some review, but I think that formula, self-disclosure, early hearing, liberal review of that hearing, if there's a way to implement it would go a long way toward getting everybody engaged in the system and adopting the system.

CHAIRMAN BABCOCK: Okay. Thanks, Lamont. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, that's certainly a big idea. I'll have to think about that because you're talking about an actually merits hearing

within a few months on complex cases. Well, I wasn't prepared to respond to that, but a couple of things, picking up on one thing Lonny alluded to, people who can't get lawyers or can't get cases going, small cases, because we had started out -- we had started talking about cases that are compelled or forced into settlement and therefore there is no jury trial; but we do have a lot of people who still need access to the system; and the new rules, which aren't in effect yet, maybe will help there. I hope so.

I mean, just the other day I had a small consumer case involving a defect in the home construction, and I had to let the attorney withdraw because the couple just couldn't pay the lawyer anymore, and he had only -- you know, it was less than $20,000, but they hadn't paid the portion that they needed to pay, and they had time coming, so they are out of the system unless somehow they can get a new lawyer and/or do that jury trial themselves, so let's not forget that we've got a lot of people in that situation who aren't forced into settlement. They just don't get to the courthouse or don't make it all the way to trial because we're talking about really small dollar cases.

On the discovery and the production, I can't speak for other trial lawyer -- or trial judges, but, boy, I would need some help with the change in the rules or,

frankly, the lawyers defending against the discovery request doing a better job of explaining to me under the current rule why the other side shouldn't get it, because behind everything is a lawyer saying, "Well, Judge, I don't know what I don't know. I don't know what they have," and when they're asking for X, it doesn't matter whether X is one page or 10 pages. I don't decide based on pages. If they can tell me that, "Well, we need to know what's in all of these leases," it's then irrelevant whether all of these leases amount to 15,000 pages. I can't say, "Well, you get 5,000 of those 15,000 pages." So the current rule, which as it says, "likely to lead to," I mean, there is some kind of relevance of likely to lead to parameter there, but the lawyer seeking doesn't know what's there, the judge doesn't know what's there, so that rule either needs to change or lawyers defending, at least in my experience, need to do a better job of explaining to me why they shouldn't get to look there.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: Yeah, it seems to me that for cases that are under $10,000 that the JP courts really are working pretty well for citizens, because most of them don't retain counsel and they get their day in court and they get heard and they get two days in court if they want to appeal by trial de novo and maybe three, so

that level of cases seems to be working well and hopefully the justice court rules revise will further enhance that experience.

The new 100,000-dollar under expedited proceeding is something we should find a way to follow more than just anecdotally. I think Lonny's right, and OCS, the folks here, see if it really is productive and if it does save the system expense and the litigants have more access. I think it would be wise to think about a corresponding expedited appellate process for cases under 100,000. You can have an expedited more inexpensive case, but once you get to the appellate process in that level of case it's pretty expensive. Maybe going forward on appeal with truncated briefs or going forward not requiring appellate judges to write full opinions, maybe even having motions where the litigants go before a panel and the court decides it based upon that as opposed to the full-blown evidentiary trial. I mean, we all know there are different kinds of cases, and everybody agrees one size cannot fit all, but it seems to me that at least for me citizens should feel they have access to the court, and when we get to the high-dollar cases those have to be engineered almost customized, but for those level of cases, it may just be effective. We may be where we need to be.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: So much has been said, what I wanted to confine my comments to was the possible explanation for a reduction in the demand for jury trials. I got licensed in 1975, which is about a midpoint between the 1960's and before, which was the dark ages for plaintiffs in this state, and the 1980's, which was the golden age for plaintiffs in this state.

MR. HARDIN: And the 2000's, which is the dark ages again.

MR. ORSINGER: It has become a dark ages again, okay. And talking to the practitioners that were experienced when I came online, they would tell me that if they got assigned to a certain district judge in San Antonio the plaintiff's lawyer would always nonsuit if the statute of limitations hadn't run because if they managed to get a favorable jury verdict there was always going to be a motion for new trial; and then we got into this area where a bunch of things all kind of happened at the same time; and I don't know societally what they were; but I do know in Texas it was very difficult for a plaintiff's lawyer to sustain a jury verdict because of the complexity of the jury charges and the inferential rebuttal issues that led to conflicts that resulted in the loss of a favorable jury verdict; and so we moved to broad form

submission, which made it possible for a plaintiff's lawyer to get a verdict and hold it and get a judgment on it.

And then I can remember one of the first books I read when I was in law practice was written by a man named Melvin Belli. Probably most of you have heard of him. It was rudimentary, but apparently he became nationally, if not internationally, famous for the idea of using exhibits and demonstrative aids to persuade juries. I remember reading the book. It was a big, long, thick book, and he had photocopies of his hokey exhibits, and then you look at these guys now that have the -- they're like the Wizard of Oz. They have the computer stuff up on the walls and sound and all of this other stuff, but back in those days it was really, really primitive.

And so right in the 1970's these plaintiffs lawyers started having the opportunity to actually get jury verdicts, and they started developing the skill to actually persuade these juries to return these fantastic levels of damages compared to what had gone on before, and so then the competition started and then instead of everybody just being a plaintiff's lawyer, now you had good plaintiffs' lawyers and then you had great plaintiffs' lawyers, and the great plaintiffs' lawyers would get million-dollar verdicts and then they would get

10 million-dollar verdicts and then they would get hundred million-dollar verdicts, and then there was a club of people that had, you know, more than a hundred million dollars worth of verdicts or 500 million, so it just enormously inflated.

And about that time here in Texas, as we all know, the Texas -- the Texas Supreme Court at that point was expanding civil liability theory incrementally, but controversially, and so there was this heyday where there was this enormous potential payoff to take your case to a jury, and if you had truly great damages you had a great shot at getting them, but some plaintiffs' lawyers were really good at getting big awards when their damages really weren't that big.

We had a reaction among the public. We all know, Justice Hecht, you were elected by the people to replace Justice Kilgarlin on the Supreme Court, and justice -- Chief Justice Phillips came in right at that time, and at the appellate level things started to shift, and so some of these larger verdicts started being taken away, and some of this seeming expansion of theories of civil liability ended up with dead ends or some of them were distinguished or limited or ignored in subsequent litigation, but on the whole -- oh, and then also the Legislature got active once the Republicans were able to

hold the majority, and they started imposing damage caps. You may remember the controversy when the first one was declared unconstitutional. We lost Barbara Culver off of the Supreme Court in a reaction to her vote to declare the cap unconstitutional.

The Legislature was moving on it. They -- whoever it is that was behind the defensive side of the docket started a public relations campaign on billboards and TV advertisements about lawsuit abuse, and it was going on everywhere. You could drive anywhere through Texas, Corpus Christi, Dallas, San Antonio, Houston, and you would see these billboards about lawsuit abuse. So the juries started returning smaller verdicts as a result of that campaign, and then it became a challenge for cause, and we have a significant Texas Supreme Court case on a plaintiff who was not allowed to voir dire the jury adequately on the effect of this public relations campaign to get smaller jury verdicts.

So the way I look at it is we went from a period of time where we didn't have a lot of demand for the civil trial system because there was no real incentive to go to court because you couldn't get a verdict, and if you got it, you couldn't keep it, to this era when it was just fantastic. It was better than going to Las Vegas. If you had good sympathetic facts and you had good

demographics on your jury and you had a good trial lawyer, you could get this enormous verdict, and so everyone was attracted to go to the courthouse. The demands were astronomical. The defendants couldn't agree to pay that much, so they would end up going to court.

Well, now we live in a different world. So the courthouse is no longer this fantastic place where you can go to make millions of dollars, and so I'm wondering if maybe it's not just natural, just part of our overall politics and demographics that in the 1960's and before we didn't have that great a need for our civil trial system, from say the early Seventies all the way up through the Nineties or whenever it changed we had this enormous demand for the opportunity to go get these huge damages, and now they're going to get reversed, the jury is not going to give them to you, you've got caps anyway, there's all kinds of restrictions on who you can sue and how much you can get, so there's not as much demand for juries anymore because there's no real payoff. There's no real reason for you to ask for these astronomical numbers, and that may not explain what's happening in the United States of America, and the thing that concerns me is that my personal experience in Texas, I can make sense out of what happened, but I'm not sure that that explains why the jury is dying off everywhere else in America. Buddy, you

probably have a much better perspective than I do, but maybe the juries are just not needed as much.

MR. LOW: You're absolutely right. Belli did start that. Lou Ash is really the one that did it, who was his partner.

CHAIRMAN BABCOCK: Speak up, Buddy, because the people back there --

MR. LOW: Lou Ash is the one that really started that, Belli took credit, but anyway, I won't go further on that, but he's the one that really did that, but we had jury trials. I defended -- I would have 400 insurance cases, and you'd go to trial, didn't take but a day, no depositions; but if I got stuck more than my policy limits, which was five at that time, there's no Stowers. Nobody would do that. You just pay it off and go on, so there was not -- no reason not to just try it. It was really easy, but then came the time when lawyers would settle a case, and they would get 3 million, but there would be a pay out, a structured settlement, of 40 million over 50 years, so they would publish that they got 40 million. Well, the verdicts got exaggerated. Juries started giving more, and the public said, "That's the end. We're going to stop here," and that's what happened.

But I see the courts as we don't let -- the courts don't legislate, they shouldn't. The courts should

follow and interpret the laws the Legislature sets, and you can take a statute, and Justice Hecht might interpret it one way, Jeff might another way, but that's controlled by people that elect them. They elect these judges. That's what they're doing, so, I mean, that's the way it is. You're absolutely right of how it's changed, and that's a sign of the times, what people want.

CHAIRMAN BABCOCK: So the substance of what you two are saying is that this is cyclical and let's not worry too much about it.

MR. LOW: No, I'm saying --

CHAIRMAN BABCOCK: Well, that's what he was saying. I'm not trying to --

MR. ORSINGER: And, by the way, I think discovery is killing the trial process --

MR. LOW: Right.

MR. ORSINGER: -- not just jury trials, but it's killing the trial process even in a nonjury world like family law. Although, we do have juries, but usually we don't get them, but I'm saying there was a period of time when the courthouse was a place to go make millions of dollars, and that's not true anymore, and so not as many people want to come.

MR. LOW: Absolutely. When we were doing the discovery rules Justice Sam Houston Clinton used to

come to the meetings. You remember?

MR. ORSINGER: Sure, Court of Criminal Appeals.

MR. LOW: And we're talking about, "Well, I've got to have 15 depositions," and the defense said, "Well, I've got to do this, I've got to do that"; and I asked him, I said, "Do you have serious cases in your court?" He said, "Yeah, a man can lose his life." I said, "What discovery you get? You get Jinks and you get Brady, and that's it." And I'm not saying we should limit it that much, but there's a real difference.

MR. MEADOWS: So, Richard, one question I have about your overview of history is whether or not your -- I think you're saying that before there was the effect of going to Vegas and trying cases before things changed around here that there weren't as many jury trials? Because it's my experience talking to lawyers who are older than I am talk about the fact that there were a lot of jury trials. I mean, disputes were resolved in the courts, kind of like Buddy was talking about trying all of those insurance cases when it was a simpler time and there wasn't this opportunity for great riches.

MR. ORSINGER: You know, they were small trials. I would go down to the courthouse when I was a young lawyer, and judges were really trying jury trials.

A lot of them were worker's comp cases that you could do in an afternoon. A lot of them were traffic accident cases that you could do in two days.

MR. LOW: Right.

MR. ORSINGER: And we took comp away, we took it out of the legal system, and that took a lot of jury trials away. People that are older than I need to comment on that, but a lot of the jury trials up to that reform were comp trials, but they were all --

PROFESSOR DORSANEO: That's how we learned.

MR. ORSINGER: There you go. Okay. You're an old comp lawyer, sure. I forgot. Bill Dorsaneo can tell you all about that. He used to do like three -- how many did you try a week?

PROFESSOR DORSANEO: Well, me, not that many, but David Keltner would tell you that that's all he did, that that's where he learned to do everything, and that's where I learned to do the little that I knew.

MR. ORSINGER: Okay. So at any rate, I'm not saying that there weren't jury trials, but I just don't think the demand was there, and I don't think that -- maybe some of the old-timers can give you a better perspective because I came on board right when that transition was happening, at least from my perspective.

CHAIRMAN BABCOCK: Skip, you had your hand

up. Was that because you were an old-timer?

MR. WATSON: You bet. I can't help but remember that the Federal system had this precise discussion back in 1990 when Congress passed the Civil Justice Reform Act and required every single district in the United States to study, issue a report, and then submit a plan for reducing costs and delay in civil litigation; and I would suggest that the Court, if it hasn't already, just read the 1990 Civil Justice Reform Act, because it -- you know, from what I remember of it, it had, you know, one or two very strong premises that I think were correct; and the one that stands out most in my mind that "You shall in doing these studies and reports consider this," the biggest one that struck me was that Congress recognized that the trial judge controlled the courtroom, controlled what was going to happen, controlled the case from the get-go; and Congress required that every plan have in it, if I remember the language correctly, it was "the early and active supervision of the judge in every case."

Now, that's become formulaic with submitting a, you know, litigation or scheduling -- a litigation plan or a scheduling order, but the concept was correct that trial judges to do their job need to know what the case is before docket call. They need to get into the case from

the get-go and determine how much discovery is needed by interrogating the lawyers, and it may be a quick phone call or even an e-mail interrogation, but they need to do it. They need to determine what this case is about and go forward on that basis, and then monitor it.

The second phase -- and this is very close to what Lamont was saying -- was that, you know, the Federal pretrial practice, that we are going to get this thing down, whether it's by summary judgment or before or at pretrial, to the actual disputed controlling fact issues. We're going to weed out the unnecessary or the unsustainable causes of action, the unsustainable affirmative defenses. We're going to get it down to what's going to be tried, what's really in dispute; and the best trials I had were the trials in which the Federal judge would come in and from the start of the case would tell the jury, "This is what we're litigating"; and the jury would be told, you know, "These are the claims, these are the defenses, and we will be focusing on these elements of these claims and defenses. Now, counsel, get up and give your opening statements." That I think would solve some of Mr. Bloom's problems and some of Rusty's problems.

But last and closest to my heart is that we are now four generations of judges removed -- well, with

the exception of Justice Hecht -- from Jack Pope, who brought us into the era of broad form practice; and I am very concerned that, as Justice Hecht said, what, 20 years ago that we've not only lost the philosophical moorings of charge objections, we've sort of lost sight of what broad form charges are about; and if you go back to the seminal case to me of *Scott vs. Atchison Topeka* where Justice Pope tried to sort out, okay, this is the way it's going to work, we've had a couple of false starts here, and this is the way it's going to work, there were a couple of principles that he had that were, you know, very important; and that was that broad form was not intended to be a situation of just submitting the ultimate legal issue and then standardized instructions and letting the jury go. It was just exactly the opposite.

Broad form was intended to be, at least as he explained it in Scott, an attempt to focus the jury on the effect of the controlling legal principles on the truly material factual disputes. It was not submitting abstract principles of law on disputed and undisputed elements of the case. It was an attempt to focus the jury using instructions, using simple concrete language on what was actually disputed at the close of the evidence; and to me that means that the charge conference has to be much, much more than an attempt to just get in and say, "Okay,

what are -- what's the plaintiff's charge, what are the defendant's objections, what are the defendant's issues, you know, what are the plaintiff's objections to those issues. Okay, well, put them together and send it out."

It has to be a winnowing process, and if I could just read to you a couple of things that I carry with me. "The explanatory instructions should focus the effect of the controlling legal concept on the relevant issues that are to be considered." "Should focus the effect of the relevant legal concepts on the issues to be considered." And then in terms of how it does that, he said, "The abstract statement of law was meaningless to the jury because it was without reference or connected with any of the issues before the jury. It failed to instruct the jurors on how to apply the law to the issues in dispute." We're not doing that. We're just giving billboard instructions followed by generic issues.

And last, they made it clear that in addition to focusing on controlling issues the charge has to limit the jury to those issues and to what they can properly consider. It says, "By complementary instructions the jury will be precluded from considering matters that go beyond the alleged" -- and I would add "proven" -- "issues in the case. This is the procedure required by Texas Rules of Procedure 277 and 279."

In short, what I'm trying to say is I think that the judges of this state -- and we have many good ones in this room -- have the capacity with the guidance of the Supreme Court to take control of the case from its inception by working with the attorneys, limit the expense and time it takes to get that case to trial, but when it gets to trial, it is tried on the issues that are truly in dispute. The noise that we throw in to try to avoid, you know, having the case weeded out, will be weeded out by an active, engaged judge; and I think the critical point here is that judges need to be engaged. I'm not -- I'm not being pejorative when I say that they need to know the elements of the cause of action and the defense before the jury is ever selected and they need to be listening to the evidence to see which of those elements have been proven; and once they get into the charge conference they need to be more like a Federal judge that will say, "Now, give me a break, counsel, that's no longer in the case," you know, and bludgeon them into admitting on the record that, no, we're not -- we're not submitting that. You know, we really aren't, and we're going to submit what's truly in dispute, and then once we submit the constituent elements that are truly in dispute, we're going to do it on instructions that get down to it and really say.

And I'm always reminded of -- you know, we

finally got 10 years after Doe when the Court said the substantial factor needed to be in causation, we finally got to Ledesma that said, "I don't care what the pattern jury charge said because we're going to bust it because substantial factor isn't in there"; but before that Justice Jefferson had said in Borg-Warner this one beautiful little phrase that to me is the way you say it in plain English. "The substantial factor is what separates the speculative from the probable." To me that's the way it ought to be submitted. Juries would understand that, and I think that's the way our charges should be submitted. I hope that's worth something.

CHAIRMAN BABCOCK: Buddy. Thank you, Skip.

MR. LOW: Chip, right now the trial judges have the proper tool. Rule 166 says, "Without undue expense or burden cause the parties to appear on discovery," all of this stuff, "on issues that are undisputed" and then it has a catchall, "other matters that may aid in the disposition," so the tool is there. 166 has been there since 1941.

CHAIRMAN BABCOCK: Yeah. Pete Schenkkan, and then Richard, and then whoever is raising their hand back there.

MR. SCHENKKAN: It seems to me there are three factors that are driving what's happening here. One

is the quantity of legal services that's required to get a case to trial and get it decided, and that has gone up because of the discovery, which has, you know, been fully allowed under the rules, and there are incentives for people to take the discovery there. They're not always symmetrical incentives. Sometimes one party has the incentive and the ability to pay to do the discovery and the other does not and has settlement leverage; but systemically, stepping back and looking at the whole legal system, discovery has resulted in there being a whole lot more legal services required to decide a case; and that drives up the price.

The second thing that drives it up is the price per unit translated into hours, and Richard's talked some about the way that happens, the way we got to the point where lawyers were up there with rock stars in terms of what they were making. I think it's as simple as pigs get fat, hogs get slaughtered. It's going to take a long time for that to unravel, but the unraveling has started. Ten years ago. And although the legal profession that my youngest son, who is in his -- finishing his first semester of his second year at law school, is going to be a very different one than the one I entered with Richard in 1975. There is going to be downward pressure on price from a gross oversupply of lawyers and reduction in the

demand for their services due to these other problems that will -- there will be some downward pressure on that. It won't cure itself, but it will move in a better direction over a long period of time. We can only chip away at the quantity of legal services problem by trying to do reforms about discovery. We should. They may help some, but they're not going to address the core item.

The third item, which I don't think we've really squarely talked about much here, I perceive as having been far more important than either of the other two, though the other two are real and important in themselves, in driving people out of what we think of as the legal system, what the people around this room think of as the legal system, and that is the open-ended risk of liability, not meaningfully -- perceived as not meaningfully controlled, whether it was punitive damages or mental anguish damages or class actions or we have a whole series of different kind of subject matter or procedural vulnerabilities in the system where the lawyer on the defense side, asked the question by the client, "Well, if it goes to trial, how big could the number be?" The only truthful answer was, "I have no idea."

That, aggravated by hot spots around the country, some of them alas in our own state, where people on one side or the other of the docket felt we didn't even

have a fair system at the trial level, I think led lots of people to say, "I'm out of here, to the extent I can get out of here," and there's different ways you can get out of here. One way is you can build into your contracts, "We aren't going to go into the legal system, we're going to go into arbitration," and those can be real bilateral negotiated contracts, and that became virtually standard it seems to me in major commercial transactions. That can be in contracts of adhesion or near adhesion. The statement about the Ebay, from sales, but people who could do it said, "I can't take the risk. It's too great."

Whatever the values of the American legal system, the kind we think of, the court system are, they are outweighed by the risks. I'm going to pay the price, the dollar price, the risk price, any price you want to think of it, the marketing price. I'm going to risk being perceived as being very unfair by insisting if you want to go on my online deal and buy something from me, you're going to agree to go to arbitration because I'm not going to take a chance of being taken to trial in a hot spot somewhere in the United States. I'm going to take the back price, and a lot of people have made that decision.

Or we've made a political decision inside our -- the true -- the proper political part of our system, the legislative system, to address some of these

specific problems, whether it was workers' comp in 1989 where, yeah, everybody got to learn how to try cases, but the worker did not get a dime until either the case was settled or it went all the way to final nonappealable judgment, and the workers' comp insurer risked at the hands of the good lawyer with a badly injured worker as the client and in an unfavorable forum a truly open-ended number that couldn't possibly be reconciled with the system, and so we replaced it with the revised workers' comp system that says we're going to have administrative decisions that are going to be made this fast and here are the dollar amounts that the workers are going to get and not a dime more, because, again, whatever the virtues were of letting good lawyers like David Keltner or Bill Dorsaneo try as many of those cases as they wanted, stepping back as a system, it was a disaster.

More politically -- that was politically controversial even then, the tort reform legislation that passed is that -- there's a famous story about it coming down to the very end of the critical whatever it was 17th vote or something in the state Senate to pass the damn thing at all. It happened a whole lot more easily but still very controversially recently to the whole system with med mal. I'm not going to take a side on whether that was, you know, a legitimate response to the problem,

but it is a good empirical example of the perception of the problem and the way people respond and will respond when they see that happening.

So what can we do? I don't think this is within the scope of tinkering with the rules. This has to do with statutes, and it seems to me that if we're serious about this, if we're proud of our product -- and I am. I think the Anglo-American legal system is one of the finest creations of the human mind and one of the most enormous contributions to just and stable societies that the world has ever seen, so I'm in favor of us doing a better job of selling our product if we can, but it seems to me it has to be done by the statutes, and we have to look at how we can respond to that perception that our system is inherently unreliable, that it -- the open-ended exposure is unacceptable, and try to integrate a solution to that with the part that we do best.

Because my understanding of the people who are beginning to see the problems with arbitration is it's really not quite a legal system. At the end of the day what you have is an almost unreviewable decision by one or three people who may or may not follow anything we would recognize as the law, and that's really not what the legal system offers. It's supposed to offer a reliable application of some set understandings about what the

rules are; and if we can integrate that, if we can make it possible to do arbitration or something like it at the bottom end and then have that be subject to meaningful -- some kind of meaningful but free of the cost of discovery rules. The plaintiffs' side of the bar ain't going to like this a bit, but where necessary, where we're dealing with intrinsically open-ended concepts like mental anguish with some limits on those that people can count on then maybe you can encourage to buy back into our system.

CHAIRMAN BABCOCK: Thanks, Pete. Nina.

MS. CORTELL: Well, I guess --

CHAIRMAN BABCOCK: Then Peter.

MS. CORTELL: That fits a number of thoughts I had. I do think that there is a bit of the bloom is off the rose of arbitration. It was seen initially as something that would be far less expensive, far more predictable, reduced risks, and so forth; and now I think we have a number of people in that system unhappy with it because the results are so arbitrary sometime, expensive, and then not reviewable. So a little bit contrary to what Mr. Gallagher said earlier, I think we have a product that arbitration does not provide, and that is our appellate system. I wonder if we might look at that to find a way -- this would be building on what Elaine said earlier. Elaine said restricted, shorter time periods, maybe

shorter products in the appellate system for less expensive cases, and I would say for other cases as well we might look at ways to expedite that process. I don't know whether timetables or what we might look at, but I think that is a very important, if you will, product that we offer that arbitration does not; and we have a ready audience out there that might choose the court system over arbitration if we could maybe streamline that process and show better return for the money and less delay if possible. That would, of course, mean that we keep all funding in place for our appellate judiciary, because what I'm hearing is cuts that there may be for clerks and so forth. If you were to streamline timetables I think you would have to make sure you had adequate resources there.

To Buddy's point about Rule 166, I think he's exactly right. The problem is most judges don't embrace it. One even told a group of -- I was watching young lawyers in Dallas -- that that judge didn't have available -- I'm trying not to say gender here -- to that person what the Federal judges have; and I went, "No," you know, and took up everybody I could find after that meeting and said, "No, no, no, there's Rule 166." The problem is most judges see that as fulfilled, I think, when they issue their scheduling order.

So to what Lamont said earlier and what's

basically been said around the table, I very much agree, and I think Skip mentioned it out of the Civil Justice Reform Act, early and active involvement by judges in controlling the case whether it's a merits disposition or some other means of really having meaningful early intervention, I think that's very important.

CHAIRMAN BABCOCK: Nina, thanks. Pete, we're going to defer your comment for a second because Chief Justice Jefferson wants to say something and then we're going to lose our justices. They have another commitment this afternoon, and I'm hungry, so, Chief, what do you have to say?

CHIEF JUSTICE JEFFERSON: Well, I just wanted to thank you for this great discussion. I've learned a lot, as I always do when I come to these meetings and when I used to be on the committee itself. I wanted to just follow up on one thing that Pete said, and it's something I never even thought about as a practicing lawyer, but engage the Legislature. I mean, you know, there is so much that is done there. It's dirty and messy and, you know, the tradeoffs are hard to take, but you can make a lot of -- you can make a big difference in terms of the direction of the legal policy in this state and more than you realize. Because you're good lawyers, you go in there and you talk to the staff or to the chairman of

appropriations or whatever, and what you say can have a big, big influence, and I -- so I think -- and I'm not talking about doing it as the Supreme Court Advisory Committee, but the individuals. Be aware of what's going on and make trips to Austin and change things.

The second thing I wanted to say is beware of some of the bills that are going to come with the new Legislature. They will be bills that threaten judicial review, that threaten substantial rights, and that may have a chance of passing, and I just think you ought to be aware of those.

The other thing I wanted to say is what I've been seeing -- and now it's been 11 years on the bench -- is that citizens can't afford our system. I mean, just even middle class, small businesses. It's not just a question of the indigent. It's a real question of a majority of the people in the state of Texas can't afford a lawyer and can't protect their rights; and then there's some category, subcategories of that, that worry me; and that is juvenile justice. You know, I sat in on Judge Meurer's -- a day of her proceedings, and there are people from middle class to poor that their kids are -- their lives are being changed fundamentally by what's going on in that courtroom or through the tickets; and they have no ability -- they can't hire a lawyer. I mean, we've got to

address that.

We get parental termination cases, cases involving termination of parental rights, where there's no good lawyer involved with the state or for the parents, and it's a tragedy and travesty, or things like evictions and things that have to do with benefits. There are people who just -- we're talking about things like life, liberty, and property, and there's no good lawyer involved in helping these people attain their rights, and that's going to -- that's a societal problem, but maybe the Legislature has some -- can provide some answers to it. It's going to take some funding of things like huge -- you know, there's been an increase in indigent defense, things like Access to Justice where the Legislature actually comes in and funds it, but, you know, your help on that would be welcome.

And I guess the final thing is I do think we need to look at judicial selection, and I do worry about the quality of judges if we don't do that, and I do worry about these -- the huge sweeps that are happening, and they will continue forever, and right now it's a lottery. You're lucky -- we're lucky to have the judges that we have, and I think we do have really good judges, but we lose them for no good reason. I mean, for absolutely no good reason, and those are the kinds of judges who decide,

you know, early on how the case is going to progress and reduce the cost of litigation. If you don't have good managers then it's whatever rules you adopt, you're lucky if they're enforced properly, but anyway, those are my two cents worth.

CHAIRMAN BABCOCK: Chief Justice Jefferson, thank you so much, and would you permit Mr. Hardin 60 seconds to respond?

CHIEF JUSTICE JEFFERSON: Sure, yes.

MR. HARDIN: I asked for it just before the two of you left because my schizophrenic side now wants to -- I would not want you to leave thinking that this committee is reflective of the attitudes of the whole bar, because I think we're top heavy with people that are more defense-oriented, and I want -- I want to point out and maybe Mike Gallagher wanted to say this, I don't know. There is this perception in the bar that the appellate judiciary in the state now is inhospitable to jury verdicts. Now, I'm not wanting to argue that issue with you right now or anything, but I would hope that maybe one of the things that comes out of this is if we can get past the anecdotal issues I think we're going to find if we did a study that Richard is wrong, jury trials have been decreasing on a steady basis. What the verdicts were may be different, but if we had a study endorsed by the

Supreme Court -- and I don't know whether the funding would be there -- I think we would come up with some ideas that would show that there need to be changes in favor of both sides of the bar that affect jury trials, both the plaintiffs and the defense bar, and I think the only way we're going to get past that is we move past the ideological predilections of people and have the kind of study that Lonny is talking about, and I think we're going to find that there are abuses in the system that can be changed that would affect both the quality of justice for the defense and the plaintiffs. I just wanted to leave and say that there are some plaintiffs' concerns out there that we haven't been addressing today.

CHAIRMAN BABCOCK: Great. Thanks, Rusty. Now, the good news is we all have Christmas presents, including you-all, and Angie will be handing them out; and in the meantime we'll have lunch; and thank you, again, so much for attending, Chief Justice Jefferson and Justice Boyd. We're in recess.

(Recess from 12:25 p.m. to 1:21 p.m.)

CHAIRMAN BABCOCK: Peter, sorry, you got cut off before lunch, but it was unavoidable. Hey, guys, we're back on the record. So, Peter, your thoughts, and again I apologize for not getting you before lunch but --

MR. KELLY: No problem.

CHAIRMAN BABCOCK: -- one of those things.

MR. KELLY: To touch on something that Judge Christopher said about adopting rules for one size fits all that will affect every single case, I think it's dangerous to address the discovery issue, the runaway discovery issue, through that type of rule when the problem is really, I think, legal economics. The most efficient cases I've ever seen tried and discovery done were one party on a contingent fee and the other working for a flat fee, and Wal-Mart, for instance, always defends on a flat fee. There is no incentive to do extra discovery on either side. The plaintiff's lawyer with the contingency, he doesn't want to incur extra expenses unless it's actually going improve his case. The defense lawyer working on a flat fee has exactly the same incentive. He's getting paid $5,000 no matter what.

When you have an hourly rate there is an incentive for the lawyer and it becomes lawyer driven to, you know, go turn over every stone, list every possible witness, review every document three times, and that drives up the discovery, not -- it's not a rule-based problem. It's an economics-based problem, and that touches on something Skip said about narrowing the issues on the case, and this could be something that affects discovery. The sooner the real issues are narrowed down,

what discovery you have, the quicker trials are going to be. I think one way to do that is to get rid of the general denial, Federalize the practice of denial so that we have specific denials of allegations. You know, in a dog bite case, if the defense is "It's not my dog," or "The dog didn't bite me," well, if you're going to concede that it actually is your dog then that's one less deposition I have to take.

PROFESSOR HOFFMAN: Is that the Peter Sellers defense? "Does your dog bite?"

"That's not my dog."

CHAIRMAN BABCOCK: "I thought you said your dog did not bite."

"It is not my dog."

MR. KELLY: But that would very quickly, if you have denial, get rid of general denial so that when the defendant has to make allegations they have some bite what they're actually contesting in the suit going forward. That would just automatically limit the amount of discovery that has to done. So get rid of general denial is my recommendation.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: To revert to an earlier point, Luke Soules made the gift of telling me about this rule of procedure, which I've been using since that time,

and I want to share it. It's Rule 248 of the Rules of Civil Procedure, and I'll read just the part that's applicable. "When a jury has been demanded, questions of law, as far as practicable, shall be heard and determined by the Court before the trial commences." And I have used that Rule 248 sometimes to try to get a judge to rule on a legal dispute, including the proper wording of an instruction or a question in the jury charge, just filed a motion, Rule 248 motion. You can put whatever legal issue you want. It's not a summary judgment. It's not a pretrial conference. It's a motion that you need to get a ruling on, and sometimes the judges will go ahead and do what they're supposed to do under that rule, and if you have that going in you can actually know what your charge is going to look like at the beginning of the voir dire process when it's really important because you want to find out whether they'll agree to follow that law or not.

So anyway, that was Luke's gift to me and my gift to you-all. Merry Christmas.

CHAIRMAN BABCOCK: Now, how many people did not know about that rule, raise your hand?

MR. ORSINGER: Oh, well, everybody knew that.

CHAIRMAN BABCOCK: Everybody knew about that rule.

MR. HAMILTON: Did you read the part that said "as far as practicable"?

MR. ORSINGER: Yes, I did, and in most courts it's not very practicable.

CHAIRMAN BABCOCK: Yes, that's the problem. Yeah, Robert.

MR. LEVY: One ancillary point to what we were discussing before is that the challenge of discovery and costs in part are due to the fact that the party requesting discovery has no disincentive to ask for everything or as much as they can possibly get, and if a court culls it down then it's still there's no real cost or impact, and so a point for consideration is whether we should look at some way to allocate costs to the party that's going to benefit from it. It's an economic analysis that says that if you're going to ask for discovery and you're going to get the benefit, then you should bear the cost or at least some of the costs of the other party producing it, and that way you're going to ask for what you need and what's going to really help your case, and the other side isn't going to be overburdened with the cost of producing it, and there are different ways you can do that.

You can make it recoverable costs, costs of court. You can require the party to actually pay it

during the process, but it will help incentivize from an economic point of view the party that is going to -- the party requesting the information to actually get what they really need and not use discovery as a way to try to leverage settlement, because unfortunately we do see that today where parties will ask for information because they know that's going to help them get a settlement if the cost of discovery becomes so high.

CHAIRMAN BABCOCK: Okay. Great, Robert. Thanks. Yeah, Richard.

MR. MUNZINGER: My personal experience is that the greatest cost in all litigation is in the discovery process. It may be time for -- pardon me, for the Court to appoint another task force as it did some years ago when it appointed the discovery task force because the practice has changed, I think, dramatically given computers and computer searches and the cost of that. The problem obviously is, is that you're searching for truth, and sometimes the truth is found in a fax legend on a document. I mean, we've all tried a case where some little line or some sentence or one whatever it might be, it makes a difference in the lawsuit, and so there's got to be a tradeoff, of course, between volume and the search for truth, but it may be time for another task force, and I suggest that.

CHAIRMAN BABCOCK: Okay. Good. Yeah, Carl.

MR. HAMILTON: When we put together Rule 194, which is the request for disclosures rule --

CHAIRMAN BABCOCK: Right.

MR. HAMILTON: -- the background of the part under 194.2(c), which requires disclosure of the legal theories and factual basis for the claims and defenses, background for that was that many plaintiffs were filing lawsuits with shotgun pleadings without any real basis for the pleading, and they hoped to discover their case and the facts to support it through discovery. So we were trying to eliminate that, but it didn't work too well, because most people respond to that request now just by saying, "It's all stated in my pleadings," you know, which doesn't get you anywhere. And maybe we need to beef that up a little bit and have the issues identified by some rule, a factual basis and the legal theories specifically, which would more narrowly define what discovery ought to be about.

CHAIRMAN BABCOCK: Good. Lisa, I got a note from Justice Gray that his many multitude of ideas were more appropriate for the Legislature than for the Court, but that he had left you with ideas that he wanted you to express to our committee. And Justice Patterson had some, too.

MS. HOBBS: He did not leave me his, so I have Justice Patterson's.

CHAIRMAN BABCOCK: Okay. Well, let's hear from Justice Patterson then.

MS. HOBBS: Justice Patterson thinks the -- she has two areas of potential reform. One is nonpartisan elections, which we've talked about.

CHAIRMAN BABCOCK: Right.

MS. HOBBS: And then the second one is the recusal rule. She would tweak the draft that has been pending at the Supreme Court for sometime now and then also do appellate court recusal rules, but she did not leave any -- like any details of her plan, but that was her suggestion.

CHAIRMAN BABCOCK: Okay, great. Thanks. Richard.

MR. ORSINGER: Yeah, as long as we're down into the weeds, some years ago --

CHAIRMAN BABCOCK: Speak for yourself.

MR. ORSINGER: -- when we were coming to the Rule 194 disclosures, this Court -- these Supreme Court tasked the committee to develop Rule 194 disclosures that might be appropriate for specific practice areas, and the family law section did at the time -- I think I still have a copy of it on one of my computers. I don't know if it

would still be in the rule books here, but --

CHAIRMAN BABCOCK: It's not a form, is it?

MR. ORSINGER: It's not a form, I promise you. It would be a provision that would apply to children's issues and property issues that balanced having enough information with burdening too many cases with too much production, and it was endorsed by the entire Family Law Council and forwarded here, and it could be very beneficial in divorces because it would routinely require the production of this information, and it might be a discouragement to people going beyond that. At the same time that was going on, Terry Tottenham had a committee of people that were doing it for medical malpractice, and I had a copy of their work product because I was using it over on the family law side.

I don't know if we have any need for a request for disclosure in med mal cases anymore. I can't tell how many of them -- I know there's some of them out there, but I know they did a pretty nice version of Rule 194 disclosures for med mal, and so I would think we could consider looking at that work product and see if we want to offer some more specific applications of the general Rule 194, and if we have a new type of litigation now that's problematic that's clogging the courts, we might consider putting a subcommittee on that and drafting a

more tailored Rule 194 disclosures, which includes, by the way, in the family law side the production of documents as well as stating of positions and listing of information, and I was very happy with that product and the Council was, too, so we can recycle that if we're --

CHAIRMAN BABCOCK: Okay. All right. Yeah, Judge Wallace.

HONORABLE R. H. WALLACE: Yeah, here are my bullet point recommendations. I agree, look at Rule 194 request for disclosures and see if they may be expanded a little bit with the idea in mind that we're going to eliminate interrogatories because they're generally useless and we're going to either eliminate request for production or limit it to admitting or denying the authenticity of a document, signature, or something of that nature, so that people don't propound request for admissions saying "admit that you're liable for whatever, whatever."

I do think we ought to explore possibly redefining the scope of discovery, because if you're going to make any impact on the discovery process it seems to me that's where you have to start. I think we ought to give the trial judges the authority when someone files a motion to designate the case as a level three, that would be an appropriate time perhaps to have a hearing, find out why

does this need to be a level three case, what kind of discovery needs to be done. I'm not suggesting a full blown pretrial hearing, but at least where the trial judge could have the authority to say, "No, you don't need to depart from the standard deadlines here."

And also I think -- and I'll ask at the beginning of the day, where is the requirement for a 12-person jury? Is that in the Texas Constitution, the statutes, or where? Because we try cases all the time, and if they were tried in the county court at law you would have a six-person jury, and a six-person jury we could apply to it any level one type case. We could -- it seems to me we could apply it to the expedited cases where we've got right now. A six-person jury will speed up voir dire. It will also save the counties and the state some money from having to pay fewer jurors, so and that may be a constitutional or statutory issue, I don't know, but it certainly wouldn't seem to be insurmountable for us to be able to dictate for the district courts to have six-person juries in certain types of cases.

I just tried a case a couple of weeks ago where the plaintiff was seeking $3,000 in medical expenses, and we had a 12-person jury. Probably spent more money on the jury than they were awarded in damages.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Judge, on the level three I've always thought if the lawyers came in and wanted a level three, you're right, I have to enter a level three, but it doesn't say what I have to put in that level three, and I can put in level one. I mean, there's -- the fact that they're entitled to a tailored scheduling order doesn't mean that they're entitled to more than what's appropriate for the case.

HONORABLE R. H. WALLACE: Yeah.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Circling back to what Chief Justice Jefferson talked about in terms of we've got a large measure of the population that can't access the courthouse and among the people that can't access the courthouse are people that are indigent and that we are not servicing these people in a way that we should, we had the -- this committee had the forms and heard lots of debate about that, but I think everybody is in agreement that the forms don't compare with having advice and counsel of a lawyer. We're not doing enough to encourage pro bono service among the bar. Volunteerism in the bar is down, and when you combine that with the growing population and the growing need -- am I right about this, Alistair -- about one in five Texans are not -- who qualify as a low income Texan can't receive legal

services, can't afford it, and there isn't a lawyer to fill their case.

MR. DAWSON: Four million people every year.

HONORABLE JANE BLAND: Four million people every year. So I -- as a self-regulated bar, it just seems like mandatory pro bono is a nonstarter, although I think there are some arguments that would favor it, like the fact that we all have a license from the state that gives us the privilege of practicing in courts in the state. There might be an idea that some responsibility follows that, but it seems like we're not doing enough to incentivize lawyers to either take on pro bono cases themselves or encourage it among their firms.

So a couple of ideas, one is to think of ways to incentivize the bar short of mandatory pro bono. Right now it seems like we have a voluntary access to justice contribution that we make when we pay our state bar dues, and we have voluntary reporting of the number of pro bono hours for lawyers, not judges because we can't practice law, but we don't have much in addition to that. A couple of ideas I've thought about, one is there have been a couple of remarks about the aging population. With that aging population we have a bunch of lawyers who are hitting retirement age and wanting to scale back their for-profit practice but are still licensed lawyers who

would be great at pro bono services.

What are the impediments to them practicing in the area of legal services for low income Texans? One is that they have to keep their license up, and so that's State Bar dues and an occupation tax, so some sort of waiver of State Bar dues and/or occupation tax, that would have to be a legislative remedy for lawyers who file an affidavit that they're going to exclusively provide services for low income Texans and report similar to CLE reporting that they have handled so many matters or so many hours worth of pro bono reporting. That could potentially capture a class of qualified lawyers who would be interested in taking those cases and who have the time because they've scaled back their practice to do it; and there's another category of lawyers that I think about, and it's at-home parents, at-home lawyers, who -- and I know lots of them who are donating their considerable talent to lots and lots of charitable endeavors, but when I say, "Do you keep your license up?" "Oh, no, I went inactive," and there's a couple of reasons why. One is the cost associated with having a license, and the second is the fear of malpractice liability.

So that's a second area that we could look at which is -- and I know this would be very controversial, but some sort of either provision for or

liability limit on malpractice liability for people to engage in services for legal services for the poor, and then finally some further incentive that we could have in the rules that would encourage in the civil justice system some sort of appointment for civil litigants particularly -- and the people that I'm thinking about are people that are -- that are involved in the family court system where there are issues of children, and we all agree the forms -- we have to have them because if they don't have the forms they have nothing, but a lawyer would be better. Some sort of provision for the appointment of counsel in those arenas on a pro bono basis; and I think all of those have lots and lots of negatives that go with them; but we need to start looking at solutions short of mandatory pro bono because I think that's going to be very unpalatable to the bar; and as far as I can tell, nobody is going to be able to impose that on the bar if the bar doesn't want to do it, but more than just saying, "I worked this many hours last year on a pro bono case and here's my voluntary access to justice contribution."

CHAIRMAN BABCOCK: Okay. Good. Thanks, Jane. Jim.

MR. PERDUE: Well, I have some specifics, and I have my perspective. I'm probably the only person who's a hundred percent contingency fee lawyer. With the

new rule on what they're calling loser-pays, but the motion to dismiss, I think that general denial practice is inconsistent with it and is somewhat of an anachronism anyway, and I do think that we ought to look at Rule 92 on the concept of the general denial, given passage or what appears to be forthcoming in this comment period of a rule that I think will impact pleading practice, and that underlies what I think the members of this committee who have been here a lot longer than me understand. There's always been kind of a recognition that maybe the Federal rules aren't best practices; but maybe there is some reaction that has been endemic in us being Texans that we know how to do things better anyway; but Rule 26 in the Federal rules, which is a mandatory disclosure rule, mandates document production, provides a pretty healthy model for getting things developed with a discovery plan in every single case and forcing both parties to give you the relevant stuff at the outset; and one of the odd things about Rule 194 is our request for disclosures requires that you send a request for disclosure. I mean, not everybody does it, but, you know, that's just kind of an oddity that you have to answer them, but you have to request it to get it; whereas, it is kind of the basic starting point of the entire case.

So I was looking back at the rules a little

closely when Chip called this, and Rule 26 in the Federal rules answers a lot of the concerns that have been talked about today, the Rule 166 kind of pretrial discussion. In other states there's a lot more kind of requirements on meet and confer, and you have to certify, you know, a meet and confer on discovery issues. And the judge will not -- he doesn't or she doesn't want to hear a motion to compel. You know, we've got certification, but the fact that, you know, you have to sit down under the Federal rules or other state rules and really try to work things out does accelerate things, and the fact that the rules are built into kind of a mandatory exchange does help.

It was odd, I went back to -- one of my pet peeves is the continuing practice of prophylactic objections. You have to deal with the prophylactic objection. You either get it withdrawn or you go because you don't know if they've answered or not, and the rule says that if you have objections that obscure the ability to determine whether there's an answer, you waive it; but I don't know, in my personal practice I don't think I've ever seen a judge declare a rash of prophylactic objections in an answer to constitute a waiver and require an answer; and that rule allows for a good faith exception, but there may be an opportunity to put a little more teeth into Rule 193.

But I will say, you know, my understanding -- and I think the guy from OCA is gone -- you know, the discussion about tort cases is a very small sliver of what's left in the civil justice system, as I understand it, in the state of Texas. I think the vast majority of cases are business disputes between very sophisticated hourly lawyers, and they consume a lot of time and a lot of money, and there is something to be said for proportionality, but that is not -- that is not a tort case issue. From a contingency fee perspective, I will tell you the last thing in the world I want is to get bogged down in discovery, to get bogged down with motions to compel, to subject myself to mandamus. You know, that's the last thing that I want. I want the case to be clean and to be moving and to have a real trial date to go, and so that's -- anything that incentivizes that makes a lot of sense from my perspective as somebody who doesn't want it to be expensive, because the reality is, is that if you're working on a contingency fee -- I was talking to -- I mean, just as a rule, if you've got to invest over 10 percent of what is the realistic damage model of the case, that case becomes economically nonfeasible for a contingency fee lawyer.

So if you've got a 50,000-dollar case and it's going to cost more than $5,000 to prosecute it, I'll

just tell you the economics from the plaintiffs' bar and the contingency group bar will tell you it doesn't work, and so I know there's use of the word "extortion" and all kinds of things, the pejoratives that have gone around. Well, I don't want to extort anything. I want to figure out how to get the case moving and get it to trial in the most efficient and cheapest way possible, and so I'm willing to engage in any kind of thought on that.

My most radical, Chip, is if you're going to take a deposition then the whole thing is going to get played to the jury.

CHAIRMAN BABCOCK: Huh.

MR. PERDUE: And it will end these five-hour depositions of asking my client everywhere they've lived for the past 20 years. So--

HONORABLE STEPHEN YELENOSKY: Does a judge have to sit there during that?

MS. ADROGUE: You're recused.

MR. PERDUE: On experts, for example, we for some reason made a vote not to have cost shifting on the production of your expert for that. I don't know what the deliberations were involved in that when they did discovery rules, but that works in the Federal system. It works in a lot of other states to really hone in, and you don't get eight-hour expert depositions when you know

you're paying the bill. So when you talk about expense and -- it may not be from an equities perspective something that carried the day in '99, but if you're looking at revisiting some of these issues in discovery, I mean, that may be something worth looking at as well. Not suggesting the Federal rules are always the best practice in everything, but that's the way it works in the Federal system, and it works pretty well.

We visited this issue of, you know, the discovery of the entire correspondence file versus now in the Federal system we didn't, and the committee voted it down, but, you know, the history on the med mal forms, for example, is the reason why the observations that Judge Christopher makes is -- and this is a challenge when you have a one size fits all because even in the confines of medical malpractice in the Tottenham work, which, by the way, is in the bill. In '77 and again in 2003 it said, "The Supreme Court shall promulgate uniform discovery interrogatories and production"; and Tottenham's committee did the work, but there has never been any consensus on that really worked for every single case; and that's in the confined area of medical malpractice, which I will tell you is a real small sliver of what's in the civil justice system anymore. But I think it's evidence of the problem when you try to recreate the entire rules to

deal -- to deal with -- my sense is the biggest things that get bogged down, and the judges here will tell you it's not the car wreck cases that are a problem in the system. It's the massive discovery fights in kind of large litigation with good lawyers that's real expensive that, you know, Rusty can handle, but I'm just trying to pay the overhead, so just a few observations.

MR. DAWSON: You were doing well until that point.

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: Just a comment about the discovery rules when we wrote those in -- I guess they went into effect 1999. The reason that we didn't -- that we made the discovery requests make it a request instead of mandatory discovery was I think at that time the studies were that, you know, more than half the cases filed in the state court have no discovery and don't want any discovery, and so that would have imposed a discovery cost on them, but I think it certainly makes sense for cases -- you know, the level three cases. Another reason why we said you have to sign a level three order if it's requested was to get -- if you're going to request a level three order then you're requesting management, and so there are a lot more deadlines, although you can for sure have level one discovery limits, but there is the

deadlines before trial, but it seems like maybe before -- if you have a level three case or that kind of order then you could have some mandatory disclosure, and it seems to me that -- I've been talking to a lot of people about electronic discovery because I taught it last semester and really didn't know anything about it, and people always tell me that it's much more problematic in state court than in Federal court because there is not this requirement to meet and confer for electronic discovery, so there is just a bunch of production of useless stuff because there hasn't been an agreement in lots of cases where people haven't focused on that. So I think it makes some sense to change our level three to require some of these things to manage discovery better.

MR. PERDUE: Let me add, one of the reasons from my perspective why level two is difficult, and this is just really rubber meets the road. My paralegals can't calculate deadlines because the way it all works backwards, and it's not a prospective set of deadlines, and it makes it really hard to calendar that stuff, and so that's why we avoid level two because you can't know what your deadline is, and that's just -- that's the way it was constructed, but it doesn't work in reality, especially if you've got something that takes some period of time because you can't miss an expert deadline, right, and if

you don't know what it is and your paralegal can't calendar it, you've got to get out of that system.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: You would know if you had a trial date right away.

MR. PERDUE: If you had a trial date, but remember, it also doesn't start -- you can't calendar once you get the docket control order because it starts from the initial discovery.

HONORABLE R. H. WALLACE: Right.

CHAIRMAN BABCOCK: Speaking about realistic trial dates, again, this is all anecdotal, although backed up with some facts, I think that it's to the plaintiff's advantage to get a realistic trial setting as early as possible and get to trial and dispose of it. I also think it's to the defendant's advantage to do that, because nothing is going to increase the cost of litigation than getting set, getting all ready, and then not being reached and being reset for, you know, eight months down the road. Maybe you're doing more discovery in that eight months, maybe you put the file aside and you forget about it, and then you've got to get geared up again and then you get reset again.

I had a business executive, real estate company, describe a litigation experience that he said was

horrible. First of all, he thought the discovery was intrusive, it was disruptive of his time, but then there was an initial -- it wasn't an injunction, but there was some hearing before trial that was -- he had to be at, and he went down to court and then the judge reset it and then he had to go back to court and the judge reset it, and he had to go back to court again and then the judge took it under submission and didn't decide it, and finally he said, "I'm getting out of this," and in a case where he thought he had limited or no liability and his lawyer agreed, they just paid a whole bunch of money just to get out of the system.

And second anecdote, as part of this process I talked to a number of general counsel, and one of a large company that gets sued a lot, not an insurance company, but they had tracked their filings worldwide against the company, and in 2005 they had been sued around the world 752 times that year, and in 2011 it was down to 252 times, and the decline had not been kind of a plateau and then a drop. It had been a steady drop all the way down from 752 to 252, and I asked the obvious question, "Well, what's causing that," and he said, "I have no idea, I'm going to try to find out, but I don't know." Those two stories together suggest to me that people are avoiding our system; and the business, the company, wasn't

just Texas. That was, you know, everywhere in the world that people are avoiding the system because it's not working for them; and that, it seems to me, informs what we're trying to do here.

What Justice Hecht and the Court have talked about doing was to take this record and the written comments that we received from a number of you and go through them and see if there are matters that the Court wishes our group to study, and they'll -- I guess I'll probably come up with a memo that delineates that, and we'll go from there in the new year. Yeah, Bill.

PROFESSOR DORSANEO: Well, you know, I think reducing costs needs to be -- everybody has already said this, but reducing costs needs to be the main thing, and there are tons of ways that the system adds expense that clients have to pay that aren't even really given much thought. We have now the ability to do discovery from nonparties by subpoena, and, you know, subpoenas have to be served and probably mostly by private process servers who are going to charge 130 bucks per subpoena, and that's just a built in cost. If you just have five or six of those, that's a pretty good start down the road to kind of needless expense, and I probably would violate the rules and recommend that they be violated and serve subpoenas by sending them to people by mail on the theory that you'd

likely get compliance anyway, and if you didn't get compliance all the time would still be -- would still be worth it.

Everybody likes this idea of mediation; and as I understand it, in some places, many places perhaps, you have to go through mediation and it has to fail before you can get a trial setting; and that's, I think, a huge waste of money. My lawyer in cases that I'm not pleased to be in at the moment thinks that mediation is part of the -- you know, part of the process and we need to spend whatever amount of money on each side of the case to compensate some mediator, and I think that mediators can help settle cases, but I don't think mediators are really necessary to settle cases and should not be necessary to obtain a trial setting to get -- they shouldn't be an obstacle to litigating the case through conventional trial processes.

On this -- on the discovery business, Federal Rule 26 is a decent enough rule, but I really think our method of making a request for disclosure, you know, works as well. It should be expanded to cover the identity and location of relevant documents or to produce documents, and I don't see any problem with re-examining Rule 194 to see what should be -- what could be added to it, the kinds of things that we use some of the

interrogatories for anyway. It's been a while since these discovery rules have been in effect, and I think that despite the fact that the people who went through the process would say you don't want to go through that again, I think it may be time to take a look at them and see, you know, what could be done to improve them under the general consideration that we want -- what we want to do is to reduce the needless expenditure of costs.

CHAIRMAN BABCOCK: Uh-huh.

PROFESSOR DORSANEO: You know, we are the problem in that we are too expensive, the system is too expensive, and everything that can be done to eliminate unnecessary costs should be done; and that ought to be part of the process of moving forward in rule making, which may get stalled for a time, but it's a never ending process.

CHAIRMAN BABCOCK: Yeah. Yeah. Thanks. Peter, and then Justice Gaultney.

MR. KELLY: On my Christmas wish list for rules changes would be judges have to specify -- trial judges have to specify the grounds for summary judgment, in particular no evidence motions for summary judgment. Generally traditional motion is one we will argue as to one specific point, whether duty is there, but a lot of times there will be a no evidence motion that says no

evidence of damages, no evidence of causation, no evidence of duty, no evidence of whatever. Really only one of those would be a valid ground, but on appeal I have to respond to each one of those and try to disprove one of those. If the trial judge can identify the issue, I think you would have quicker appeals because there will only be one issue. If you really argue about damages lets's go up on that issue and not force briefing and adjudication of all these other subsidiary issues which truly weren't being challenged.

CHAIRMAN BABCOCK: Yeah. Justice Gaultney.

HONORABLE DAVID GAULTNEY: I was just going to say I think the availability of mandamus and interlocutory appeals has created some additional delay in the process and perhaps those two areas could be looked at if we're really interested in streamlining and getting to trial without a lot of expense.

CHAIRMAN BABCOCK: Okay. Yeah, Professor Hoffman.

PROFESSOR HOFFMAN: So I'll repeat again that I think electronic discovery, like discovery issues generally, are important to a very small segment of our cases, and though we ought to fix them, we ought to realize that that's not the main event. Having said that, on Professor Albright's point about the Rule 26 and the

meet and confer on e-discovery, I think that works better in theory than in reality. They've done some survey work, and it looks like lawyers aren't really talking about e-discovery issues very much in Federal court, even though the rule suggests they should, so what that suggests to me is not that it's not a good idea. I think it is a good idea, but we may need to be more specific than the current Federal rule is.

The Seventh Circuit, for example, has a pilot project that they've done for several years now on e-discovery and kind of laying out much more specifics about what lawyers need to think about in advance and talk about. We could potentially do some -- you know, we were ahead of the curve on e-discovery. We're probably behind the curve now because we haven't gone back to the rules, so I like Alex's idea. I would just append to that they maybe need to be more specific than just "Go talk about some stuff," which is not exactly close.

CHAIRMAN BABCOCK: Justice Christopher, and then Frank.

HONORABLE TRACY CHRISTOPHER: Well, while we're thinking of things to study, I think one of the problems that makes people suspicious of the jury system is when they hear stories of the jurors violating their instructions. So whether it's jurors, you know, tweeting

about the case or looking things up on the internet or whatever, when that becomes public knowledge in a case I'm not sure we in our system have the appropriate way to deal with that kind of misconduct. I would suggest to the Supreme Court that they look at the Court of Criminal Appeals that just came out in October called McQuarrie, M-c-Q-u-a-r-r-i-e, which is totally different from the civil system despite the fact that we both have Rule 606(b) of the Rules of Evidence.

So basically the Court of Criminal Appeals has said if a juror brings outside information to the jury room -- in this case the juror looked something up on the internet, brought that information to the jury room -- the Court of Criminal Appeals was going to consider whether that would be jury misconduct warranting a new trial. All the civil cases out there say that would not be jury misconduct. So it's interesting. We've got the split between the criminal and the civil system with respect to this issue, and I continue to think when we close the door on looking at what jurors are doing -- and I understand there are good reasons why we do that -- it can lead to a loss of faith in the system.

CHAIRMAN BABCOCK: How do you spell the name of that case again?

HONORABLE TRACY CHRISTOPHER: McQuarrie,

M-c-Q-u-a-r-r-i-e, and that was October of 2012 from the Court of Criminal Appeals.

CHAIRMAN BABCOCK: *State vs. McQuarrie*?

HONORABLE TRACY CHRISTOPHER: *McQuarrie V. State*.

CHAIRMAN BABCOCK: *V. State*. Great. Okay. Yeah, Professor Dorsaneo.

PROFESSOR DORSANEO: Does that case say that it's not jury misconduct or that it's not admissible?

HONORABLE TRACY CHRISTOPHER: No. That case said that they would consider that as an element of jury misconduct.

PROFESSOR DORSANEO: Well, but I'm saying was it based on the outside influence language?

HONORABLE TRACY CHRISTOPHER: Yes. Yes. They said that was outside --

PROFESSOR DORSANEO: It's not that it's not jury misconduct. It's just you can't --

HONORABLE TRACY CHRISTOPHER: No, no, no. They said that was outside influence.

PROFESSOR DORSANEO: Okay.

HONORABLE TRACY CHRISTOPHER: And remanded it to the lower court to determine under -- it's kind of interesting -- under a hypothetical jury standard. So you're not going to get into the actual did this piece of

information influence you, fellow juror --

PROFESSOR DORSANEO: Okay.

HONORABLE TRACY CHRISTOPHER: -- but would this information influence a hypothetical jury, and there's -- it's -- there's a majority opinion, two dissenting opinions. It's really fascinating, got cases from all over the country that are sort of dealing with this issue. It's very interesting to read.

CHAIRMAN BABCOCK: Sounds like a five-four decision.

PROFESSOR DORSANEO: We probably made a mistake when 606(b) was changed from the Federal language.

HONORABLE TRACY CHRISTOPHER: Right. Right.

PROFESSOR DORSANEO: But that second part of it eliminating the rest of the jury misconduct drill is an excellent idea.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Going back to Peter's point, I think he said that it might be helpful to look at the possibility of having a rule where -- that requires the judge in a summary judgment motion to specify the grounds. We approved such a rule. It's been a long time. It was right after I came on the committee. We approved such a rule and sent it to the Court, and in that regard, if the Court wants to look at some ideas for improving the

process, there are a number of recommendations that have been made over the years that probably have been passed over, but the Court might want to go back and look at some of those, because some of them were thought out. It might be helpful.

CHAIRMAN BABCOCK: Yep. Tom.

MR. RINEY: I think we've had enough experience with the discovery rules that it probably is time to tweak them a little bit based on what was learned. Jim Perdue is exactly right about level two. I think all of us tried some cases under level two and tried to handle them and found ourselves in a bind because it was difficult to calculate the deadlines correctly and decided why take that risk, we'll just ask for level three. I think we really need to give serious consideration to Judge Wallace's comments about limiting specifically request for admission. That's a great idea. That's much abused. I would probably allow four or five interrogatories, that would be it, limit what they were for, and I think it's time to put a numerical limit on request for production. On any of these a party can go to the court for good cause and get them extended, but I think there ought to be a presumption of some type of limitation, which, again, for good cause can be changed.

CHAIRMAN BABCOCK: Okay. Yeah, Judge

Yelenosky.

HONORABLE STEPHEN YELENOSKY: I would go further. I don't understand the role of request for admissions anymore. I mean, as I read the case law, if it matters you need to let them out of it, so, right? Right? I mean, the standard I read in the case law is not just good cause. You have to show that -- I forget the exact language, but the other side, you know, engaged in some kind of conduct, so I always tell lawyers if you're here arguing about admissions then, you know, then they weren't used for their proper purpose, which was to establish essentially matters which shouldn't be disputed, and if that's their only purpose then why isn't that done through a Rule 11 or something. So I don't really see what purpose they serve.

MR. RINEY: But in terms of reducing costs what we're facing right now is page after page of silly admission requests, as Judge Wallace has said, that are not appropriate, admit that you're liable, admit you did this.

HONORABLE STEPHEN YELENOSKY: Right, which is why I would just get rid of them entirely.

MR. RINEY: But right now in terms of cost, it costs money to go through and either respond to them, object to them, or something when they just ought not to

be allowed, period.

MR. RODRIGUEZ: That's what he said.

MR. RINEY: Oh, I'm sorry, so you would just get rid of --

HONORABLE STEPHEN YELENOSKY: I would get rid of them entirely.

MR. RINEY: Okay. Well, I do think they serve a useful purpose on documents.

MR. DAWSON: Yeah, proving up authenticity of business records.

MR. RINEY: You can do it by Rule 11, but I think a lot of times it's just an easier way to get the ball rolling. The time you get the ball rolling is usually after you've done some discovery and you just want to make sure you know what it is. It's just I suppose it could be done just, "Here's a proposed Rule 11 agreement," but there ought to be some burden if opponent doesn't get back to you for 90 days. This at least puts a deadline on it.

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: When we were working on the discovery rules and doing research about what other states had done, one thing that I thought was real interesting is many states have just said you don't get depositions other than the parties, for example, and the

experts or -- and there's, you know, very limited written discovery, and when I talked to the judges about that they said the reason that they do that in a sense you kind of say no discovery unless you show good cause and the judge allows it or you agree to it. They said it works great because everybody has to talk to each other about discovery that way.

When we talked about our discovery rules, this group was not willing to go that way. Our limitations I think in many cases were really not limitations, so it doesn't make people talk to each other, but I think that's definitely something to look at again and talk to -- I think it was Arizona, Colorado, maybe New Mexico, I'm not sure, who had those kinds of rules, and they now have 15 years experience with them.

CHAIRMAN BABCOCK: Okay. Any other comments? Okay. Well, this has been a terrific discussion. I hope it's been interesting to you, and I know it -- Chief Justice Jefferson and Justice Hecht and Justice Boyd told me before they left that they got a lot out of it, so thanks for doing it. Let's see if -- yeah, Judge.

HONORABLE TRACY CHRISTOPHER: Can I say just one thing?

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: I would like to echo on the appellate process that I think there are ways that we could reduce the cost in the appellate process. I don't know if we need to talk about it now, but I think it would be interesting to have a group of people to, you know, sit down and think about that. One of the biggest costs we have in the appellate process is the court reporter's record and the clerk's record and, you know, just things like that; and there's some traps in the appellate rules, if you don't bring the whole record up there you can get your whole case thrown out essentially because of presumptions against you, if you don't bring the whole record up, so I think there are ways that we could help make that more cost-effective.

CHAIRMAN BABCOCK: Okay. Good.

MS. WINGATE: Along -- I'm sorry.

CHAIRMAN BABCOCK: I'm sorry, Brandy, go ahead.

MS. WINGATE: That sparked my interest there. Along those lines the rules now provide for how to correct a situation when trial exhibits or part of the record is missing, but there is nothing that really prevents it from happening in the first place. Court reporters take our trial exhibits and leave the courthouse with them in their cars and then take them over to Fed

Ex/Kinko's and make all their copies there. There's not really a lot of regulation or rules about how they are supposed to treat our exhibits and the care that they're supposed to treat them, and I think that that could reduce some of the costs because I've had it happen to me where my exhibits are gone, and, you know, court reporter doesn't know where they are, and so I think that that could be done on the front end rather than just trying to fix it on the back end.

CHAIRMAN BABCOCK: Okay. Great. Well, now the moment that everybody has been waiting for, the ancillary rules. I see some hands going up in the back, Roger excited. Now, he's been asleep through this first part.

MR. GILSTRAP: Just shaking.

CHAIRMAN BABCOCK: So, Elaine, which of our talented trio are going to deal with --

PROFESSOR CARLSON: We've covered everything except we have not completed the rules on execution of property, and Donna Brown, who is probably our leading expert in the state, introduced part of these rules several meetings ago, and she's going to pick up where we left off.

MS. BROWN: We left off at Rule Execution 8 or EXE 8 on page 93, if you-all want to find that, and in

the interest of time what I'm going to try to do is point out what we kept and what is new and what the actual revisions were. Rule 8, replevy rights, used to be called the delivery bond. This is rarely used when a defendant's property is seized in execution that the defendant would post any kind of what they would call delivery bond. We're now calling it replevy bond. Generally what happens, there's either a sale of the property or an agreement is reached with the creditor's attorney. In 30 years I've never seen a replevy or delivery bond done. What we've done is just collapse some of the old rules, change it from "delivery" to "replevy bond," and we've also provided that if a bond is set, it's set by the court with opportunity for a hearing. The old rule provided that it was set by the levying officer, and the sheriffs and constables were not happy with that responsibility should it arise, and so we provided that for notice and hearing by the court.

Rule No. 9, sale after levy, this again, is a collapsing of a number of rules to modernize it. Instead of having separate little rules, we have parts (a), (b), (c), et cetera. There's not any substantial changes under the sale of real property until you get down to number (3), and this little section under (a)(3) for purposes of recording a release of levy is a provision

that is in answer to another provision that was put in an earlier rule, and that is if the constable levies on real property they would file notice of levy in the real property records, and this was a provision that if the property wasn't sold that the notice of levy would be released so that it would clear up any issue of the title to the property going forward.

Some constables in some counties in Texas do file the notice of levy with the real property records, so it's a local practice that the committee agreed would be useful to formalize so that there would be a place if there was a property sale that it would notify whoever was buying it that the property was under levy. The provision does not say when the release would be filed. I would suggest that we add that it be filed when the writ and any extensions thereof have expired because property can be levied on, not sold, but there might be the need to repost the sale for some reason, and so just because it didn't sell they may need to resell it and -- or repost it, and so there wouldn't be a need to relevy or refile the notice of levy, just a need to repost the sale, and so I think that that -- that needs to be added to part (3).

Number (4) is also a new provision. Again, we're trying to address what the actual practice is among the sheriffs and constables who handle these writs of

execution, and that is what -- how do they deal with the issue of expenses of the levy and keeping of the property and posting for the sale. Now, the general provision -- or the general way it happens usually is the creditor is working with the sheriff or constable; and they talk in terms of do we need tow trucks, do we need moving van, do we need movers, what kind of storage facility does the county have, do we need to get a bonded storage facility, what are the requirements for posting, if any, what are the requirements for publication, and what are the problems for storage; and so the idea was, again, to put what the current practice is, which in general is that from the proceeds of the sale the officer usually keeps any expenses that they have incurred out of the sale proceeds. I don't remember if this was part of the harmonizing -- I think this was part of the harmonizing. What we didn't talk about or what this doesn't talk about is what happens if a sale doesn't occur and you have the expenses, and so I think probably we need to address that if a sale does not occur and there are expenses that they would be reimbursed probably by the creditor's attorney and taxed as costs.

CHAIRMAN BABCOCK: Donna, hang on for a second. Richard Munzinger has a question.

MR. MUNZINGER: What kind of accounting or

record is kept of the expense the officer claims to have incurred, and what kind of proof is required that the expense was, in fact, incurred? Is there any other rule elsewhere that addresses that?

MS. BROWN: No. As a matter of practice they usually -- they will do an accounting to the judgment creditor of how they figured what was owing on the judgment, what was received from the sale proceeds, and then what was taken out, and I have before asked for copies of documentation of the expenses. Some expenses are set by the commissioners' court. For example, if there's a notice of sale or a posting, that's set. If there is hours above a standard, maybe two hours on a levy, that there's often a provision with the commissioners' court, schedule of costs, that will say the deputies will be charged $25 an hour. I can't remember what it is in Travis County.

MR. MUNZINGER: Is there any protection for the judgment debtor against being looted by the officer or creditors under the guise of incurring expenses?

MS. BROWN: Well, I guess you're assuming dishonesty on the part of --

MR. MUNZINGER: I certainly am.

MS. BROWN: Okay.

CHAIRMAN BABCOCK: Make no mistake about

that.

MR. MUNZINGER: Well, I mean, just because they're officers it doesn't make them honest.

MS. BROWN: It is your law license, it is your official bond, and it's criminal charges if you're stealing from people. Now, do they have a side deal with a storage facility to -- I don't know. I mean, there is not any -- anything other than as far as structuring what the amounts are, there's some set by the commissioners' court, and then the others just -- you know, usually it comes to the creditor's attorney is what's going to cost us X number of dollars a day to store these and, you know, are you okay with that because if it doesn't sell enough to cover it you're going to cover it, and so that's the incentive to keep a cap on expenses associated with the sale.

MR. MUNZINGER: And all my concern is, is there anything built into the rules or does the Court -- should the Court do anything about these rules to protect a judgment debtor from being looted by a creditor and a conniving officer because those are the kinds of things that happen in the real world. I mean no criticism of you at all. I just asked the question. There appear to be no protection from the judgment debtor for that problem in these rules.

MS. BROWN: I've been doing collections for 25 years. I have never had any lawyer, debtor, constable, sheriff, come to me and say, "We've got to deal with these crooked creditor lawyers working with these crooked constables." I have -- I have no knowledge of it. I've not heard of it, but I would think that it would be a great lawsuit and --

MR. MUNZINGER: Well, we had a county judge in El Paso that's been taking bribes and is now convicted of a felony for taking bribes.

MS. BROWN: And he's going to jail.

MR. MUNZINGER: A lot of judges don't do that, but this one did.

MS. BROWN: And we have a criminal system to deal with it.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Well, what if we had the officer file with the trial court in which the judgment was rendered an accounting of expenses, so now it's public and if anybody wants to contest it's not reasonable they could go in on a motion. Would that satisfy your concern?

MR. MUNZINGER: Well, I just raised the question, is there any protection, and there doesn't appear to be any. I think there should be. I think a person --

CHAIRMAN BABCOCK: Well, does that give enough protection, what Elaine said?

MR. MUNZINGER: Yeah, have them file a sworn statement, these expenses were incurred.

CHAIRMAN BABCOCK: There you go.

MR. ORSINGER: The crooks will always tell the truth, won't they?

MR. MUNZINGER: They may not, but they now have something of record that they can be prosecuted for for perjury, and up to this point in time apparently they don't.

MS. BROWN: The return of service on the writ would probably -- would include that, but we can provide that the return of service on the writ include an accounting of any costs associated with the levy of execution and that it be filed as part of the return, and I think -- I think that is the practice, but we can -- again, we're trying to take practice and put it into a rule where the new constable who has never done one before has a rule, and so I think that's good, and I would also like, you know, to massage this number (4) to also provide for who covers the expenses in the event the sale does not occur or the proceeds are not enough to cover the expenses.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Is this paragraph (3) a new paragraph?

MS. BROWN: (3) is a new paragraph as is (4).

MR. HAMILTON: Well, I'm confused about (3). How is there going to be a situation where there's no sale?

MS. BROWN: Nobody showed -- nobody shows up, nobody bids.

MR. HAMILTON: Nobody bids on it. That's the situation we're talking about?

MS. BROWN: Yes, that happens.

CHAIRMAN BABCOCK: Okay. Dulcie, you had your hand up a minute ago. Did you want to say something?

MR. HAMILTON: Why doesn't the sheriff then just have to repost it again and try again for another sale?

MS. BROWN: Well, and generally what they do if they have time on the writ if the creditor's attorney wants to go through the expense of doing that because you're going to have to come out of pocket for additional publication costs, and so it just becomes a decision do we -- do we go forward or we just return the writ and let our judgment lien sit, and maybe at some point in time this property would be more attractive for sale and sell

it at a later time.

MR. HAMILTON: Okay, so if I have a judgment and the sheriff goes out and levies on property but it doesn't sell, I guess he tells me it didn't sell and he's going to return the writ, so then what do I do? Do I go back and apply for another writ and have him do it again?

MS. BROWN: Again, and that's addressed on -- in the new -- in execution Rule 12(a) where when the proceeds of sale are insufficient that they are to levy again and to levy on additional funds. Usually it's a timing issue. You've got generally a 90-day writ. If there's time to either repost, if you want to repost, or levy on additional property and you're going to have enough life in that writ to get it completed, you'll do that. If you're right at the end of the writ and there's nothing readily available to levy on, you might want to wait and get a new writ later; or if there's property to levy on and you don't have enough time to do a sale, there's a provision for venditioni exponas, which we'll talk about later, so you can levy on the property then and there and then extend the life of your writ with a venditioni exponas, so there's ways to address all the issues you've talked about in the rules.

CHAIRMAN BABCOCK: Okay. Frank had his hand up, and then Professor Dorsaneo.

MR. GILSTRAP: It's in section (a)(2) and you just said it, so what is a venditioni exponas, and do we have to say it in the rule?

MS. WINK: It comes right out of Harry Potter.

MS. BROWN: And that was Dulcie, not me. Venditioni exponas extends the life of your lien. There was no rule -- there's no rule. It is mentioned one time in one of the rules saying if it's -- if property has been levied under writ or venditioni exponas, blah, blah, blah, blah, blah. So --

CHAIRMAN BABCOCK: That just rolls off your tongue.

MS. BROWN: Yes. It sounds really exotic, doesn't it, and there's forms floating around. Okay. Let me tell you that. What -- again, what we've tried to do in providing a specific rule for venditioni exponas is to put in a rule a practice in which you get the clerk to issue a venditioni exponas which says that this writ is going to expire and we've levied on either this personal or this real property and we don't have time to sell it, we're going to extend the life of the writ so that it will have -- we will have time to sell it, so -- because you have to have either a writ or an extended writ in order to keep possession of the property.

CHAIRMAN BABCOCK: David.

MR. FRITSCHE: In essence what it does is it maintains the priority of the levy as against competing judgment creditors so that you maintain your priority.

CHAIRMAN BABCOCK: Okay. Bill, did you have a comment?

PROFESSOR DORSANEO: Yeah. We don't say fieri facias anymore. I think we still say scire facias.

MR. ORSINGER: Scire facias.

PROFESSOR DORSANEO: Well, I think we have to go back to the Romans to see how they pronounced it, unless you're going to use the church pronunciation. I don't see why this Latin term needs to be carried forward into our conversation. Usually when we speak in Latin it's because it sounds stupid in English.

MS. BROWN: Well, you'll like the title to execution Rule Number 11. It's called "Extension of return date." How's that?

PROFESSOR DORSANEO: That's good.

MS. BROWN: Okay.

PROFESSOR DORSANEO: And this "if not sold" paragraph, I'm kind of like Carl in that I used to teach creditors' rights a long time ago, but I would like to know -- and still do as part of civil procedure, but I would like to know why we're not told more about what

happens if not sold. You know, like, okay, what do we do now, and you said you look at this other rule down here a couple of pages forward, and I think it would be better for someone who is not as learned in all of this as you are to find out a little bit more about, well, what happens next.

MS. WINK: Do you think this is a good place for perhaps a comment to the writ where --

PROFESSOR DORSANEO: Just something, because the rule --

MS. WINK: -- someone like Donna, who knows it well, can explain it as a comment but not necessarily something that is an executable rule.

MR. HARDIN: With her bar number and everything.

MS. WINK: Absolutely.

MS. BROWN: Well, we have a rule for post execution sale matters which talks about when the judgment is not satisfied or something happens that --

PROFESSOR DORSANEO: Uh-huh.

MS. BROWN: -- the sale falls through, and perhaps that might be a good place to say if you conduct a sale and nobody bids what do you do with the property, and I think that we can add that as another section there. I'm going to put that down as an (e), what if property

doesn't sell, and we'll talk about that when we get to number 12.

PROFESSOR DORSANEO: Thank you.

MS. BROWN: Okay. Great.

CHAIRMAN BABCOCK: Anything else about this rule, this particular rule, Rule 9?

MR. ORSINGER: Chip?

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: I just wanted to say that for the most part the remaining Latin we have is in the area of writs, which goes all the way back to the Middle Ages. It's one of the few ties between what we we're doing and what they were doing in the Middle Ages, and I feel a certain nostalgia for that, and I think that --

CHAIRMAN BABCOCK: You're a Middle Ages kind of guy.

MR. ORSINGER: This is a fairly harmless area for us to continue forward with these Latin names associated with the great writs. It doesn't harm a lot of people because only a few people ever use them, and so I would at least put in one word to consider perpetuating the use of Latin in this area.

CHAIRMAN BABCOCK: Okay. Well, you and Dorsaneo take it outside and let us know how you come out.

MR. HARDIN: Then you put in the El Paso

rule.

CHAIRMAN BABCOCK: Well, we already got the El Paso rule in there. That's been done.

MS. BROWN: Shall we move on to sale of personal property? Again, this is not much changed here.

CHAIRMAN BABCOCK: Are we jumping over the courthouse door defined?

PROFESSOR CARLSON: No.

MS. BROWN: No, no, no. We're down to the bottom of page 95. No, the door that's going to cause all kinds of discussion, unfortunately. Top of page 96, notice of sale of personal property, there is again a current practice that most sheriffs and constables will send notice of the sale to the judgment debtor, not just post the notice, and we think in the interest of fairness the notice should be sent to the judgment debtor, and so we put that in the rule. Number (3) is also new. Again, this is similar to part (4) under (a), and we will address the issue of accounting of the costs and how that should be worded.

Turning to page 97, the courthouse door, there is no other place that courthouse door is defined in any statute or rule. This is it. There is a need for a definition of courthouse door because there are many places under the execution rules that it talks about the

courthouse door. There was confusion about where foreclosures take place versus the courthouse door; and as you know, the commissioners' court can say where in the courthouse, the area of the courthouse, that a foreclosure can occur, foreclosures will occur for that county. That's not necessarily the courthouse door. So we can't just pull that in and say, "Oh, well, we'll just look there, wherever the commissioners say the foreclosures should occur, that's the courthouse door," because it's not. It's a different thing.

So we looked at what is the function of the commissioners to the courthouse, and the answer is the law -- local Government Code provides that the commissioners shall provide a courthouse, and so there was the connection on principal entrance to the building provided by the county commissioners court. It used to talk about where the district court shall principally maintain -- blah, blah, blah, blah, blah, so anyway, they tried to make it, again, the building and where it is and how we define what's the courthouse, and that's where for purposes of posting or conducting of sales we've got it made. The real practical downside on this is county by county there is where they conduct the sheriff's sale, where they conduct foreclosure sales, and it varies. So --

CHAIRMAN BABCOCK: Okay. Richard Munzinger.

MR. MUNZINGER: Second sentence of that number 10 you say, "If for any reason there is no such building, the door of the building," would it not be more precise to say "the principal entrance of the building"?

MS. BROWN: I think you could do that.

CHAIRMAN BABCOCK: Okay. Richard, and then Roger.

MR. ORSINGER: Contrary to my previous suggestion I'm going to suggest a modernization. In Bexar County, for example, we have two courthouses that are across the street from each other, and one of them --

PROFESSOR DORSANEO: We have three.

MR. ORSINGER: You have three in Dallas?

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: And so why don't we just forget the door? And we also have the problem about when the courthouse burns down there's no door. There's case law on that, too, but why don't --

MS. BROWN: It's in the rule, too.

MR. ORSINGER: Why don't we have the commissioners' court designate the place where the sales will occur, and it doesn't necessarily have to be in a doorway? Could it be in a larger meeting room, or could it be on the sidewalk or something? So couldn't we just

give them the discretion and require them to designate a place?

MS. BROWN: Well, I think that would be statutory as opposed to rule.

MR. ORSINGER: The local Government Code requires that this occur at a doorway?

MS. BROWN: The local Government Code requires the commissioners to provide a courthouse, and it gives them the power should they so desire to designate a place in the courthouse where foreclosures shall occur, can occur, but they may or they may not, and so we know every -- every courthouse has a principal entrance, so --

MR. ORSINGER: But you just don't know which courthouse you're talking about, because in this day and time there's not just one county courthouse anymore, right?

CHAIRMAN BABCOCK: Well, in big counties.

MS. WINK: I think what we're saying is that the Government Code requires the commissioners of the county to designate, which is going to be considered for purposes of these rules the principal.

MR. ORSINGER: Does it require that they specify a door?

MS. BROWN: No, that they provide a courthouse.

MR. FRITSCHE: Carry out at the courthouse.

HONORABLE STEPHEN YELENOSKY: And should somebody carry that door somewhere else, must the auction follow the door?

MR. ORSINGER: All I'm saying is I think it's an archaic concept that this has to be at a doorway or outside a door, and I don't see why you don't have the rule power to broaden it to a designated area.

MS. BROWN: Well, we'd have to change all the rules that talk about courthouse door in order to -- and there are lots of --

MR. ORSINGER: Could you define "courthouse door" to be the place where the county commissioners designate or in the alternative the principal entrance to the --

CHAIRMAN BABCOCK: Guys, guys.

MS. BROWN: I don't -- I don't know if -- and you'd have to answer this. Can the Supreme Court tell the county commissioners that they need to designate a door?

MR. ORSINGER: Or if they don't.

MR. HUGHES: Tell them.

MR. ORSINGER: We could in the rules say that they have the power to do that, and if they don't it defaults to the courthouse door.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Now, most people, that's been practiced for so long, if they have a question they can find out where is the door. I mean, that's just been in our history, the courthouse door. I'd hate to see -- I don't like old things taken away.

CHAIRMAN BABCOCK: Yeah. Marisa.

MS. SECCO: I just have a quick question. They just referenced that -- or Donna just said that the courthouse door is used in many, many places in the rules.

CHAIRMAN BABCOCK: Right.

MS. SECCO: So I'm wondering if it's used in places other than the execution rule, the definition should probably be somewhere else, somewhere more general that applies to all of the ancillary proceedings rules and should not be buried in the execution rule.

CHAIRMAN BABCOCK: Yeah, Roger.

MR. HUGHES: Well, I mean, I could see the problem. There are some cities where the courthouse is spread out all over town. I mean, if you've ever been to Laredo and tried to figure out which court is where, it can be a chore, but I guess my question is has there been a problem? What kind of problems have been coming up in practice?

MS. BROWN: I don't know of any problems

that have come up in practice. I haven't had any problems, but no one -- and no one has asked me, "How do I know where to go?" I mean, you go to the courthouse and you ask around until you find it.

CHAIRMAN BABCOCK: That's a quaint notion.

MS. BROWN: I know it.

MR. HUGHES: As far as trying to get the commissioners' court to do anything, I think we have to plan a rule that has a default in it if the commissioners' court won't act. I mean, you know, in some of these small counties they may not want to deal with it, and in a lot of large counties they may not want to deal with it, so I think we need have a default provision as well as incorporated whatever the commissioners' court might see fit to do.

MS. BROWN: Well, let me just say that this rule as written is a rule that I -- I didn't advocate the rule as it is presented to you-all. The designation by the commissioners' court was added by these guys in the harmonizing committee because I believe there is a definite distinction between their role in foreclosures versus defining the courthouse door, so I will just say I'm not excited about this particular rule myself. The harmonizing folks can say whether -- why they think we should defer to the county commissioners' court because I

read it differently, so --

MR. HUGHES: My only suggestion in this is a matter of consideration. This doesn't solve the building problem where you have the -- so to speak, the courthouse spread over several buildings. I mean, in Cameron County we have the commissioners' court building, which actually does have one or two judicial courts in it, and then we have another building several blocks away which is -- which has the words above it "courthouse," which holds all the other courts, which is, by the way, where the foreclosures are held and where they have the bulletin board where people post things. I'm just saying maybe not every county has it worked out that well.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Do deeds of trust speak about courthouse door being a place where the sales occur?

MS. BROWN: I don't know. I don't do foreclosures.

HONORABLE R. H. WALLACE: The notice, the notice of foreclosure.

MS. WINK: Notice of foreclosure, I want to think that the notices of foreclosure talk about the courthouse door, too. Again, as you've both recognized and everybody sees, in every county there is a place that has been designated, whether in the past or history or

whatever, in each county that is considered the courthouse door, so there is a place right now that is already being treated as the courthouse door where postings are made, et cetera, for these.

CHAIRMAN BABCOCK: I'm sorry, this is sounding like a country western song.

MS. WINK: It does. Don't ask me to sing, it will get really bad, but the reality is it exists, and the rule as it originally was written, you know, specified the principal entry, but it also says it's in the house provided by the proper authority for the holding of the district court, so again, when counties have grown and had more courthouses each county has dealt with that, oh, we're not going to move these to the new one, they're going to stay here, or vice versa. They even provided for if there's a fire, something happens and that old courthouse door goes wrong, you know, and again they have to designate someplace else, but for all practical purposes if you're in a county and you've got the constables coming up going, "That one's burned down, where do we post it," they're going to make a decision where those postings are going to be. It's just that the Government Code says that the commissioners do it, and we can't really fight that.

CHAIRMAN BABCOCK: Justice Bland, Judge

Wallace, and then Eduardo.

HONORABLE JANE BLAND: I don't like the idea that we're defining a "courthouse door" in our rules because I think this is not the place people will find this information, but if we are going to define it, why don't we just define it as "The courthouse door means the principal entrance to the building designated by the county commissioners," period, and stop because really it's the county commissioners who make the decision about what door is the courthouse door, and everything we have after that is just surplusage, and every county is so different. Harris County, talk about courthouses, we have five around the courthouse square, not including the county administration building where the county commissioners' court meets, so you know, it doesn't make any sense for us to try to rule make or to decide by rule what door is the courthouse door. Let's let the county commissioners do that.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, somebody asked if this was a problem. I don't think it's a problem, but when first Tuesday is coming up and people start filing TROs to stop banks from foreclosing on their house one of the things you see is that they failed to get proper notice because the specific location wasn't

designated where the foreclosure was going to take place. That's usually just a litany of reasons. I doubt that that's ever been litigated, but the more specific you can be, but I think I agree with Justice Bland. I think that's about the best you can do.

CHAIRMAN BABCOCK: Yeah.

HONORABLE R. H. WALLACE: And then at least you can say, "Well, you need to go find out where the commissioners have designated."

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: Well, I was just going to say, why don't we just say, "At the courthouse door where the commissioners court is located or where the commissioners may designate."

CHAIRMAN BABCOCK: Yeah. Okay. You got all of that?

MS. BROWN: No.

CHAIRMAN BABCOCK: You don't have all of that?

MS. BROWN: No. No. It's --

CHAIRMAN BABCOCK: You disagree with that?

MS. BROWN: No, I don't disagree with it. I'm not getting a consensus here.

HONORABLE R. H. WALLACE: A consensus.

MS. BROWN: I guess I wouldn't get that

here, would I?

CHAIRMAN BABCOCK: Yeah, we're not going to vote on the courthouse door, I'll tell you that. Justice Gaultney.

HONORABLE DAVID GAULTNEY: Well, I think I agree we need to have one place. As you've got it now, isn't it two places? In other words, potentially the commissioners could designate someplace other than the principal entrance, right, and so you've got principal entrance and then you've got a place that the commissioners have also designated, right?

MS. BROWN: Well, again, the designation by commissioners is not of the courthouse door. They have the option to designate where foreclosures should be conducted, and I -- so, you know, I don't know that we can tell the commissioners court they've got to tell us where the courthouse door or make it by rule. I think we could stop with -- I can't read that far because my glasses don't work --

HONORABLE JANE BLAND: I'm Jane Bland.

CHAIRMAN BABCOCK: That's Justice Bland.

MS. BROWN: Bland. Okay. I cannot read that far.

HONORABLE JANE BLAND: Jane is fine.

MS. BROWN: Stop at courthouse, period, and

be done with it. I mean, how many courthouses are going to burn down in Texas and somebody not figure out within about 24 hours where we're going to have court the next day? Duh? I mean, really.

CHAIRMAN BABCOCK: Well, we have hurricanes in certain parts of the state.

MS. BROWN: We do, right, and is somebody going to make a decision probably in 24 hours where we're going to have court the next day or if we do?

CHAIRMAN BABCOCK: I think during Ike that is what happened, isn't it?

HONORABLE TRACY CHRISTOPHER: It's in the emergency plan as to where the courthouse will be designated.

CHAIRMAN BABCOCK: Yeah. Yeah. So --

MS. BROWN: So maybe we put a period after "courthouse" in the second line and be done with it.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: All of this is to say this is not a thing that is best decided by a rule in this book, because it takes people living on the ground in the county where you are to decide where the best place to have these postings is, not this book.

MS. WINK: We're not necessarily disagreeing with you. It's the problem that so many rules say you

must do such and such at the courthouse door, and this is the place in the rules existing where they go to figure out where that is.

HONORABLE JANE BLAND: I understand that, and that's why I backed off my original position when I was first thinking about this, which was to eliminate the rule entirely, to changing it to "to be determined by the county commissioners' court."

CHAIRMAN BABCOCK: Yeah. So that's a proposal.

HONORABLE JANE BLAND: That's my proposal.

CHAIRMAN BABCOCK: Yeah, that's your proposal, and --

HONORABLE JANE BLAND: Whether it's in a fire or flood or just tomorrow.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: I'm guessing that at a lot of the entrances there is not a place to physically place a notice. I mean, you're not Luther nailing the theses to the door, so maybe you want something other than the entrance or door, just the location customarily designated for notices.

MS. BROWN: Okay. Are we ready?

CHAIRMAN BABCOCK: Yeah, we're ready to move on. Except Rusty's got a comment.

MR. HARDIN: I just want to ask how many people here consider this their favorite conversation of the year?

CHAIRMAN BABCOCK: At least top ten, it's at least top ten. Yeah, let's move on.

MS. BROWN: And it was much shorter than at the task force meeting, I can guarantee you. Rule Number 11, and this is a new rule from the standpoint of having a rule that addresses venditioni exponas, the extension of the writs. We've already talked about the word "venditioni exponas," and so I think we can probably move on.

CHAIRMAN BABCOCK: All right. We can, other than I see that this rule has the devil sign next to it, but, yeah, let's move on.

MR. SCHENKKAN: We just want everyone to know that Judge Yelenosky looked it up, and we now know what it means, for those of you who don't know what the Latin means. None of us did. "Exposed for sale" is what "venditioni exponas" means.

MR. HAMILTON: Do the clerks' offices have these sort of writs?

MS. BROWN: Yes, they do, and if they don't, I provide it to them.

MR. HAMILTON: Okay.

MS. BROWN: There's an underground system of creditor's rights lawyers who maintain these forms, and you have to have an inside, you know, so call me if you need one.

MS. WINK: She's really not kidding.

MS. BROWN: No, I'm really not kidding. It's the truth.

PROFESSOR DORSANEO: Do y'all have staffs?

MS. WINK: Well, no, most -- a lot of the courts will have these. They'll have these kinds of things if this is common, and if not, they'll ask the lawyers, "Can you provide us a form" and so that's when I call Donna.

MS. BROWN: Okay. Execution Rule Number 12, again, this is a collapsing of many -- of four rules into one with four subparts. Nothing has been really changed from the substance of those rules. We do have the suggestion that we add part (e), when property does not sale what happens, and we'll work on some language and provide that. Three of us can work on some language and provide that in the comments to the Court.

CHAIRMAN BABCOCK: Okay. Great.

MR. GILSTRAP: Chip?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: In (b) it provides that if

the bidder fails to comply with the terms of the sale the -- he's liable for a 20 percent penalty, which I guess can be substantial. Was that in the old rule?

MS. BROWN: Yes.

MR. GILSTRAP: I'm not familiar with any other place in the rules where we impose that kind of liability by rule. Maybe there are some, but I'm a little disturbed by that. Seems like maybe that should be what the Legislature does.

MS. BROWN: Well, the problem is there is a lot of money -- and y'all were talking about spending money with your lawyer. There is a lot of time and energy and money to get to the point of a sale, and if somebody shows up and bids at the sale and then doesn't comply, there's damages involved there.

MR. GILSTRAP: I understand there's a reason. I'm just concerned about doing it by rule.

MS. BROWN: Well, but, again, it's based on the value of the property determined by the court, and so if you've got somebody that comes in there and -- and bids and is not -- is not really prepared to put up the money to buy the property and they have prevented a sale from occurring because somebody else might have bid then that is just a damages way -- and I think this is a lot like some of the motion and hearing practice that used to occur

with the liability for sheriffs and constables not going forward with the sale. This is a similar type of language. That liability is taken care of in the statute, and it's -- was revised a few years ago. This is just the only place that there is a method for -- to keep some wild man from coming in there and screwing up a sale and then causing a bunch of people to incur funds and then have to re-up the sale. So -- yes.

MR. MUNZINGER: Was this language in (b) in the prior rule? The entire rule is just a repeat of the original rule?

MS. BROWN: Yes. Yes. Yes. It was just collapsed. Any other questions? Okay. Pardon.

CHAIRMAN BABCOCK: Keep going.

MS. BROWN: Execution Number 13, permanent record of execution, this was a rule that provided for the clerk to keep an execution docket, and this was a rule that was of particular concern to the clerks because the new electronic docket systems don't have a provision for an execution docket. We did a survey of clerks, and many of them didn't know they were supposed to keep an execution docket. They never heard of it, and Bonnie Wolbrueck had some insight on this in that this should -- this was among permanent records that needed to be kept under another statute, and I'm sorry that we don't have

that referenced in here, but the idea was that what happens to the judgments at execution should not be destroyed, and I think the key in that is a judgment will expire after 10 years. There's two years to revive it, but you can keep a judgment alive with a proper writ of execution issued, levied, and returned, and so this would be a way that there would be a place where you would keep a record that a judgment remains alive.

There was some old case law that referenced execution dockets, but it was mainly -- it almost looked like they were relying on execution dockets for purposes of property searches, and that's -- I think that's old law and probably inapplicable because now there is a sale document that would occur that the constable's office will do under -- I think it's under Chapter 34, a conveyancing document, so you wouldn't have to go back and look at a writ of execution to see if property conveyed and to who. You would go just to the real property records. Still there is a need to know if the judgment is alive or not, and basically we just wanted a provision in there that says that it should be a permanent record and could be cross-indexes, and it doesn't have to be a separate item because the searchabilities of most of the electronic systems would allow you to look at executions and cross-indexing. The Legislature, oddly enough, last

session did add a section to the Civil Practice and Remedies Code, which says that the execution docket can be kept electronically, so that's the background on this.

CHAIRMAN BABCOCK: Any comments about this? Yeah.

PROFESSOR HOFFMAN: Just stylistic, so this is an example, it would be good when we rewrite rules if we try to move away from old language, so --

MR. GILSTRAP: No.

PROFESSOR HOFFMAN: "Thereon" and "therein," so if we're going to write it, let's write it better than we used to write it, and it doesn't need to be one sentence. It can be two. It could be -- end after "returns" and then say "the record must be indexed and cross-indexed" or something a little bit better.

CHAIRMAN BABCOCK: Okay. Any other comments? Carl.

MR. HAMILTON: This word "permanent," are there other records that the clerk keeps that are not permanent records?

MS. WINK: That wasn't the concern. The concern was there's always been a provision in the rules that the execution records, a docket was kept for them, and that didn't necessarily get translated when the various counties went to electronic recordkeeping, so some

had just allowed that to fall by the wayside. Because you can have property, real property, as well as personal property passing through execution sales for purposes of muniments of title, who are going back and making sure that that's taken care of, and I don't know how the Legislature got to this issue, too, but it's just -- it is a change in the law, but it is making sure that the clerks --

MR. HAMILTON: Yeah, but the clerk that issues the execution is going to have a copy of that in the file, right, and the return?

MS. WINK: But if it's not indexed by a normal docket the way they normally do. They just had stopped doing that in some counties, we learned in the process of the task force and looking at this rule. So we haven't changed anything.

MR. HAMILTON: Okay, but the indexing is one thing, but the record itself is going to be the same, isn't it?

MS. WINK: Not necessarily, no. What is in the record -- the difference being finding the record you need goes back to having an indexed docket of some sort. A room full of records that you don't have an index to are not very helpful if you're looking for one at some unknown time and place.

MR. HAMILTON: I understand that. I understand they've got to index it. My question is this: Does the clerk keep a copy of the original execution in the file and the return of the execution in the file that's the permanent record of the district clerk?

MS. WINK: Yes. I believe a lot of counties have gone to scanned copies, but yes.

MR. HAMILTON: Well, if they scan them then they throw the paper away, is that --

MS. WINK: I don't know. I just don't know.

MR. HAMILTON: But that would be the normal record before we had all of the electronic stuff, is they would keep the paper copies, right?

MS. WINK: That, plus a written index saying what's in these, and it's just that index that we're talking about.

MR. HAMILTON: It's the index really that we're talking about here.

MS. WINK: Yes.

CHAIRMAN BABCOCK: Okay. Anymore on this rule? Let's go to Rule 14.

MS. BROWN: 14 is again collapsing four rules. We put all of the death in one execution rule, and that's about all I can say about that one.

CHAIRMAN BABCOCK: Frank. You've got

something more to say about this one.

MR. GILSTRAP: Well, a little bit. Initially I'm opposed to Lonny's suggestion that when we rewrite the rules we should use different language, but 14(a) makes me rethink that. What on earth does that mean? "Executor, administrator, guardian, or trustee of an express trust dies." Are we talking about the creditor, the debtor? There's something missing from that.

MS. BROWN: This is, again, the old rule.

MR. GILSTRAP: I understand. If there's some meaning to that, someone needs to tell me, but I can't figure it out.

PROFESSOR HOFFMAN: For the record, Frank is in favor of my idea only when it's completely ridiculously bad language, but only when it's partially bad we should leave it.

CHAIRMAN BABCOCK: Hey, we have standards. Frank has standards.

MR. GILSTRAP: I think Lonny has got it right. I think Lonny has got it right there on that, but I just don't know what that means. I think we're talking about the representative of the judgment creditor. I think we're talking about and if he's --

MS. BROWN: Yes.

MR. GILSTRAP: -- if he dies something like that, something happens.

MS. BROWN: Yes.

MR. GILSTRAP: But I just don't see any reference in there to who this might be referring to.

MS. BROWN: I see what you're saying. I think it -- and we're talking about, I believe, it's judgment creditor. Yeah.

MR. GILSTRAP: Well, if you guys don't know, I can't figure it out, and we probably need to maybe make it more clearer.

CHAIRMAN BABCOCK: Yep, good comment. Yeah, Richard Munzinger.

MR. MUNZINGER: In (b) you say, "Execution shall issue in the name of the party for whose use the suit was brought." Would it not be better to say "for whose benefit the suit was brought"?

MS. BROWN: Okay.

MR. MUNZINGER: And then in (c), why do you limit the applicability of (c) to a sole judgment debtor? It seems to me that the word "sole" is unnecessary. I suspect it's because you don't want to cause ambiguity as to whether execution could be issued if there were multiple judgment debtors, only one of whom died, but I think the purpose of the rule is accomplished by deleting

the word "sole." It's unnecessary to the rule.

MS. BROWN: Well, if you have -- if you have a joint debtor or another debtor that didn't die you can still get an execution out as to the debtor that's alive.

MR. MUNZINGER: I agree. All I'm saying, the word "sole" seems to me to be surplus. I don't want to waste anybody else's time on it. Y'all can think on it, but it just seemed to me to be excess, surplus.

CHAIRMAN BABCOCK: Okay. What else?

MR. HAMILTON: Question.

CHAIRMAN BABCOCK: Donna, you look aggrieved.

MS. BROWN: No, no, no. I'm trying to take a few notes this time.

CHAIRMAN BABCOCK: Okay.

MS. BROWN: I'm not aggrieved.

CHAIRMAN BABCOCK: Because these guys can be aggravating.

MS. BROWN: Dead debtors are a real problem to me because you have to start all over --

MR. MUNZINGER: You must have been pointing at Lonny and Frank when you said that.

CHAIRMAN BABCOCK: I was.

MS. BROWN: You've got to start all over in probate court. It's frustrating.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: The paragraphs deal with the representative of the plaintiff I assume and the death of a nominal plaintiff, but you don't deal with the death of the plaintiff.

MR. GILSTRAP: I think that's the purpose of (a). I think that's what they're talking about in (a), is the death of the plaintiff who is not nominal.

MR. HAMILTON: Where?

MR. GILSTRAP: It's not in there, but I think that's what it's talking about.

MR. HAMILTON: That's what I'm saying, it's not in there.

CHAIRMAN BABCOCK: Frank is speculating that (a) is the plaintiff.

MR. HAMILTON: It doesn't say "plaintiff."

CHAIRMAN BABCOCK: I know, and we've got to fix that we think. Any other comments about Rule 14?

MS. BROWN: Okay. Finally, Rule 15, the Civil Practice and Remedies Code talks about reviving a judgment by scire facias, but we couldn't find a scire facias anywhere high or low or a mention of it in the rule, and so we wanted to put something about the writ of scire facias in a place in the rules that is near to the effect of it, which was if you don't get a writ of

execution out within 10 years your judgment dies. This is the place where it has a provision for reviving the judgment and has a place in the rules for the issuance of the scire facias.

Clerks do them. Again, this is kind of like the venditioni exponas. We all know what it does, some clerks got forms, some don't. We know when we need one, when the judgment is expired and we don't want to do an action on a debt, we want to do a writ of scire facias and get it out, and so we wanted to have, again, a place in the rules to satisfy what is a practice.

CHAIRMAN BABCOCK: Okay. Comments about this? Elaine.

PROFESSOR CARLSON: Over on page 102 under 34.002 of the Civil Practice and Remedies Code, we're told what the effect of the plaintiff's death is, and I think this execution Rule 14 is if the person who is now representing the plaintiff dies, dies, then what would happen.

MR. HAMILTON: Where does it deal with the plaintiff?

PROFESSOR CARLSON: I'm looking over on page 102 at 34.002.

MS. BROWN: This gets back to the problem that these rules were all together once and then they were

pulled apart and some were left in a statute and some were brought --

PROFESSOR CARLSON: Right.

MS. BROWN: -- into the civil procedure rules, so you have to go back and forth between the two. Sometimes that's not very convenient, but that's the way it is.

CHAIRMAN BABCOCK: Well, could you cross-reference 14(a) to 34.002 of the Civil Practice and Remedies Code? Would that be the way to do it, Elaine?

PROFESSOR CARLSON: Yeah, that might be a good fix. We usually don't cross-index but this is an instance where I agree with Frank, someone just reading that rule --

CHAIRMAN BABCOCK: Would scratch their head a little bit.

PROFESSOR CARLSON: Would be mystified.

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: You know, Carl talked about the death rule, our Rule 151 deals with the death of a plaintiff and scire facias being issued, doesn't it?

MS. BROWN: Those rules, those rules --

MR. LOW: That's a suit.

MS. BROWN: It's -- they're using the same language, scire facias, to deal with a whole different

situation.

MR. LOW: Well, but a plaintiff, which it doesn't say plaintiff in a personal injury suit or a plaintiff in what, does it? It just says "plaintiff."

MS. BROWN: Well, the scire facias that's talked about in Rules 151 through 154, it has the same name, it is a different animal. We wanted a place for the animal that is relative to reviving a judgment when you have not got an execution out within 10 years. There was -- there was not a rule that talked about it.

MR. LOW: That exhibits my lack of knowledge of scire facias.

MS. BROWN: Well, it's weird. Like I said, they --

MR. LOW: Okay.

MS. BROWN: -- use the same name, but it's a whole different dog.

CHAIRMAN BABCOCK: Buddy generally understands weird stuff, but Elaine.

PROFESSOR CARLSON: Yeah, Buddy, I think that's discussed in footnote 56 on page 100. Those 151 rules, two and three, four.

MR. LOW: What's that? Oh, okay. Well, again, my failure to read.

CHAIRMAN BABCOCK: Okay. Anything more on

Rule 15?

MS. BROWN: And that's all of them.

CHAIRMAN BABCOCK: Wow. Well, we're done with the ancillary rules, and you guys did an unbelievable job on it.

(Applause)

CHAIRMAN BABCOCK: And thank you very much, and I know the Court really --

MS. BROWN: And if you don't do executions you haven't lived.

PROFESSOR CARLSON: The executioner.

CHAIRMAN BABCOCK: We all feel that way, so we will get out a schedule for next year, but I think we've had a really productive year. A lot of rules that we have worked on have actually gone to the Court and come back out again. So thanks, everybody, for your hard work. I think the photograph of our little troop came out very well.

MULTIPLE SIMULTANEOUS MEMBERS: Thank you.

CHAIRMAN BABCOCK: And Angie needs to say something on that topic.

MS. SENNEFF: I have e-mailed the photographer to see if he can take the faces out and put numbers and then I'll make a key, and I can bring that to the next meeting.

HONORABLE JANE BLAND: Can we get one of these faces?

MR. GILSTRAP: Can he Photoshop some of the faces?

CHAIRMAN BABCOCK: All right. Have a happy holiday, everybody. We're in recess.

(Adjourned at 3:10 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

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I further certify that the costs for my services in the matter are $_____.

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Given under my hand and seal of office on this the _____ day of _____, 2012.

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D'LOIS L. JONES, CSR
Certification No. 4546
Certificate Expires 12/31/2012
3215 F.M. 1339
Kingsbury, Texas 78638
(512) 751-2618

#DJ-337