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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

January 28, 2012

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 28th day of January, 2012, between the hours of 9:01 a.m. and 11:49 a.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

11-04 Ancillary Proceedings Task Force proposals.

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

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CHAIRMAN BABCOCK: All right. Welcome back, everybody. Thanks for attending the reception last night. It seemed like everybody had a good time. Justice Gray.

HONORABLE TOM GRAY: Actually, we were supposed to do this in solidarity of Dee Dee. Dee Dee wants to know where the photo from the picture was three years ago.

CHAIRMAN BABCOCK: I'll defer to my able colleague, Ms. Senneff, about that.

MS. SENNEFF: Our photographer skipped bail or whatever, because we never heard from him. I tried to call him and e-mail him constantly after that.

CHAIRMAN BABCOCK: We didn't get a print?

MS. SENNEFF: No.

CHAIRMAN BABCOCK: No.

PROFESSOR CARLSON: It's really on a dart board.

HONORABLE TOM GRAY: That really didn't need to be on the record.

MS. SENNEFF: Well, I didn't say his name.

CHAIRMAN BABCOCK: But we're going to do better this time. We're going to get a copy for everybody.

HONORABLE KEM FROST: Jane's going to take one.

HONORABLE JANE BLAND: Yeah. Smile, everybody.

MS. BARON: That's the last we'll see of Jane, I guess.

MR. HAMILTON: Can you print 52 copies, Jane?

CHAIRMAN BABCOCK: Yeah, right, make some copies for us. All right. We're back on expedited actions, and we're going to take up this morning the mandatory rule, and let's just go through it. I hope we can get this done in an hour or hour and a half at the most, and then finish up ancillary, but that may be overly optimistic. The first subparagraph is the application of the rule. We spent obviously some time yesterday talking about issues that relate to this, but does anybody have any comments about subparagraph (a), either (a)(1), (a)(2), or (a)(3)? Carl.

MR. HAMILTON: Well, (a)(1) says "monetary relief aggregating 100,000 for all claimants" and paragraph (2) says that no party can recover more than 100,000. It seems like those are inconsistent.

PROFESSOR DORSANEO: Because they are.

MR. HAMILTON: They are.

MR. GILSTRAP: Chip, we talked yesterday about rewriting (1), and we need to rewrite (1) the same way we talked about rewriting the analogous part of the

other rule; that is, to make it clear that each claimant must seek $100,000 and not all claimants in the suit shall seek $100,000.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: But that's not what the statute says.

MR. GILSTRAP: I understand.

PROFESSOR DORSANEO: So if it's going to be mandatory, doesn't it have to be like the statute? I guess it doesn't absolutely have to be, but to do what the Legislature wants it does.

MR. CHAMBERLAIN: Mr. Chairman?

CHAIRMAN BABCOCK: Yeah, David.

MR. CHAMBERLAIN: The task force intended for -- and there was discussion about this yesterday, and, Bill, I think maybe you were the one that was talking about it, but the task force intended that there could not be a judgment recovered against a defendant in excess of $100,000.

CHAIRMAN BABCOCK: David, speak up a little bit, please.

MR. CHAMBERLAIN: Yeah. The task force contended that the most that could be recovered against a defendant by all claimants was $100,000, so if each

claimant pled -- let's say you had three claimants and each pled $70,000. That would not fall under the expedited actions rule.

CHAIRMAN BABCOCK: And we talked yesterday about if you had three plaintiffs, each with 100,000-dollar claims, they couldn't bring it in the same suit, but they could bring it in separate suits.

MR. CHAMBERLAIN: Correct.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Yeah, by way of example, the plaintiff and defendant can sue each other for $100,000 and the total dollars involved would be 200, but you couldn't have two plaintiffs suing one defendant for 200,000.

CHAIRMAN BABCOCK: Right. Okay. Yeah, Justice Brown.

HONORABLE HARVEY BROWN: This is maybe a little out of bounds, but for the mandatory it seems like to me that we're assuming that the mandatory has to be $100,000 It could be that you could have a mandatory with an amount less than $100,000 and the voluntary go up to $100,000 and I think that for the mandatory we should have a smaller amount. I think maybe $50,000 or something like that, and I think everybody in this room is assuming that there's a lot of -- that there are not going to be that many cases that are tried that are under $100,000. I mean,

that was not my experience when I was a trial judge. I asked two members of our committee that are trial judges whether that was their experience. They had lots of cases under $100,000. I would say probably half of my docket was under $100,000, and that's in Harris County. I've got to believe in West Texas and other parts of the state there are many cases that are less than $100,000 and even with attorney's fees, some parts of the state I think the attorney's fees are charged at rates more like 100 to $150 an hour; and so those can easily fall within this; and I think if you're in a small county and you're suing individually on a construction contract over your house or a problem with your ranch and it's a 20,000-dollar case, well, that may be, you know, the main asset that person has, so it might not fall within our category of kind of reputational; but it's still in that county a very, very significant case. For them that may be worth a case for a lot of us is worth $200,000, individual. So I think putting a smaller number of cases in that mandatory and looking at statewide and not the type of experiences we have at this table is something that should be considered.

CHAIRMAN BABCOCK: Justice Brown, you said half your cases when you were on the trial bench were under $100,000?

HONORABLE HARVEY BROWN: I would say that got

tried, yes.

CHAIRMAN BABCOCK: That got tried. How many of those were under 50?

HONORABLE HARVEY BROWN: A good number.

CHAIRMAN BABCOCK: Yeah, Professor Dorsaneo.

PROFESSOR DORSANEO: The problem with that is that the statute seems to be mandatory, to me, so I think we're stuck with a hundred.

CHAIRMAN BABCOCK: Yeah. Frank.

MR. GILSTRAP: Okay. I'm confused, I'm sorry, but A and B sue the defendant for $90,000 each, can we do that under the rule that we're proposing?

MR. CHAMBERLAIN: That would not -- if two plaintiffs were making a claim that aggregated above $100,000 it would not fall within the expedited action.

MR. GILSTRAP: So they could not bring -- if A comes in and says, "I want to recover for $90,000," and B comes in and joins the suit and says, "I want to recover $90,000," they're out of the rule.

MR. CHAMBERLAIN: That's correct.

MR. GILSTRAP: Okay. But if the defendant sues back, if A sues for $90,000 and the defendant sues back for $80,000, they're still in the rule.

MR. CHAMBERLAIN: That's correct.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: With respect to the exclusion of the Family Code, Property Code, Tax Code, et cetera, I understand why the committee wanted to do it that way because it's a lot easier, but the law doesn't require them to be excluded. The law just says they can't be inconsistent with provisions in there, and with the change in the discovery control plan they've eliminated the old level one, and the old level one included divorces without children where the marital estate was 50,000 or less. So it seems to me if we're going to follow this format and get rid of old level one, we've totally taken those potential divorce cases out of the expedited process, and I don't think we should.

CHAIRMAN BABCOCK: Okay.

MR. GILSTRAP: Well --

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: You know, I don't think that -- if what you said is the answer, I don't think the answer is apparent from the statutory language -- or from the proposed language of the rule. I can't fathom that just by looking at the rule language; and also, you know, as Professor Dorsaneo points out, it seems to conflict with the statute, which says "in which the amount in controversy inclusive of all claims for damages of any kind is" -- does not exceed $100,000. It seems to me that includes

counterclaims, but, you know, whatever it is I think it needs to be clear, and I don't think what we have here is clear.

CHAIRMAN BABCOCK: Yeah, I think there is consensus that this section needs reworking, but the question is, is it our feeling that the statute requires what David thinks it does, which is, you know, one plaintiff, 100,000 or less, multiple plaintiffs can't aggregate more than 100,000, and a defendant counterclaim can be 100,000 or less. Is that everybody's reading of the statute?

HONORABLE TOM GRAY: No.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I read it just like Frank does, I think. You aggregate all the claims. It doesn't matter who is making them, because it can be a triangle effect here of three different people suing each other, but if all the claims added up exceed 100,000, you're out.

CHAIRMAN BABCOCK: So if a plaintiff has a claim against the defendant for 80 and the counterclaim is for 80 then they're out of this?

HONORABLE TOM GRAY: You're out.

CHAIRMAN BABCOCK: Okay.

MR. GILSTRAP: I think the Court has the

power within its rule-making authority to make that adjustment. You know, I wouldn't have a problem with that, but whatever it is we need to say.

MS. HOBBS: Chip?

CHAIRMAN BABCOCK: Yeah, Lisa.

MS. HOBBS: Does this not go back to what Pam was saying yesterday about perhaps the rule might adopt the existing case law on jurisdictional limitations on county courts at law, which is a well-developed area of case law that we might be able to pull from about what aggregate means.

CHAIRMAN BABCOCK: And amount in controversy.

MS. HOBBS: Amount in -- yes.

CHAIRMAN BABCOCK: Yeah, Robert.

MR. LEVY: I think for this situation, though, it's a little bit different if we're talking mandatory, and that does instruct, but I think there's a greater potential for problems if you've got individual claims and different defendants, and the case law might be helpful on that, but I think we should try to be clear to avoid any uncertainty.

CHAIRMAN BABCOCK: Yeah. Well, let's say that the Legislature does -- did intend what Frank and Justice Gray think it intended. Is there anything in the statute that would prohibit the Supreme Court from

capturing a larger class of cases? In other words, adopt the construction that David is advocating. Yeah, Professor Dorsaneo.

PROFESSOR DORSANEO: I think you can go up.

CHAIRMAN BABCOCK: You can go up, but you can't go down?

PROFESSOR DORSANEO: Right.

CHAIRMAN BABCOCK: Yeah. Anyone else have any thoughts about that? Richard.

MR. ORSINGER: No. I have a different thought.

CHAIRMAN BABCOCK: Huh? Different thought. Anybody have any thoughts about that? Justice Jennings.

HONORABLE STEPHEN YELENOSKY: Well, it just says the rules -- the Supreme Court is going to promulgate these rules and "The rules shall apply to civil actions," and then it has all of these qualifying factors.

CHAIRMAN BABCOCK: But let's say there was no statute and the Supreme Court just wanted to amend the rules to change the level of discovery and all of these other things that are being changed. Could they do it even if there was no statute?

HONORABLE TERRY JENNINGS: Right. Sure.

CHAIRMAN BABCOCK: I think so. Justice Bland.

HONORABLE JANE BLAND: I'm good.
CHAIRMAN BABCOCK: You're good? Richard.
MR. ORSINGER: Can I change subjects?
CHAIRMAN BABCOCK: Okay.
MR. ORSINGER: I thought you wanted to move on.
CHAIRMAN BABCOCK: Wait a minute. Pam's got something on the old one.
MR. ORSINGER: Okay. Fine.
MS. BARON: The question really, they use the term "amount in controversy" in the statute. We know what that means.
CHAIRMAN BABCOCK: Yeah.
MS. BARON: Then the question is by adding the phrase "inclusive of all claims for damages" did the Legislature intend to limit in some way what we traditionally -- the way we traditionally calculate amount in controversy, and I don't know the answer to that.
CHAIRMAN BABCOCK: Jane is back.
HONORABLE JANE BLAND: Well, I think I'll voice my vote for Chief Justice Gray and Frank Gilstrap's reading of the statute. I don't think that the Legislature meant for us to engraft county court jurisdiction, which is a little complicated, into this process. It says "civil actions, inclusive of all claims." "All" should mean all,

and then it has the list of the kinds of damages, not to exceed 100,000. So I don't think they were trying to overcomplicate it by saying adopt county court jurisdictional principles to decide whether or not these cases fall within this statute.

CHAIRMAN BABCOCK: Okay. Yeah, Professor Dorsaneo, and then Gene Storie.

PROFESSOR DORSANEO: Before the statute started messing with it "amount in controversy" did mean all, with the exception of -- with the exception of things that were just improper on their face, like request for, you know, punitive damages in a breach of contract case, things like that that were specious claims didn't count, but everything else counted until we got the county court statutes that started taking -- except, you know, interest, by that name, and then we got the county court statutes. I don't think we ought to think about the county court statutes. "All" means all. I agree with that.

CHAIRMAN BABCOCK: Okay. Gene.

MR. STORIE: I think raising the limit for a voluntary rule would be okay, but with the mandatory rule I'm reminded of the old saw, you can do things cheaply or fast or well, pick which two you want. So cheap and fast may not be good as the mandatory rule for bigger cases.

CHAIRMAN BABCOCK: Okay. Good comment.

Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I just suggest that however the Supreme Court decides on that that the best way to handle it would be through a comment at the bottom and go through the various scenarios rather than trying to actually craft language of the rule that would cover every eventuality, so, you know, we can decide if two plaintiffs, each suing the same defendant, you know, how you handle it, one plaintiff suing two defendants how you handle it, because otherwise there's so many permutations I don't think you could write language that would cover everything.

CHAIRMAN BABCOCK: Yeah. Good point. All right. Anything more on subparagraph (a)?

MR. ORSINGER: Over here.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: To follow up on Justice Christopher's point about the Family Code, House Bill 274 is not entirely consistent in the way that it relates to the Family Code. The provision about early dismissal does not apply to the Family Code. The provision about expedited civil actions just can't be inconsistent with the Family Code. The provision about waiver of appeals cannot apply to the Family Code, and the provision on the allocation of litigation costs cannot apply to the Family

Code. So in this particular area we're dealing with something that the Legislature said can't be inconsistent with the Family Code. The -- as a practical problem, the jury provisions in here, which are one of the important features of this whole process that the task force has offered, is not going to have an impact in my opinion on family law because most of the family law cases in my experience, not statistically, but in my experience involve custody of children, which is excluded from the whole process.

Then the other cases in family law that are jury related and now set aside, the government brought termination cases. The ones that are not custody cases are property cases involving a lot of property, well over $100,000 worth of property or you wouldn't be standing for the expense of a jury trial. So as a practical matter the proposal that's been worked out I think is going to have no effect on family law litigation, and I would like to go back to my comment yesterday that I don't think we should destroy level one discovery. What the task force has proposed is that their expedited trial process with all of its deadlines is going to supplant the existing level one discovery. I think we should leave level one discovery where it is. It still has an application in family law. Maybe we ought to move it from 50,000 to 100,000, which I'm

in favor of, but I wouldn't eliminate it because I think that family law really isn't -- isn't engaged in this task force proposal and we ought to create a new level of discovery that's associated with the expedited dispositions and leave the old level one there for other uses.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I'm just thinking about if you aggregate to figure out whether it applies and you have multiple plaintiffs or multiple claimants then what do you do when you get to (2), (a)(2)? Do you adjust what each can get from their judgment because, of course, if they're all against the same defendant, you have five plaintiffs, each of them pleads 19,000, right? So that falls within this rule, no counterclaim, right, that adds up to less than a hundred, but under (2) each one of them could get a jury verdict of 100,000, so the defendant could end up with a judgment against it of 500,000, and I heard from David earlier, Chamberlain, the idea was that there would not be a judgment against any one party for more than 100,000. So we need to figure that out, if we're going to use an aggregation for amount in controversy.

CHAIRMAN BABCOCK: Yeah, I think that's precisely the conflict that somebody has pointed out earlier.

HONORABLE TRACY CHRISTOPHER: No, but --

HONORABLE STEPHEN YELENOSKY: Go ahead.

HONORABLE TRACY CHRISTOPHER: But the judgment issue is something we really haven't talked about --

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE TRACY CHRISTOPHER: -- and that's even more complicated.

CHAIRMAN BABCOCK: Right.

HONORABLE STEPHEN YELENOSKY: Yeah. I mean, once we figure out the amount -- in figuring out whether you go with amount in controversy as dictated by current law or otherwise, you have to figure out what that's going to mean for this next part because it will determine perhaps how many plaintiffs, how much they might plead for, and all that, so they're tied together, and I don't think we have talked about that.

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: Yeah, I mean, from a prospective of the defense, if -- I don't know why anybody would want to participate in this kind of limiting discovery process if you're going to be subject to greater than 100,000-dollar judgment.

CHAIRMAN BABCOCK: Uh-huh.

MR. RODRIGUEZ: I mean, it just doesn't make

sense for you to say, okay, I want to limit what I can do and find out and then you go to -- because they're asking for less than 100,000, so that puts you within the statute, but they get a lot more -- if the jury gives them more they get more than that. It just -- I don't think it's something that most defense lawyers are going to want to sit there and think about that possibility and agree to it.

CHAIRMAN BABCOCK: Yeah. Yeah. Justice Brown.

HONORABLE HARVEY BROWN: Well, to give an example, you might have three plaintiffs who each seek $25,000, but the jury awards each $50,000.

HONORABLE STEPHEN YELENOSKY: Yeah, or like I said, a hundred.

HONORABLE HARVEY BROWN: So you would have 150 even though the claim by the plaintiff in the aggregate was less than a hundred, the verdict might not be; and therefore, you've got to figure out what you're going to do about the judgment, so that needs to be considered for that second part.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, and if you do that, if you start from the perspective that we're going to write a rule that basically nobody can end up facing a judgment of more than 100,000 from any number of

other claimants then, I mean, it's really complicated because how do you do that? Well, because there are two plaintiffs, and each of them has pled $49,000 in damages, which in the aggregate nobody -- if they stick with their pleadings, so then the rule would have to say that you're limited to whatever you pled. That's the only way you could result with a judgment against any one defendant less than that, so you could not write an amount. You would have to say you're limited to what you pled.

CHAIRMAN BABCOCK: Justice Christopher, and then Skip Watson.

HONORABLE TRACY CHRISTOPHER: Oh, no, that was going to be my solution.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: Limited to what you plead.

CHAIRMAN BABCOCK: Okay. Skip.

MR. WATSON: Well, you could also just in the jury charge put in an instruction that the total amount awarded to all plaintiffs in damages cannot exceed $100,000 if that's the way we interpret it. There are ways to head off the problem of trying to make a judgment conform to both the charge and the rule.

HONORABLE STEPHEN YELENOSKY: But wouldn't that be a problem? I mean, because you're telling the jury

to trade off between two different claimants on the arbitrary limit. I don't know that we could do that.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Yeah, I have a question. When you were considering amount in controversy, did you look at Government Code 24.009, which says that when multiple parties that for jurisdictional purposes you add all claims, even though it said when multiple plaintiffs assert claims against a defendant their claims are aggregated to determine the amount in controversy. Did y'all look at that particular statute in arriving at your conclusion that you aggregate all of them?

MR. CHAMBERLAIN: Well, Buddy, no, actually, we didn't. Here's what our thought was: It was much along -- and we had a very vigorous internal debate about this, but it was much along what Peewee was talking about just a few minutes ago. We shouldn't be in a situation where a defendant enters this process thinking that the aggregate amount of the two or three claims is $95,000 and the jury gets it and it ends up with a judgment to be three or four hundred thousand dollars. Essentially what you are doing with the mandatory rule is you are -- if a plaintiff pleads for $50,000 then that's all the plaintiff is ever going to get. So if the jury comes back with $150,000, it's going to be $50,000, and we were thinking that in a

comment we would say that the Greenhall case where you can get a post-trial amendment simply does not apply to this process. You're limited to what you plead.

MR. LOW: I know, but you had to arrive at some conclusion as to whether or not what aggregate amount meant with multiple claimants, and it looks like the Government Code defines "aggregate amount" for purposes of jurisdiction, and would you recommend having some different definition of "aggregate amount" than is in the Government Code for jurisdictional purposes?

MR. CHAMBERLAIN: Well, I would have to -- I've got to tell you we didn't analyze it in terms of the Government Code.

MR. LOW: Well, it's pretty -- go ahead.

CHAIRMAN BABCOCK: Yeah, Judge Estevez.

HONORABLE ANA ESTEVEZ: I just have a question regarding why we have the cap in here. If they're going to be voluntarily entering into --

MR. CHAMBERLAIN: No, this is the mandatory rule.

HONORABLE ANA ESTEVEZ: Okay, only on the mandatory. Okay, so even in the mandatory rule, if I have a breach of contract case, and I want it expedited anyway, whether it was mandatory or not, what is the purpose of having the cap?

MR. CHAMBERLAIN: For the reasons that Peewee was talking about, is that if you enter -- if the defendant enters the process, whether by mandatory rule or by voluntary rule, if the defendant enters the process on a pleading of less than $100,000, and at the same time gives up valuable discovery rights such as the number of hours of depositions, the length of the discovery period, the number of written interrogatories, request for production, and request for admissions that can be propounded, then in exchange for that it ought to be capped at $100,000 because otherwise if it's going to -- if there's a danger that there's going to be a half a million-dollar verdict then certainly the defendant will want to have more vigorously engaged in discovery in the case.

CHAIRMAN BABCOCK: Go ahead, Judge.

HONORABLE ANA ESTEVEZ: But isn't the plaintiff giving up that same right?

MR. CHAMBERLAIN: Well, the plaintiff has the option under the mandatory or the voluntary rule to simply plead $101,000.

HONORABLE ANA ESTEVEZ: But if you're going to be -- let's say you know your claim is under a hundred, it's a car wreck, and I know then it may not come into effect, but the jury could possibly give them more for pain and suffering. You know, I think there's counties that

could do that. Why would the plaintiff, thinking that it really is under 100,000, be barred --

MR. CHAMBERLAIN: Well --

HONORABLE ANA ESTEVEZ: -- from recovering what a jury would have determined. I'm just saying they gave up their discovery, too. They gave up something, so I see it as a one-sided -- if they're being intellectually honest I feel like it seems like a one-sided rule.

MR. CHAMBERLAIN: Well, if the plaintiff wants to enter into the process and plead for $75,000, and get the benefits of it then they're going to be capped at less than $100,000. Now, they could get more than 75 and could get up to a hundred, but they could not get over a hundred, and the reason -- and, see, I think it's important to remember the plaintiff always has an option. The plaintiff always has the option of pleading for $101,000. Even under the mandatory rule plaintiff could before trial, at least 30 days before trial, can amend the pleading and plead over $100,000, and it comes out of the mandatory process. So there's plenty of opportunities here for the plaintiff to, you know, to be able to recover $100,000, but once it gets 30 days before trial then without leave of court they can no longer do that, either pretrial or post-trial, and it's just -- Judge, what this really is, is simply just a trade-off is what it is.

CHAIRMAN BABCOCK: Marisa.

MS. SENNEFF: Yeah, I just want to add that this was something that was heavily debated in the task force meetings, and the ultimate conclusion -- and it's not obvious from what we're discussing right now is that in this package version, the voluntary rule does not have a cap, but the voluntary rule that I guess that was discussed yesterday, the standalone rule, does have a cap as well as this mandatory rule has a cap, and it is just -- you know, it is sort of an incentive device for the defendants, and that is how it was discussed among the task force, so it is one-sided in a way, but it was a decision that the task force made to incentivize use of the rule; and also in the mandatory sentence, not to incentivize since the defendants don't have a choice, but to prevent the defendant from having to pay more than 100,000 in one of these cases because they are limited in the discovery that they can use.

CHAIRMAN BABCOCK: Marcy.

MS. GREER: There is a little bit of a box because once the plaintiff pleads $100,000, they could be removed. So a lot of plaintiffs plead it's less than 75 to avoid removal, but then that would get them into the mandatory procedure, right? Unless I'm missing something.

MR. CHAMBERLAIN: Yeah.

MS. GREER: So I think that might create a problem in and of itself because the only way to stay out of Federal court is to make that affirmative stipulation, which gets you right into this.

HONORABLE TERRY JENNINGS: Can I ask for a clarification?

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: Just a clarification, the statute doesn't require that if the rules are adopted that any judgment be capped at $100,000, right?

MR. ORSINGER: I think it does.

HONORABLE TERRY JENNINGS: Am I looking at the wrong statute? I'm looking at page two here, House Bill 274. It says this applies where the amount in controversy does not exceed $100,000.

MR. ORSINGER: So if you had a judgment --

HONORABLE TERRY JENNINGS: So when you file your lawsuit and then it appears from the pleadings the amount in controversy doesn't exceed $100,000, and the Court is to craft these rules for those kinds of cases. I mean, we could adopt -- the Court could adopt that rule, but does it have to?

CHAIRMAN BABCOCK: Frank, then Hayes, then Judge Yelenosky.

MR. GILSTRAP: Well, I want to follow up on that. I mean, you know, it's always been my view that when the Legislature passes a procedural statute and gives us some of the procedure that the Court certainly explicitly but I think implicitly has the power to adjust these to make them work in dealing with all of these situations we're talking about that aren't addressed in the statute; but this statute, if you read it closely, it says, "These rules shall apply to civil actions in district courts, county courts," blah, blah, blah, "in which the amount in controversy inclusive of all claims does not exceed $100,000." It does not say only to those. The Court can apply these -- the Court could go on and apply these to much larger claims if it wants to. There is nothing that restricts it from doing that, and I think under that power it could go in and deal with the situation and say, well, yes, we've got three plaintiffs. They've each sued for under $100,000, but at the end of the day the defendant winds up getting hit for 300,000. We could pass a rule that covers that. We could make this rule cover that and be consistent with the language of the statute.

CHAIRMAN BABCOCK: Hayes, then Judge Yelenosky.

MR. FULLER: Was there any discussion in the Legislature on amount in controversy? I'm curious, I'm

kind of thinking the Legislature may have been thinking one plaintiff, one defendant, $100,000, however you call it or get there; and we're off into how you aggregate multiple parties and the effect of joinders and consolidations and things of this nature. I'm just curious is there anything in the legislative history that would tell us we may be going a little too far afield?

MR. CHAMBERLAIN: Yeah, well --

MR. FULLER: Or I'm just --

MR. CHAMBERLAIN: Yes, I think that's an excellent point. I mean, there was many of us on the task force and in the working group that actually were over in the Legislature both on the House and the Senate side working on this. Interestingly enough, this part of 274 was the least discussed and the least debated of all the provisions, all the five parts of 274, but I can tell you that this was not controversial in either chamber, in any committee hearing. It was always envisioned that this was one plaintiff and one defendant over a minor case. I don't think -- I didn't hear any discussion about, well, what do we do when we've got 50 plaintiffs bringing, you know, 50 thousand-dollar claims. There was no discussion of that.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, and earlier I said the only solution in that situation, if

you're going to apply a cap, is to limit the pleadings. Well, you're pointing to the other solution, which is probably more elegant, which is to say that it doesn't apply to multiparty cases in which more than one claimant is proceeding against a defendant or counterdefendant, because then you could clearly limit it to 100,000 per, because nobody could possibly then end up with a judgment against them of over 100,000. So that would be more elegant I think and more consistent with the idea that these are supposed to be small cases, and the -- the other -- and that certainly cannot be inconsistent with the statute because the statute doesn't require any cap on judgment. So if we want to do a cap on judgment, we can limit that to whatever cases we want to limit it to, even if you believe that the statute is mandatory as to some amount in controversy. No matter how many plaintiffs, the cap need not apply to all of those.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo, and then Lisa Hobbs.

PROFESSOR DORSANEO: Well, the cases are really quite messy if you don't have a cap on the judgment, and the Casares case was a county court at law case, and the pleadings were for $100,000 or thereabouts, and the testimony at trial was it's getting worser all the time, and it got worser to $300,000, and then the subsequent

Supreme Court case law on not only interpreting pleadings but on how you work with the amount in controversy statutes, those cases are a work in progress, if I can put it that way, because it's very tough sledding moving forward through these kind of difficulties.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: So and I think Justice Jennings is right on the way the statute reads. It doesn't appear to do anything with judgments, but if it -- if we don't then the sky's the limit.

HONORABLE TERRY JENNINGS: Well, I have a -- I have a slightly deeper concern, and of course, the Court should respect the bar's input on this, but the way I read this statute is as a reform, and this is to help expedite public justice for certain kinds of cases so that these certain kinds of cases, people who have these kind of smaller claims -- they're not small claims, but smaller claims -- can get through the court system, get a resolution, a prompt, efficient, and cost-effective resolution of their cases, and it has -- it says you at least have to talk about cases where the amount in controversy, the way I read it, as pled is less than $100,000 and the Court is supposed to adopt rules for cost-effective and reducing and lowering the discovery costs.

So I think maybe the Legislature was thinking that the system, lawyers and judges who aren't getting these cases effectively moved through the system timely, maybe we're part of the problem; and to that extent I just want to -- I think the Court should take that into consideration when it's adopting these rules. Of course, you always want to consider the input of the bar in this thing, but when you start putting limitations on what really I think is supposed to be a reform to move these cases quickly through the system and at much lower cost so that people can actually have access to the courthouse and have access that an expedited, prompt, resolution to their disputes.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Going back to Justice Yelenosky's suggestion that perhaps a solution to the judgment issue would be to just only allow the rule to apply to single plaintiff, single defendant cases, the only reservation I would have with that approach might be if the plaintiff were -- let's say this is a contract dispute and he's the sole proprietor of a business and he sued in both capacities just because he wasn't really sure what way to sue, and it's really just a single case, a single contract dispute, but he might sue in a couple of capacities, and so your exclusion might be overly broad, and I don't know how

you work around that.

HONORABLE STEPHEN YELENOSKY: Well, it might, but --

CHAIRMAN BABCOCK: David.

MR. JACKSON: That could be a problem, because I see cases everyday in 10,000-dollar cases where you've got the husband, wife, or a driver and owner of a car suing -- suing the driver and owner of the car and three plaintiffs that were all in the car, and you would have just a mess of cases with several plaintiffs and defendants that all are cheap.

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: Well, I mean, I think the Legislature, from reading this statute, wanted to come up -- or for us to come up with rules to allow smaller cases to go forward. The reality is that if we don't -- if we don't provide for a cap at say $100,000, most defense lawyers are not going to be willing to be limited in what discovery they can do in a case because they're afraid if they -- if they are limited and all of the sudden a case where they know they can't get stuff for more than 100,000 or think they can't ends up being 250 or 300,000 or maybe more, which has happened in my area of the state, not infrequently, you know, then somebody behind us is looking over our shoulders and saying, you know, "Why didn't you do

something about this?" I mean, you know, "Why didn't you take that other deposition that you should have taken that you should have known?"

I mean, and so as a defensive mechanism we're going to just try and stay out of it, which is what the problem with the levels that we have now is. Most defense lawyers automatically stay out of level one or two just because it's so difficult to -- you've got 10 cases of level three discovery and then all of the sudden you've got one case of level one, you know, it might -- your timetable might have passed before you realize I've got to go and really put all of those times down, so I think we need to recognize, and in order to provide a framework for this to work, that there's got to be a limitation.

On the plaintiff's side the plaintiff is protected. The reason they opt out for this is because they have a 20,000-dollar case that they may be able to get up to $100,000, but they're able to go to trial within nine months of something happening. If they -- if they feel that it's more than that all they have to do is plead, you know, 150,000-dollar damages, and they're out. So they -- the give and take there is done by the plaintiff's lawyer.

CHAIRMAN BABCOCK: Yeah.

MR. RODRIGUEZ: And that's just sort of my comments.

CHAIRMAN BABCOCK: Justice Christopher, then Nina, then Justice Jennings.

HONORABLE TRACY CHRISTOPHER: Well, the more people talk about it you can see the more complicated it gets. When you think about a lot of small cases, like in the car wreck situation, if you do have two unrelated plaintiffs, sometimes they'll file separate lawsuits but then they get consolidated, and individually those two lawsuits could fit into this expedited process, and but consolidated maybe they wouldn't, but, you know, are we going to penalize the system and not make a consolidation of the two cases because, you know, it's a lot more efficient to have one trial than two trials and if they both belong together then we should do it. So, you know, we have to think about that, too, if we require one plaintiff, one defendant, then we're going to have multiplicity of lawsuits out there, and we'll have five jury trials instead of one.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I just wanted to echo a lot of what's been said. I think this is a wonderful opportunity for the state to provide for prompt resolution of smaller disputes, and I hope that we can work it so that it will be a user-friendly rule that will actually be used, and I think for that purpose I agree with Eduardo, there should

be a limit of liability. We should expand where three or four people all have aggregate claims that are 100,000 or less, let's put them in the suit, let's cap the liability, and this is a statement against personal interest being an appellate lawyer, I know we can't mandatorily limit appellate review, but I think we ought to suggest it as a voluntary adjunct to the mandatory rule.

CHAIRMAN BABCOCK: Justice Jennings, then Justice Moseley.

HONORABLE TERRY JENNINGS: Another question. All of this is going to shake out, I guess, depending on how the Supreme Court interprets the mandate from the Legislature, and, you know, "shall adopt rules" means must adopt rules, and if those rules have to apply to all claims under -- where the amount in controversy doesn't exceed $100,000, I can see under a voluntary, if the Court interprets that as well, we can make this voluntary and it doesn't have to apply to all claims, only those claims where people volunteer to opt into this, then I can see putting a cap on it. But does the Supreme Court -- if it interprets this provision as mandatory that the Court must adopt rules that apply to all claims, can the Supreme Court adopt a rule that caps damages?

CHAIRMAN BABCOCK: Okay. Justice Moseley.

HONORABLE JAMES MOSELEY: The Legislature may

have been thinking one plaintiff and one defendant, but that's not what they said, and if we start going beyond that and put in those types of limitations, we're going to be kicking cases out. For example, if you have a homeowner suing a contractor who says, "No, it's the subcontractor's fault." You're going to be kicking out a lot of cases that otherwise might fall into this. I think what we have to do is pass a rule -- what the Supreme Court has to do is pass a rule that meets the minimum standards of what the Legislature said. The Legislature said 100,000, counting everything altogether, and I think we can go beyond that, if the Court chooses to do so, but to cover itself it's got to cover that minimum.

CHAIRMAN BABCOCK: Sofia.

MS. ADROGUE: This may not be the venue, but I do think it's important that whether David says it here -- I'm sorry, I'm losing my voice -- that the whole issue of does it make sense to have the first level remain discovery one or expedited does get fleshed out somewhere and the issue of the family law cases does get fleshed out somewhere. I just want to make sure, they spent so much time doing all of this work that I know we're just trying to highlight issues, but I think that is important whether we're going to create another category in the family law issue because it doesn't appear that it can't be included.

It just can't conflict, and I know personally, as people learned I was on this committee, the one question people kept asking me from the family law perspective there's just inquiries. It could have been because of the form issue, but --

CHAIRMAN BABCOCK: Okay. Sarah, and then Judge Yelenosky, and then Frank.

HONORABLE SARAH DUNCAN: I just have a question. I distinguish between, for instance, attorney's fees as attorney's fees for prosecuting the suit that's going to the jury and attorney's fees as damages, for instance, for a suit within a suit formal practice case, and apparently the task force and pretty much everybody else that's spoken I think has interpreted this to mean that for purposes of this statute attorney's fees or costs or interests, it's not that they are considered damages rather than the cost of prosecuting suit. Am I the only one that's thinking that way, that there's a difference between attorney's fees as damages and attorney's fees as a cost of prosecuting this suit?

For instance, a legal malpractice case, one of the items of damage in a legal malpractice case is the attorney's fees that you spent to prosecute the case in which the malpractice occurred, but those attorney's fees are distinct from the attorney's fees you incurred to

prosecute your malpractice case, right? There's a difference. But this purports -- I mean, the way everybody around the table seems to be interpreting this is that we're not going to make that distinction for purposes of these kinds of suits. I guess I don't really understand that.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I guess I'd like to hear more on Justice Jennings' point. We've been jumping back and forth between mandatory and voluntary, so it's been confusing, at least to me, but his point that, well, can you make the mandatory rule constitutionally and without an even statutory authority that says if you plead less than $100,000, the most you can get is 100,000, but if you plead $5 million you can get $50 million. I would like to hear what people think about whether that can even be done, because if it can't then applying a cap is moot on a mandatory rule.

CHAIRMAN BABCOCK: Skip Watson had his hand up, and then Roger, and then Frank.

MR. WATSON: Well, just two quick things. To me the answer to Sarah's question, you know, I think we all see the point, but I think that part of the -- one of the things that's going to make this thing work if it works is the fact that the lawyer filing the suit has got to figure

out, "I'm willing to limit myself to X attorney's fees, trial, appeal, whatever," and it's that determination that for purposes of this rule, not the body of law that we are all accustomed to living under and applying, but this rule, I have got to do that, I think that's going to be what makes this affordable and makes it work. I also think personally that it will solve Nina's question at the end about appellate attorney's fees. I mean, it's all in there. If it's not in -- you know, if it's not all under the hundred thousand you're not going to get it. You're working for free. I mean, that's what's going to happen.

The second thing is, is that I think that we're going to have to just at some point come to a decision of we don't know, you know, what the 100,000 was supposed to apply to, and we're going to have to decide, is it all claims by all parties have to be within that cap, I mean, just everything that's pleaded by anyone aggregates 100,000. Is it all claims under Pam's formula of what we usually understand the term to mean, or does each plaintiff get 100,000? I don't think, you know, that we're going to get a divine light coming down saying, "Here's the right answer." I think we're going to have to make a policy decision as an advisory body of "This is the way we want it to work."

CHAIRMAN BABCOCK: Yep. Roger.

MR. HUGHES: Well, I guess I hate to -- I hate to say it, I'm almost in favor of the rule -- if you're going to go to mandatory I almost kind of like it the way it is. I think if you've got a case where you have four or five plaintiffs and serious counterclaims on the other side, I'm not sure it is a small case that deserves this kind of truncated discovery and then a fast track to trial and a quick trial. So I tend to favor the let's aggregate it all together, let's add up all the plaintiffs and all the defendants and see if it's under 100,000. If it is, you're in. If it's not, you're out.

The other thing of it is I think (a)(2), I think it has a lot of merit, because if you start out with four or five plaintiffs, and they all say, "Okay, we're all going to limit ourselves to $20,000," well, what happens if plaintiffs start disappearing before you get to judgment? One settles, another gets a directed verdict, and that plaintiff is out the window, so all of the sudden this lone remaining plaintiff who has seen the process through -- why not allow that one to say, "Okay, you're capped at 100,000, even if you only pled for 20." Maybe the judge will let you up and let you increase your pleading, and the purpose of the rule is still achieved. The defendant's judgment liability will not exceed $100,000.

The only trouble I see with (a)(2) is the

case where you sue multiple defendants, one of whom is vicariously liable for the other two or the other three or how many. I mean, the truck owner and the truck driver. Are you going to say the plaintiff gets 100,000 against each one? They're probably both covered by the same insurer, and it's all coming out of the same profit. Or are you going to say he only gets 100,000 against that side because they're all linked by vicarious liability? I'm not sure where we want to go with that.

CHAIRMAN BABCOCK: Okay. Frank, and then Elaine, and then we're going to move on to subsection (b).

MR. GILSTRAP: I don't think we should worry too much about the statutory language. It's pretty vague. It doesn't say "all claims in which the amount in controversy is under $100,000 and it doesn't say "only claims in which the amount in controversy is under $100,000." If we pass a rule that deals with some small claims under $100,000, I think we will have fulfilled the legislative mandate. What we need to do is pass a rule that, first of all, has very clear boundaries, which deals with some of these cases. Justice Christopher is correct. We may wind up creating other litigation. That may be the by-product, but for now let's sit down and pass a simple rule that deals with some of these claims, that's very clear, and put it out there and see if it works. If it

works, we can tinker -- the Court can tinker with the boundaries later, but this may be another rule -- another level one discovery that doesn't go anywhere. So let's get a rule that's simple, easy, clear to apply, clearly deals with small cases, put it out there, and see if it flies, and then we can worry about the details later.

CHAIRMAN BABCOCK: Okay. Elaine, last comment on (a).

PROFESSOR CARLSON: Okay. Currently we have level one limitations of $100,000 by virtue of comment two to Rule 190. I mean, currently that is our low. "The relief award cannot exceed the limitation in level one because the purpose of the rule is to bind the pleader to a maximum claim." Now, I don't know if there's been any attacks on that.

MR. CHAMBERLAIN: There has not.

PROFESSOR CARLSON: So that would not be anything new. I do favor some limitation like that, otherwise I don't think the rule is going to be used, and I would favor it in a rule provision as opposed to in the jury charge, Skip, because of sufficiency review and things like that.

MR. WATSON: I agree with you.

PROFESSOR CARLSON: And, Judge Christopher, I was thinking of the flip side when you were talking about

consolidation, and that is, is there a limit on the trial court to sever. You get down, and we have more than $100,000 these multiple parties, say, "Well, I'll just sever this," that one judgment, and each one won't be more than 100,000. There is some room for trickery.

HONORABLE STEPHEN YELENOSKY: I couldn't hear the first part of what you said. Are you saying there's a cap now in the law?

PROFESSOR CARLSON: Yeah. In level one cases now.

HONORABLE STEPHEN YELENOSKY: You cannot recover more than a hundred thousand?

PROFESSOR CARLSON: That's what the comment says. Greenhall does not apply to level one cases now, by virtue of comment two in Rule 190. Finally, on the part three, I think we want to make clear what's excluded, and I would expressly put in there doesn't apply to JP court and constitutional county court because the Legislature said that, if it truly is mandatory. We might want to think about excluding class actions as well.

CHAIRMAN BABCOCK: Okay. Let's go on to (b), the removal from the process. Three subsections here. Any comments on the proposed Rule 168, subpart (b)? Justice Brown.

HONORABLE HARVEY BROWN: I want to go back to

the comment yesterday about good cause.

CHAIRMAN BABCOCK: Right.

HONORABLE HARVEY BROWN: That maybe we need a fuller definition. I'm not sure how easy it would be to come up with a fuller definition, so I think I'm in favor of a comment and that we could use some of the examples that David was talking about that would be problematic such as reputational type of claim, but I think that something is needed, otherwise I predict we will have a lot of mandamus fights over this, and I think giving some guidance early on rather than waiting for a whole bunch of cases to develop would be important, particularly given the whole goal here is to cheapen the cost.

CHAIRMAN BABCOCK: All right. Other comments about subpart (b)? Yeah, Peter.

MR. KELLY: Just a grammatical point, I guess, that sub (1) says, "A court must remove a suit," and sub (2) refers to the pleading removing the suit, and I just find it a little bit jarring that removal at one point is accomplished by a court action and then in sub (2) it makes it seem like it's automatic, that the pleading would automatically remove it, and then go down to (3) and it's all of the sudden in the passive voice, and I would ask we harmonize that the court takes the action each time.

CHAIRMAN BABCOCK: Yeah, good point. Yeah,

Justice Gaultney.

HONORABLE DAVID GAULTNEY: I was just going to urge the same thing I did yesterday, that maybe it should just be one thing that takes it out; and that's a motion and good cause based on a material change in circumstances or something, however we define good cause, because (b) is automatic, I mean; and I think that's some of the inefficiency of the removal process, is you can be rocking along on this expedited process, everybody thinks that you're under that situation and suddenly you've got a different situation totally at the election of one party. It seems to me that if you're going to have a mandatory process it ought to be mandatory unless the court decides there's good cause based on material change in circumstances, change the rules.

CHAIRMAN BABCOCK: Okay. Did you get all of that? We had some distractions down here.

MS. SECCO: Sorry.

CHAIRMAN BABCOCK: No, that's okay. Justice Brown, and then Justice Gray.

HONORABLE HARVEY BROWN: For subpart (1)(b), the amended pleading, we talked yesterday if the defendant does this that the pleading must be filed in good faith and cannot be stricken because it is in violation of some other rule. I think that's the way a court might interpret this,

but I think it would be clearer to provide something about that in the rule.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I would prefer some other language than the term "removal" because of the removal to Federal court. That's just confusing to me when I sat down and read it. I was just -- that terminology is so engrained in Federal court removal proceedings; and then the other aspect of that, this talks about it "expedited actions process," like there's going to be an expedited docket or something in the context of the clerk's docketing process; and I don't really understand what that means, so just in the context of what is the clerk doing with these or the trial court, how are they tracking these, obviously some thought needs to be given to that process as to the mechanics of it, how they're -- what it means to be removed from an expedited action process.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Jennings.

HONORABLE TERRY JENNINGS: Quick question about this. Yesterday concern was expressed about, well, you might be -- there's a concern that a defendant might get into a certain jurisdiction or venue and get pled into one of these kinds of cases if this were mandatory and then get sandbagged by, you know, getting hit with a much larger

judgment later down the road because they didn't have adequate discovery. Was any thought given into making maybe some stronger language here as far as good cause goes that maybe the defendant has shown a need for a deeper discovery, which could be mandamusable so you could get the relief that you would need? Was any thought given to that? I mean, good cause is kind of -- it almost implies the trial courts have a great deal of discretion. Was any thought given into maybe addressing that kind of specific concern, some stronger language that would -- you could basically, you know, get a ruling that you could mandamus a trial court on, or could you think of any?

MR. CHAMBERLAIN: Yeah. Well, there was a vigorous discussion about that. I wish Alan could have been with us because Alan is a mandatory advocate. This is one of the problems that the -- those on the task force who favor a voluntary process see this as a problem, because, as I said yesterday, we did -- first in answer to your question, we did have that discussion, but at least those of us who favor a voluntary rule think that this is a trap, and it's something defendant is just not going to be able to get out of; and good cause, there is a body of case law surrounding the term "good cause," and quite frankly it's a pretty onerous burden. But this is the language that the mandatory folks wanted.

CHAIRMAN BABCOCK: Marcy.

MS. GREER: Just a minor point on (b)(3), it says that if the court --

THE REPORTER: Speak up, please.

CHAIRMAN BABCOCK: Can you speak up, Marcy? We can't hear you down here.

MS. GREER: Sorry. On (b)(3) it says, "If the suit is removed from the process then the court must continue the trial date." Should we modify that to say "if requested by the parties" so that there's not an automatic continuance, because it might not be necessary and it might throw off the docket or --

CHAIRMAN BABCOCK: Uh-huh. Good point. Richard.

MR. MUNZINGER: I want to go back to the point about removing the -- or taking it out of this expedited process for, quote, "good cause," close quote. As a defendant's lawyer I would be concerned that this little ten-dollar suit or thousand-dollar suit, whatever, might be something that could have claims of preclusion or res judicata effects down the road, and the rule should contemplate that. I can come up with any number of hypothetical examples where a suit between A and a defendant can preclude the defendant from urging defenses or defending against liability down the road because the

plaintiff is in privity with the group that follows, and I think that's a serious concern here, especially if the rule is, as I think it should be, mandatory. I think you've got a real problem there because the defendants have no choice almost regarding -- if it's a mandatory rule regarding what the discovery is, what the length of their trial is, what the length of their cross-examination and witnesses is, et cetera, so you can have some very serious claims preclusion results from a nickel lawsuit, and the rules should contemplate that problem.

MR. CHAMBERLAIN: Well, and that's one of the things, Richard, that we discussed, that I think is a problem with the mandatory rule, particularly in employment law context.

CHAIRMAN BABCOCK: Okay. Let's move on to (c), expedited action process. We talked at some length yesterday about the task force's suggestions for Rule 190.2. Are there any additional different comments about that? Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I've -- in terms of the changes in 190.2 for the expedited situation, I would be in favor of automatic request for disclosures in these type of cases rather than requiring someone to file a request for a disclosure. I wasn't here when we apparently had the long debate about this process many, many years

ago, but to me, and especially in these type of cases, we should just have it automatic on all the request for disclosures. I like the part that they put in there with respect to the documents, too, and I think -- you know, I think that's a good change for the request for disclosure rule in general.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: Not just in these cases.

CHAIRMAN BABCOCK: Okay. Richard Munzinger.

MR. MUNZINGER: I agree with Justice Christopher about the mandatory aspect of the disclosure rule, and I would point out that our draft provision relating to mandatory disclosure of documents provides no description of what the disclosure should include, contrary to Rule 26 in the Federal rules which goes to some extent saying, "A copy or a description by category and location of all documents, electronically stored information, and tangible things that the disclosing party has in its possession." That's a far more descriptive characterization of the obligation of the disclosing party than is the draft rule, and we all know that discovery is -- on one side is to keep as much as you possibly can within the framework of the rules and your ethical obligation if you can. That's the way the game has been

played, and I think our rules should more closely approximate Federal Rule 26b.

CHAIRMAN BABCOCK: Well, except, Richard, in this context, as I understand it, the task force drafted a disclosure rule that only basically says give me -- give me the documents that each side is going to use at trial.

HONORABLE HARVEY BROWN: No. No, I don't think that's right, Chip.

CHAIRMAN BABCOCK: You don't agree with that?

HONORABLE HARVEY BROWN: Alan says that's not right yesterday. I talked to him about that. He said that they used the Federal rule language verbatim so that the disclosure of documents is the same as it is in Federal court, although there is one omission I discovered last night in actually pulling out the language. The Federal rule says you don't have to disclose documents that are going to be used solely for impeachment purposes, and I don't know if it was a draftsmanship mistake or if it was a policy choice, but that is not included in this language, that's --

CHAIRMAN BABCOCK: Well, Harvey, the proposed Rule 190.2(a)(6) is not the Federal rule, I don't believe. Richard Munzinger, is it?

MR. MUNZINGER: It's not quite as complete. The Federal rule -- this says "may request disclosure of

all documents." I'm reading the draft of subsection (6), "electronic information and tangible items that the disclosing party has in its possession, custody, or control." And --

CHAIRMAN BABCOCK: "And may use to support its claims or defenses." I mean, that's --

HONORABLE HARVEY BROWN: I think that's in the Federal rule.

MR. MUNZINGER: I think that is the Federal rule. I stand corrected.

CHAIRMAN BABCOCK: Well, but the Federal rule goes on to say other things, doesn't it?

HONORABLE HARVEY BROWN: I think that category -- that sentence then has a comma, "except for impeachment purposes" and then it's a period.

CHAIRMAN BABCOCK: Yeah, but the Federal rule goes on to say you've got to identify categories of documents.

HONORABLE HARVEY BROWN: Yes.

CHAIRMAN BABCOCK: I mean, there are other things you've got to do in the Federal rule.

HONORABLE HARVEY BROWN: Right, but I'm saying that what the Federal rule requires as far as you have to produce not just documents you're going to use at trial but documents that help or hurt your claim.

CHAIRMAN BABCOCK: Not hurt. Not hurt.

PROFESSOR DORSANEO: Not hurt.

CHAIRMAN BABCOCK: Only help. There was a big debate about that. And now the Federal rules only help.

HONORABLE HARVEY BROWN: Only help.

CHAIRMAN BABCOCK: And that's what this says, only help. Richard.

MR. ORSINGER: Chip, the trigger for expedited actions is that people affirmatively plead that they only seek monetary relief aggregated less than 100,000, and in every family law matter that will not be complied with because in a divorce you're trying to get a marital dissolution and in a case involving kids you're trying to get custody and visitation, and so all family law cases will be out of the mandatory rule, but this eliminates level one for divorces where a party pleads a value of the marital state is more than zero but less than 50,000, so we are taking level one away from family law cases inadvertently, so we need to be sure -- this expedited process will not apply to family law cases, in my opinion, and we ought to leave level one for family law cases rather than supplant it with the expedited process.

CHAIRMAN BABCOCK: Yeah. Okay. All right. Yeah, Justice Brown.

HONORABLE HARVEY BROWN: I think there is a problem with the affidavit. I don't think the affidavit complies with Haygood. The last paragraph, the total amount paid for the services was blank using a passive voice. I think under Haygood we're going to have to know the amount paid by the claimant or the claimant has liability for, because otherwise this is just the total amount which would be paid by an insurance carrier, and so I think you've got a paid or incurred problem the way it's drafted.

CHAIRMAN BABCOCK: Okay. Just a point I raised yesterday, but I'd like to see if anybody has any other additional thoughts about it, and that is on the expert testimony. What if we said no expert testimony unless it's required to support a claim or defense? Otherwise no experts in these kind of cases. What's wrong with that?

MR. BOYD: How would you decide --

MR. HAMILTON: Where else would you --

MR. BOYD: -- whether it's required?

CHAIRMAN BABCOCK: Hang on. Jeff, you start.

MR. BOYD: I'm sorry. How would you decide whether or not the expert testimony is required?

CHAIRMAN BABCOCK: Well, I mean, the case law would -- for example, in med mal cases you have to have

some expert.

MR. BOYD: So required by law?

CHAIRMAN BABCOCK: Yes.

MR. BOYD: As opposed to the plaintiff saying, "I have to have this expert to support my" --

CHAIRMAN BABCOCK: Oh, yeah, right. I'm sorry. Required by law.

MR. BOYD: Required by law.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Well, I think the problem is going to be all the car wreck cases, anything like that that the defense wants to bring their own expert to say he's not hurt. So are you just saying that (4) would only apply to those things, or are you saying -- I mean, I see the under $100,000 case being the car wreck case when the issue normally isn't liability, it's just damages and whether or not the causation will put all those together, so it usually is the family doctor and some other doctor that reviewed those records, so I don't know how you do that.

CHAIRMAN BABCOCK: Would the -- would expert testimony in the car wreck case be required by law?

HONORABLE ANA ESTEVEZ: I think -- well, are you going to give them -- is the defendant going to bring an affidavit to controvert that, and if he does then

they're going to have to bring their doctor. I mean, I always have the doctors in my trials.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: The answer to your question is it depends on whether expert testimony would be necessary. Some type of injuries that are claimed by a plaintiff after auto accident do require expert testimony under Supreme Court precedent and some do not. It's whether laypeople would commonly know that could be a result. A broken leg, you don't need a doctor. Some more unusual injury that juries won't know, you do need a doctor, and there are some areas of the case law where you might not need it, but it might be as a practical matter needed. For example, lost profits you don't necessarily have to have an expert on, but it might be the person who works for the company isn't themselves qualified in that case to give the testimony on lost profits, and so they might need an expert -- not that the law requires an expert but because under the facts of that case they don't have a person that could do it, so that would be a problem if you just required that as a legal matter.

CHAIRMAN BABCOCK: David.

MR. JACKSON: I'm seeing a lot of expert witness depositions in small cases that involve delta-v where they just come in and basically testify the speeds

these vehicles were going couldn't have caused these injuries type thing, so you would probably knock out a lot of that stuff if you do that.

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I don't think we can, you know, fix this today because there's -- there are a lot of things that we might be able to do with respect to experts to help things along, but when you're talking about expenses that you paid to do something in connection with like damage to your home or something like that, you know, the law is a little unclear about whether I can get up and say, you know, "I paid the roofer a hundred bucks, and I paid the plumber 200 bucks," you know, and that was all related to whatever the particular cause of action I have versus do I have to get these affidavits. I think we could simplify things if we really thought about it, but that's really a big process down the road.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Same point the justice makes, there's a difference between perhaps expert testimony and opinion testimony, and a lot of laypeople are permitted to give their opinion as to value, for example, even in real estate cases. So if you do draft a rule that precludes expert testimony you need to be careful that you don't

draft it so broadly that you exclude opinion testimony of laypersons where that's part of the cause of action or would otherwise be proper.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Are we talking about subsection (c) here yet?

CHAIRMAN BABCOCK: Yeah, we're talking about (c), (c)(4).

HONORABLE R. H. WALLACE: Okay. Can I talk about (c)(2)?

CHAIRMAN BABCOCK: Sure, talk about (c)(2).

HONORABLE R. H. WALLACE: It seems to me that one of the selling points of people using this procedure is obviously getting to trial quickly, that it will help the plaintiffs sell their clients, and the plaintiffs are going to control pretty much whether this process is used. Usually a client wants to know what is it going to cost and how soon is it -- you know, how long is it going to take.

CHAIRMAN BABCOCK: Right.

HONORABLE R. H. WALLACE: We're here, we're saying we're going to set it for trial within 90 days after the discovery period. The discovery period is about six months.

CHAIRMAN BABCOCK: Right.

HONORABLE R. H. WALLACE: Correct? There is

nine months, and so you're going to tell your client, "Well, we'll get an expedited trial in about a year." I don't think that sounds very expedited to laypeople, and I think we ought to consider making it a shorter period of time.

Now, here's another problem. Everybody has their own docket control systems and all of that. In Tarrant County the old cases go to the top, so even if you set one of these cases within six months it's going to be probably the last case on the docket. So how does the trial judge know to try to get that case set? Do we want to get it some type of -- I shudder, but, you know, say you give these cases preferential treatment? It's just something -- otherwise they're not going to get to trial a lot faster, I don't think.

CHAIRMAN BABCOCK: Yeah, good point. Tom.

MR. RINEY: I think the question of expert testimony in large part depends upon the elements of damages that are claimed. You can use the affidavit for past medical expenses, but you can't for future. You've got to have some type of opinion testimony, so if someone even has a broken arm, there's going to have to be a surgeon taking pins out and giving expert testimony; and as I recall even in, you know, fender benders the cost of repair I think had to be expert testimony. I think it even

had to be like it was restricted to the county where the accident occurred. That's been many years, but I think it does require some expert testimony, so we have to be very careful about that.

CHAIRMAN BABCOCK: Yeah. Okay, great.

MS. HOBBS: Chip?

CHAIRMAN BABCOCK: Yeah. Sorry, I missed you, Lisa.

MS. HOBBS: That's okay. Yesterday we talked a little bit about limiting summary judgment in these expedited cases, and I know the defense bar felt very strongly that you shouldn't because -- and rightly so. A lot of times this is a statute of limitations or something real easy that would, you know, actually expedite the disposition of a case --

CHAIRMAN BABCOCK: Yeah.

MS. HOBBS: -- in resolving that legal issue, but I just want to throw out there one more time for at least the Court's consideration, if not this body's consideration, that one way to honor that sometimes summary judgment can actually move a case forward towards disposition quickly, the no evidence summary judgment is often used as a way to just get the other side to marshal their evidence, and you could restrict no evidence summary judgment motions and still allow the types of summary

judgment motions that we all know we want to keep like the statute of limitations and things like that, so I just throw that out there for the Court's consideration or further comment.

CHAIRMAN BABCOCK: Good point. Richard.

MR. ORSINGER: We've been discussing expert testimony from the plaintiff's perspective, but I would be very uncomfortable with a mandatory rule that said a defendant could not call an expert, even though the plaintiff is not required to call an expert to prove his case because a defendant would be deprived of the opportunity to defend themselves through expert testimony in a rule that banned it from both sides. Additionally the expert testimony proposal from the task force says the Daubert challenges are held until trial and yet you're only allowed five hours per side, and so I can -- I can imagine that unless it's done in a pretrial way on the day of trial that people would be strategically asserting their Daubert challenges in the middle of a trial, which is only five hours long including jury selection, so I'm wondering how we're going to handle that. And then secondly, some Daubert hearings --

CHAIRMAN BABCOCK: You've got to talk real fast.

MR. ORSINGER: Yeah. Some Daubert hearings

are not based just on what the expert says to defend their own position but their opposing experts that want to challenge the methodology of the proponent's expert, and you can't do that in the middle of the jury trial. You have to do that before the trial starts, so I think the way this is working with the expert witness we need to think this through a little bit more.

CHAIRMAN BABCOCK: Carl.

MR. CHAMBERLAIN: Mr. Chair, I would just point out that the limitations on the length of the trial are not in the mandatory.

MR. ORSINGER: That's just voluntary?

MR. CHAMBERLAIN: That's just voluntary.

MR. ORSINGER: Okay. Well, I mistook that.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: (c)(4), it says "unless requested by the party sponsoring the expert." Unless what's requested? I don't really understand that sentence.

HONORABLE NATHAN HECHT: There was discussion yesterday it needed to be revised.

CHAIRMAN BABCOCK: Yeah, we're going to revise that. Yeah, Buddy.

MR. LOW: Chip, it looks like concerning expert testimony I guess that needs to fit in on shortening the time, expense, and so forth, and it's difficult to do

when you start getting experts because there's so much you can limit and so much you can't limit. So it's a pretty difficult thing to draw to -- to allow expert testimony and you can't in a situation where you're trying to cut costs because that increases the whole thing, so it's a very difficult rule to use, and voluntary a lot of people that want an expert aren't going to go into the system anyway.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I was just going to point out that there wasn't a mandatory time limit.

CHAIRMAN BABCOCK: Okay. Justice Brown.

HONORABLE HARVEY BROWN: I just want to briefly speak in defense of (c)(2), where it says the court must set the case for a trial date rather than try it by a certain date, because it's going to be hard for judges that have to balance lots of these things out. I mean, if there are as many level one cases as I think there may be, you'll have a number set the same week, and even if you don't have you have other things that have preferences, and you have a lot of parties who want preferential trial settings. So if I set something preferentially and it's a three-week trial with witnesses from out of the country and then I have something set that's a level one the next week, what am I supposed to do, interrupt the one? So I think that this is an area that judges can handle and telling them that we

want it done but it's not mandatory is a better way than making it mandatory.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: Yeah, I wanted to touch on this and R. H.'s comments. I think that we kid ourselves maybe if we think the discussion yesterday and today has given the Court some guidance on how trial courts might dispose of these cases quicker. I don't quarrel with what Harvey said that there's maybe 200 -- 50 percent of the cases might fit into this category, so I don't know whether he would view this, but so in Harris County that would be mean a trial court might have about 200 such cases on its docket at a given time that apply to this, that this might apply to.

None of this that -- none of these rules or none of the discussion give the trial courts guidance in getting the cases disposed of quicker. You might minimize discovery, you might minimize expense related to discovery, but in Cameron County and Potter County they're still going to have to deal with family dockets, the criminal dockets. Those cases are just not going to go to trial any sooner than they are now. And I don't know how -- so what do we do about that? Maybe -- maybe we show this and develop a rule that relates to something else Harvey loves, and that's summary jury trials, and we -- and we put in rules

for an expedited summary jury trial that's not binding. I don't know, but these rules, I think -- I think we kid the public, we kid the Legislature, and we kid ourselves if we think in any state -- in any county across the state cases will be disposed of any quicker. I rest.

CHAIRMAN BABCOCK: Okay. Sarah.

HONORABLE SARAH DUNCAN: Well, I'd like to second what Judge Benton said.

CHAIRMAN BABCOCK: You have to speak up a little bit, Sarah.

HONORABLE SARAH DUNCAN: I'd like to second what Judge Benton said. I think these are all, you know, nice procedures and everything, but it's sort of like a friend was dying the other day and there was -- there were differences of opinion amongst her children about feeding tubes and ventilators and how long to -- she should stay in the hospital unconscious. They finally brought in a palliative care mediator to explain to the children, "This is what the rest of your mother's short life will be like if you keep her on the ventilator and keep her on the feeding tube." That was the only way they could reach agreement on what to do, and I think what Judge Benton is saying is exactly the same thing. The way we might get cases actually disposed of more quickly is to have some neutral person who is not the judge but who is

knowledgeable about that type of case go in and say to lawyer for the plaintiff, "Look, here are your chances of getting anything out of this defendant, here is how much I think it's going to cost you," and "Defendant, here's how much it's going to cost you to defend against this claim, and here's what you can possibly get popped for." I think then that case might actually get disposed of relatively quickly, but I have to say, I agree with Levi, I don't think these procedures are going to do it.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I have two thoughts. I had previously spoken out in favor of limiting summary judgments in these cases, but I have been lobbied by other judges who tell me I'm crazy to suggest that, and I'll give one example of how you would not want to have -- eliminate a no evidence summary judgment in a case like this. If a person filed a small legal malpractice case but failed to designate an expert, the simplest way to eliminate -- to get rid of that case is to do a no evidence motion for summary judgment. You don't have a legal expert. You know, so, yes, a lot of times no evidence summary judgments are misused, but I can certainly see how that is a expeditious way to eliminate that case.

My second point on the written discovery, while I understand that the task force had a lot of input

on, you know, the admissions, the interrogatories, the document requests, does it really save anyone any time to change the interrogatory rule from 30 to 15 or from -- you know, the admission rule from 30 to 15? To me that's a false economy, and I would prefer to see -- to identify what is it that we try to get from these 15 interrogatories or these admissions that would be so useful and put them in an automatic disclosure.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: I understand Judge Benton's concerns, but I don't know that I completely and totally agree that this is going to be of no use, because I do think it will at least -- I think this all goes back to our rocket docket discussions from a year or two ago, which is probably the genesis of this, and frankly, this is going to force I think certain trial courts to start setting some of these cases for trial. I understand a lot of the time a problem is, is getting a trial setting, and so at least by rule you're going to get a trial setting, and if you don't get a trial setting you can at least have something to mandamus the judge on and say, "Look, you don't have any discretion here. You have to set my case for trial."

So it is going to force, I think, certain trial courts that maybe not be acting efficiently to act more efficiently. Maybe they would start setting some of

these cases on a particular day of the week, you set a bunch of them and maybe you -- certain cases will work out and then you'll try what's left over; and I think it is going to force certain judges to be more efficient; and let's face it, part of the problem has been that some judges are great at getting cases to trial, some judges drag their feet, and this will hopefully be helpful. It may not be an elixir, but it will be helpful.

CHAIRMAN BABCOCK: Okay. Levi, last comment before we take a break.

HONORABLE LEVI BENTON: Harris County judge on average is going to try 20 to 25 jury trials in a 52-week period, and there's just -- I mean, I think really we are living in a la-la world if we think that there's going to be any more cases tried because of these rules, and, you know, I don't know where this sprang from. I think that if it was Justice Hill or Justice Phillips who upon losing the battle to redesign the court system went down this path, but, you know, during the break I really -- David, I would be interested in hearing your thoughts about do you really think this accomplishes an expedited disposition of cases. Because I just don't -- I don't see it in Harris County. I don't know how it would happen in Travis County. I'm ready for your break, Mr. Babcock.

CHAIRMAN BABCOCK: I didn't realize that Kent

had his hand up right behind you, so he can have the last comment.

HONORABLE KENT SULLIVAN: From the cheap seats here. I just want to speak in support of Justice Christopher's comment and to say that while there's certainly not a consensus in the room I notice a collection of opinions that are thematically similar and I think are interesting and worth noting. One is a use of automatic disclosures and eliminating the need for requests in terms of the format of this process. Second is to expand the use of automatic disclosures so that to the extent possible by way of these automatic disclosures you are put in a position essentially to know enough about the case to actually try the case after the disclosures are done.

Third, to significantly limit or better yet eliminate most of the other more traditional discovery. No interrogatories, no requests for production. Conceptually those would be covered by the automatic disclosures, and to the extent possible eliminate depositions. Criminal lawyers have survived without them. We can go to witness statements, disclosures of identity, and contact information for witnesses so that people could interview them to the extent that they want. If you control the witness maybe you owe a witness statement to the other side by way of this automatic disclosure, but to wrap as much of

this up in terms of an automatic process as possible, and then it seems to me the last question that people have raised is the availability of courts to expeditiously try these cases, and that's something that we need to grapple with. While that doesn't deal with all the issues raised by a long shot, thematically I think that has some coherence and some appeal.

CHAIRMAN BABCOCK: Okay, great. We'll take our morning break, and when we come back we will go to executions.

(Recess from 10:32 a.m. to 10:53 a.m.)

CHAIRMAN BABCOCK: All right, here's something very important. Don't -- I just saw Tom leave the room, so I had said yesterday that our April meeting was only going to be one day, and I thought that was because Justice Hecht couldn't be there on Saturday, and he thought it was because I couldn't be there on Saturday, but we found out the real reason was neither this space nor the bar association is available on Saturday, so Justice Hecht and Marisa are going to see if we can get a caucus room at the Capitol, and so we'll have our meeting there, and if that's not available then we'll either do it at Jackson Walker or some other suitable place, but we will have a Saturday meeting in April because we really -- we have a lot of stuff that we've got to deal with. So --

MR. HAMILTON: Are you talking about meeting both days at a different place or Friday will still be here?

CHAIRMAN BABCOCK: No. We'll find one place for both days. Yeah. And we'll let you know, but I was mis -- or I misunderstood what the reason was for not having the Saturday meeting in April, and we're going to have a lot of stuff to talk about, so we need the extra half day. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I know -- could I make one suggestion before we move on? I know the Supreme Court is probably reluctant to say mandatory/voluntary before they know what a proposed rule would look like, but to me if we could get that decision from them before we really focused on drafting we could help make a better rule.

CHAIRMAN BABCOCK: You want an advisory opinion?

HONORABLE TRACY CHRISTOPHER: Yes.

HONORABLE NATHAN HECHT: The Court will talk about it, but it is a kind of a chicken and egg thing, but I think having -- taking some of the abstraction out of it is helpful, so we look at a draft and see kind of whether it should be mandatory or voluntary and what that means exactly and then I think we will circle back for some

drafting help.

CHAIRMAN BABCOCK: So there you go. So where did Elaine get to? Weren't you over there a minute ago?

PROFESSOR CARLSON: I'm floating.

CHAIRMAN BABCOCK: Flitting, I would say. So, Elaine, we're on execution, singular, and --

PROFESSOR CARLSON: Yeah, last time we finished Rule 5. We're picking up on Rule 6 on page 92, and Donna Brown is going to lead the discussion.

CHAIRMAN BABCOCK: Great. Thanks, Donna.

MS. BROWN: First rule that we'll talk about this morning is execution Rule 6. This is levy on pledged property. Most debtors don't own property free and clear, and it's oftentimes -- whether it be real estate or personal property it's subject to other liens, yet there is a need to reach the equity in the property and also to get past some shenanigans we've seen where debtors pledged the property to the accountant, the lawyer, and the sister and the brother in order to try to make it harder to get to, and so we have a pre-existing rule, 643, that says you can levy on a property that's pledged. There's been some troublesome case law which overlooked Civil Practice and Remedies Code 34.004, just totally overlooked it, which says if property is subject to a lien then you can levy on it unless the secured creditor can point out sufficient

property in the county subject to execution to satisfy the judgment and so there were both creditor -- secured creditor and judgment creditors lawyers on the task force, and we grappled with this at length on how we balance the rights of the judgment creditor seeking satisfaction of the judgment and the rights of the secured creditor in knowing what's going on with their collateral, assuming that they're not already checking on it regularly anyway, and so the additions of notice of levy to nonparties was added to this rule to provide a means to notify those secure creditors.

It gives an extra burden on the judgment creditor, but it puts those secured creditors on notice that a levy has occurred and gives them then the opportunity to point out other property. And the net effect of this probably is going to be that they are put on notice that something is happening with their collateral and the debtor probably does not have other property subject to execution because we would levy on that to begin with, but it would at least give them some notice that something is happening with the collateral. They could attend the sale, and in some instances I've actually had secured creditors loan the debtor some money to get them out of trouble with the judgment creditor. So this is basically balancing the rights of the secured creditor and

the judgment creditor as to pledged property.

CHAIRMAN BABCOCK: All right. Comments? Carl.

MR. HAMILTON: Many deeds of trust have a due on sale clause in them so that any time the mortgaged property is sold the secured creditor can declare the entire note due at that time and foreclose, so I don't know if we need to deal with that, and I don't know whether the language in that means that any time the mortgagee sells the property, if that's the way it's worded, then perhaps this is okay, but if it just says any time the property is sold then this would trigger the mortgagor's -- mortgagee's right to foreclose on it.

MS. BROWN: Well, and that's true, they could, in fact, do that. In fact, I've had a situation where the secured creditor as to a vehicle would show up at an execution sale, and when it sold to a third party purchaser, if it was a third party purchaser, they would then deal with the third party purchaser, their rights under their security agreement, and what we're doing -- we really can't address Article 9 and the whole foreclosure situation, but we can provide notice to the secured creditors that something is happening to their collateral and have a mechanism, a procedural mechanism, for notifying them so they can point out property of the judgment debtor

under the Civil Practice and Remedies Code provision.

CHAIRMAN BABCOCK: Okay. Yeah, Professor Dorsaneo.

PROFESSOR DORSANEO: You want to say in that opening thing "other property subject to execution or other nonexempt property"?

MS. BROWN: I'm sorry?

PROFESSOR DORSANEO: Up there before (a), do you want to say "other property subject to execution," "other property of the judgment debtor subject to execution or other nonexempt property"?

MS. BROWN: I don't know where you're --

PROFESSOR DORSANEO: I'm on the page 93.

MS. BROWN: Right.

PROFESSOR DORSANEO: Second line.

MS. BROWN: Second line.

PROFESSOR DORSANEO: "Points out other property." You mean "other property subject to execution," right?

MS. BROWN: Let's see.

MR. FRITSCHE: He's up here.

MS. BROWN: Oh, you're up here, okay.

CHAIRMAN BABCOCK: Let the record reflect they're huddling.

MS. BROWN: Yeah.

CHAIRMAN BABCOCK: Justice Bland, you got the answer?

MR. FRITSCHE: Well, if I --

MS. BROWN: Well, I mean, it would necessarily be nonexempt property.

PROFESSOR DORSANEO: Right. So I think you ought to say that to people who might be even more puzzled --

MR. ORSINGER: Who don't have a huddle.

PROFESSOR DORSANEO: -- yeah, than us would know what it means.

MS. BROWN: So "points out other nonexempt property"?

PROFESSOR DORSANEO: Yeah. Well, I like "subject to execution," but, you know, a little broader.

MS. BROWN: "Subject to execution," okay.

CHAIRMAN BABCOCK: Yeah, David.

MR. FRITSCHE: Part of the conundrum is that the statute, 34.004, requires that the mortgagee points out other property in the county that is sufficient to satisfy the execution, so it's even a -- it even sounds like statutorily a higher burden, sufficient.

MS. BROWN: Well, and we continue on with that "and is sufficient."

PROFESSOR DORSANEO: I would probably use the

statutory language. I'm not that big of a fan of monkey-see monkey-do, but in this context it makes sense.

MS. BROWN: Well, this is lifted just -- is right out of the 34.004. It actually says, "points out other property of the debtor in the county," and so we just brought that -- that language over into the procedural rule.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I have a concern about part (b), effect of sale, because that says that the property "shall be sold at execution" and then says that the purchaser takes it -- takes the property subject to any pre-existing sale, pledge, mortgage, or conveyance, and I see that that's probably in response to this Grocers Supply case that raises the concern, but I see this as an attempt to by rule create some substantive law. In other words, I think that requiring the sale of property to which there are other secured liens on is sort of saying that the judgment creditor can kind of leap above secured liens even though that interest is probably unsecured and then says -- and then says it shall be sold at execution, and I think in an effort to say that the unsecured creditor -- I mean, yeah, unsecured creditor is protected from anything they might do in connection with a sale. And I see all of that as jumping into the substantive area of secured credit and

something that we shouldn't tackle with a rule, and I don't see that section 34.004 of the Civil Practice and Remedies Code requires section (b), and I think section (b) is trying to talk about what the substantive legal effect of a sale is and really is not trying to address the procedure for levying on property.

CHAIRMAN BABCOCK: Yeah, Dulcie.

MS. WINK: If I may, the pre-existing law does give creditors the right to sell.

CHAIRMAN BABCOCK: Dulcie, speak up.

MS. WINK: Yes. The pre-existing law does give creditors the right to sell the -- the right to sell the property, and the purchaser at execution sale takes the property subject to existing liens, and those -- then you deal with Article 9, those which are known and filed of record, et cetera, et cetera, so that's really not a change from what's going on here because we are only talking about the equity interest.

MS. BROWN: Yeah, and it's settled law. It is settled law that you can levy on property subject to a pre-existing lien, and am I --

CHAIRMAN BABCOCK: No, go ahead.

MS. BROWN: Yeah. And, I mean, to not be able to do so would take us down the path of the Grocers Supply case, which was unfortunately poorly briefed, quite

frankly. It didn't even address 34.004. It went off on other state law, did not even take into consideration then Rule 643, and there was for a while several cases that came out of that same court, which even called it exempt property if it was subject to a lien, and we all know that only the Constitution and the Legislature via the Constitution can exempt property. So by putting a lien on property you can't create property exemptions and protect it from levy by just putting a lien on it, and for -- if a judgment creditor cannot levy on that property then you're creating an exemption that we have no authority to create. So what we've done in (b) was really to put in the rule really what was established case law that has been established for years.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I think maybe my -- I think I understand better why you have section (b), but I think the problem I have is with "shall" instead of "may," because the old rule, 643, says "may," and I think if you say "shall" then that confers some --

CHAIRMAN BABCOCK: Duty.

HONORABLE ANA ESTEVEZ: Mandate.

HONORABLE JANE BLAND: -- mandate that an unsecured creditor who could argue would say, "Yes, I get to do this"; and I'm not certain, because I'm not as

knowledgeable about secured credit as you guys are, that a unsecured creditor can do this with impunity, so I think "may" might make me feel better because I think there are obligations that unsecured creditors should know about when there are perfected liens on property.

CHAIRMAN BABCOCK: Peter.

MR. KELLY: I wanted to shift to subparagraph (a), third line, who notice has to be given to, "notice of levy to all persons whose existing interests appear of public record," and that's just an undefined term. What interest, secured interest, recorded interest, equitable interest in the property? So that term needs to be defined, and also I think it needs to be more specifically limited on public record.

Back when the disciplinary rules, revision of those had been floating around, I found the most troublesome revision was the property of others provision, which required the attorney to do an investigation and to safeguard property belonging to others, and it increased the penalties to the attorney and the duty to investigate, and what is the duty of the party or the attorney to investigate the public record. I mean, if there's a judgment that's not recorded, that could be an interest in the public record that the attorney can find but could later come back and be enforced because it still is a

public record, so I think both of those terms need to be defined and limited.

MS. BROWN: Well, I mean, for an interest to appear of public record, if there's an interest in real estate it would have to be in the real property records, and that's a simple owner and lien search that you can order from a title company.

MR. KELLY: But that's a recorded interest.

MS. BROWN: Right.

MR. KELLY: You have an interest that is not yet recorded.

MS. BROWN: Well, then it would not be of public record, and the idea being that if there is a findable interest in property that you notify the interest holder of the action against the collateral. Same way with via UCC search. It's the same kind of inquiry that you would make if you were recommending a client who was wanting to buy a piece of property, you would say, "Okay, we need to get -- we need to get a search done by a title company so that you can know what you're getting." Same way if that client was going to purchase a piece of equipment from someone. What searches would you do in order to determine whether that equipment was subject to a lien? The answer is you do a UCC search, and so without saying that in here and giving those instructions we're

just saying "existing interests that appear of public record," those interests then would rise to the level of notification.

CHAIRMAN BABCOCK: Let's go off the record for a second.

(Off the record)

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I have a little bit of a concern about the last sentence in subparagraph (b). It says "the purchaser that takes the property subject to any pre-existing sale, pledge, mortgage, or conveyance." It's my understanding that it's only properly perfected interest that you take subject to. If it hasn't been properly perfected the judgment foreclosure would have priority. Do you agree with that, that it must be properly perfected?

MS. BROWN: I would agree with that.

MR. ORSINGER: Then you better put the words in here or else you're changing the substantive law, I think. You see what I'm saying because --

CHAIRMAN BABCOCK: You got a thumbs up from Dulcie.

MR. ORSINGER: I did?

MS. WINK: Yes.

MR. ORSINGER: That's the first positive feedback I have received from her in this whole process. I

appreciate that, and I'm going to write that in my notes.

MS. WINK: I love you, Richard.

CHAIRMAN BABCOCK: Okay. Harvey -- Gene, and then Justice Brown.

MR. STORIE: I just want to follow-up on Peter's point, and what if you had something like a competing judgment that was signed before the judgment you're trying to execute on? Would that qualify as existing interest appearing of public record?

MS. BROWN: No, because your judgment that is not abstracted would not create a lien on the real estate. Just the judgment standing alone, floating around out there, not abstracted, would not create a lien, and therefore, it wouldn't be a prior -- a prior interest.

MR. STORIE: Okay.

MS. BROWN: And then as to personal property, if there had been a seizure by a prior judgment holder then it would not be available for seizure to the new judgment holder.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: Well, mine's related and maybe you just answered it, but a judgment seems like to me it's a matter of public record, therefore, it falls within your language of public record, whereas to use some statement like "the real property records" it might be a

little more narrow and might give some comfort to the point.

MS. BROWN: Well, if I may answer that, you don't have an interest in the judgment debtor's property as a judgment creditor until you've done something to your judgment lien. As to real estate, to attach the judgment lien there's got to be an abstract of judgment filed or a levy on the real estate. As to personal property, there has to be a seizure.

HONORABLE HARVEY BROWN: Well, what if the judgment awards ownership in property but it's never filed in the real property records? They own it, right? They have an interest in it.

MS. BROWN: You're talking in terms of real estate?

HONORABLE HARVEY BROWN: Yes.

MS. BROWN: That is a title company question that I don't know the answer to. Maybe if anybody is better at real estate than I am.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I think what we're trying to say and we're not sure exactly how to fix it is that "existing interests appearing of public record" seems so broad. You know how it's defined as to what are the, you know, specific interests that would have to be

identified, but the rest of us don't, and the question is whether those words, you know, mean something in the industry or whether they need to be defined further.

CHAIRMAN BABCOCK: Okay. Peter.

MR. KELLY: I think she's using "interest" as a term of art, which means something very specific in that context, but in the general rules, though, interest means -- can mean lots of different things, equitable interest or the interest awarded by another judgment or something like that; and so I think that for, you know, outside of the -- terms need to be narrowed down and defined; and if you mean by "of public record" you mean recorded in the real estate, recorded, which is a more specific term than "of record," I think the rule needs to say that, otherwise you're putting too much of a duty on the judgment creditor to do too large a search for any possible interest that might be of public record.

MS. BROWN: I believe there was -- and I need to ask my harmonizing folks. There was some discussion when we initially started this about prior perfected liens, and we were concerned about narrowing it to prior perfected liens and having to make a decision, is this perfected or not perfected, and so that's why we did the broader interest of public record, so that if there was some kind of notice that somebody was claiming in interest and it

showed up on a search, you didn't -- you weren't limited to making -- having to make a decision about whether something was perfected or not perfected, so that was the reason for using interest of public record so that you go out and you get a search and you see somebody making a claim to that property, and it would put you on notice as a good faith purchaser.

You know, just a judgment out there giving somebody title to real estate, if it's not put in the real property records it will not cut off a good faith purchaser for value, and so that is why we at least said in the public records that you could do a search, find out interests as to this judgment debtor, and notify.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: This may be a matter of semantics, but the statute says that this type of property may not be seized if the purchaser, mortgagee, and so forth points out other property, and generally the way that works is the constable or the sheriff after the property is identified goes to them and first finds out if there's other property before the levy is made. The rule, on the other hand, turns it around and says that it can be sold unless the mortgagee points out. So that sort of implies that the levy can be had before there's any inquiry made about whether there's other property. I'm wondering why

that -- how you've reversed it.

MS. BROWN: Let's see, I think the debtor pointing out property is discussed in a -- is it in the prior rule or it comes after this?

MR. FRITSCHE: 643.

MS. BROWN: 643. I could find it in the old rules, but I probably can't find it in the new rules. And we did grapple with the notice -- the notice before or after the seizure, and, you know, when you've got a writ out there, you've got the constable out finding property, the opportunity to seize the boat may be lost if the property is not seized right then and there, and so the idea was there would be no harm in the seizure of it and then they could run the title and give the opportunity prior to the sale. I see what you're pointing out, because 34.004 says if the secured creditor can point something else out you shouldn't levy on their property, and it was just a balancing of how can we get the property seized and it not walk away, which it would do.

MR. HAMILTON: When you're talking about real estate -- you're talking about real estate, when they file that levy that could mess up a sale that's in progress, even if there's other property that would have been available.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I'm bothered also by the "public record" language because I wouldn't want it to be interpreted to include judgments, because you don't even know where to look for a judgment. In real estate you know the county to look in, and for personal property for secured liens you can follow title line, I think it is, or the UCC to figure out where to look for perfected security interests. It seems to me -- and I don't have a suggestion on what to do. I just want to present this thought, that ownership of land is governed by what's in the deed record office of the county where the land is located; isn't that right? You have to file it there in that county or else you don't have notice to the world, and if it's a titled personal property item then you can go to the titling agency, like an automobile or an airplane or a boat, and the owner is going to be whoever is in the title and if anyone has a security interest in that property it's going to be reflected in the title as well or it's not perfected. It seems to me the real problem here is not ownership claims in real property. It's ownership claims in personal property that's not titled because personal property that's not titled there's no place to go to find out who the owner is. Right?

MS. BROWN: Well, you can certainly check liens as to --

MR. ORSINGER: Sure, I'm talking --

MS. BROWN: -- on the UCC.

MR. ORSINGER: The issue was raised about a judgment that transferred ownership or established an ownership interest in land, and I agree with you that that judgment -- if a certified copy of that judgment is not filed in the deed record office it's not notice to anybody, but you don't have -- I mean, if there's an ownership interest that's claimed that's adverse ownership, not a perfected security interest, in personal property it's nowhere reflected. There is no law that requires that an ownership interest in nontitled personalty be filed with any government agency. So I feel that "public record" is too broad because it might be interpreted to include judgments that are not filed in the deed record office or not reflected, but I don't know what you do, but it's -- "public record" I think is too broad.

CHAIRMAN BABCOCK: Okay. Dulcie.

MS. WINK: And one quick point just to add to some of the things you were saying, Richard, is that a person who has an interest in property, whether it's a security interest or whatever, and does not take steps to perfect it, the law is very clear, they take those risks of the property being sold without their notice. So I'm not ignoring the rest of what you said, but when it comes to

the personal property or any other kind of property, if you have an interest and you don't go out and perfect it, then the law is clear in Article 9 that you're taking your own risks.

MR. ORSINGER: Well, let's say that I have a safety deposit box with gold in it. Are you saying that there is some law that I have to register my ownership somewhere or else it can be seized?

MS. WINK: No. I'm saying the world doesn't necessarily know of your gold. Are you a third party and someone else is claiming it? There are too many questions.

MR. ORSINGER: Where would I go to register my ownership in a bag of gold?

MS. WINK: I'm not saying you would.

CHAIRMAN BABCOCK: I thought it was a box of gold.

MR. ORSINGER: Box of gold.

CHAIRMAN BABCOCK: Stay straight in this.

MS. WINK: My point is if you are the debtor, that's subject to execution. If you are not the debtor, if you are a third party and it's the debtor's and you have a security interest in that bag of gold --

MR. ORSINGER: It should have been perfected.

MS. WINK: You should have perfected it. Absolutely.

MR. ORSINGER: But if it's an ownership interest and not a security interest then I can't do anything other than hope that I find out about it and intervene in time, right?

MS. WINK: Can't think of anything else, but you do have trial of right of property.

HONORABLE JAMES MOSELEY: I keep my gold close beside me at all times.

CHAIRMAN BABCOCK: I was going to say, so the record is complete, Richard, where is your box of gold?

MR. ORSINGER: San Antonio, but I'm not going to tell you where.

CHAIRMAN BABCOCK: That's as close as you're getting, huh? Did somebody have their hand up there? Justice Gray.

HONORABLE TOM GRAY: Two quick comments, one practical, one structural, I guess. The practical question is the sales price for any asset being sold under this is substantially depressed because of the contingencies of these prior interests.

MS. BROWN: Yes.

HONORABLE TOM GRAY: And I'm wondering is there any way a prospective purchaser can obtain information about who all these notices were given to? That's a practical question, if the prospective purchaser

can it's going to substantially increase the price because they'll pay more to the benefit of both the judgment creditor, debtor, just because they're going to know their risks. Do you understand? If as a prospective purchaser I can call the person who has noticed this asset for sale and say, "Who all did you get notices to" and be entitled to get that notice, that would be great, just as a practical matter.

MS. BROWN: I wouldn't want that burden on a judgment creditor. I think it would be legal advice. The judgment debtor's property is sold as-is subject to all liens. You only get what the debtor had in it, and --

HONORABLE TOM GRAY: Therein lies the substantially depressed price of any of these things that are sold to the detriment of the creditor that's being represented, but that's just one person's perspective.

From a structural standpoint under subsection (b), I don't see what the first sentence of that subsection has anything to do with the caption of the section, "Effect of Sale." Second sentence properly goes under "Effect of Sale." First sentence needs to be either in a new subsection (b) or somewhere else.

CHAIRMAN BABCOCK: Okay. Can we go on to Rule 7?

MS. BROWN: I'm fine with that.
CHAIRMAN BABCOCK: Cool. Let's do that.
MS. BROWN: Execution Rule 7 just is the effect of a supersedeas on the execution process.
CHAIRMAN BABCOCK: Rule number 8 -- pardon? Yes.
MR. HUGHES: I --
CHAIRMAN BABCOCK: Yeah, Roger.
MR. HUGHES: I had some questions about this one.
CHAIRMAN BABCOCK: About 7?
MR. HUGHES: Yes.
CHAIRMAN BABCOCK: Okay.
MR. HUGHES: Actually, two things. First, as I read this, if a writ of execution issues from a district or a county court you can file your supersedeas bond or whatever, and the clerk issues a writ of supersedeas, but my understanding of the law or rather the way it was set up is that if that writ of supersedeas doesn't get to the sheriff in time and the property sold, too bad, your property is sold; is that right?
MS. BROWN: Elaine? Where is she?
MS. HOBBS: She walked out.
MS. BROWN: She walked out.
MR. HUGHES: Because what I see is for a

judgment from a justice court the supersedeas bond is effective immediately, and but now for other judgments you have to get a new writ issued, and you have to get it served on the sheriff before it does them any good.

MR. ORSINGER: It might take a day to get that writ of supersedeas.

MS. BROWN: I've got to confer here.

CHAIRMAN BABCOCK: Huddling. There should be some bonus points if you make them huddle.

MR. HUGHES: Well, I've got one more.

CHAIRMAN BABCOCK: Whoa. You've got another trick up your sleeve, do you?

MS. WINK: There are some quirks from the justice court provisions, so that's what the huddling is about.

CHAIRMAN BABCOCK: Still huddling.

MR. FRITSCHE: There is no supersedeas out of justice court. There is only an appeal de novo to county court --

MR. HUGHES: Okay.

MR. FRITSCHE: -- so we had to divide the two sections to be clear and take it out of existing 634.

MR. HUGHES: So why -- why would we want a writ of supersedeas to be more effective in justice court than for a district court? Why not make the writ of the

supersedeas -- pardon me, the supersedeas bond effective immediately?

HONORABLE SARAH DUNCAN: It is.

MR. HUGHES: Well, it isn't if the sheriff can sell your property before he gets the writ of supersedeas, and it's sold.

MR. GILSTRAP: Is that the current law?

MR. HUGHES: Well, that's my understanding. That's why I asked. Otherwise, the point of issuing a writ of supersedeas is --

MR. GILSTRAP: I think the point of issuing a writ is to let the sheriff know if he had -- in other words, you can go out and say, "Gosh, sheriff, we just issued a supersedeas bond, so you've got to stop." He says, "Well, I need to see a paper," so now you have a piece of paper. It's a writ issued by the court saying "stop the sale."

MR. HUGHES: And my point is my understanding until he gets that writ is he can sell it.

MR. GILSTRAP: I don't know. Is that the law?

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I think he can -- he can sell it, and obviously getting the writ of supersedeas into the hands of the sheriff is what will cause the sale

to be stopped, but because the writ of supersedeas has issued and writ of supersedeas is effective immediately, that makes that a wrongful execution from the moment the writ of supersedeas was issued.

MR. GILSTRAP: So they can set the sale aside?

HONORABLE SARAH DUNCAN: To the extent you can collect, you could get damages for wrongful garnishment or execution or whatever it is.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Rule 24(a)(1) of the appellate rules says, "Unless the law or these rules provide otherwise a judgment debtor may supersede the judgment by, one, filing with the trial court clerk a writ and agreement," and it goes on down, so supersedeas, compliance with the supersedeas rule suspends the judgment; and I think it later says, 24.1(f), "Enforcement of a judgment must be suspended if the judgment is superseded. Enforcement begun before the judgment is superseded must cease when the judgment is superseded." It doesn't talk about service of a writ on the sheriff or anybody else. If execution has been issued, the clerk will promptly issue a writ of supersedeas, but the effectiveness of it doesn't appear under Rule 24.1 to be effected by a subsequent writ being issued by the clerk, or at least that's my reading.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: And just one minor point. It doesn't suspend the judgment; it suspends enforcement of the judgment, two very different things to people who hold judgments.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: With regard to the justice court, is it the law now that appeal from the justice court suspends the writ of execution?

MS. BROWN: That's what David is saying.

MR. GILSTRAP: Because the current rules have a provision for the bond, for a supersedeas in the justice court rules.

MR. FRITSCHE: I think you're talking about the appeal bond. The appeal bond perfects the appeal out of JP court to county court for trial de novo.

MR. GILSTRAP: Right.

MR. FRITSCHE: The only time, I believe, if I recall what Judge Lawrence said, the only time that a writ of execution can issue out of JP court earlier than the 10-day appeal period on a typical civil claim or the five days in an eviction case is if the affidavit is delivered that the judgment debtor is about to secrete or remove the property, shorten the amount of time for the writ of execution to issue. So the concept of supersedeas out of

JP court really doesn't exist. It's solely an absolute right to essentially a new trial, trial de novo, if an appeal out of JP court is properly perfected.

MR. GILSTRAP: Well, even so, wouldn't we want a writ to show to the sheriff who is about to sell the property, or is it possible he's ever about to sell the property under a justice court judgment? In other words, it seems to imply that -- you know, it seems to imply that you don't need a writ to stop the sale.

MR. FRITSCHE: In (b)?

MR. GILSTRAP: In (b). I mean, there's no provision for a writ.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I would suggest that we just eliminate the writ of supersedeas concept altogether. If there's a bankruptcy filed and the automatic stay is triggered, a writ of supersedeas is not even provided, but the sale is stopped by Federal law. Why shouldn't the posting of a supersedeas bond pursuant to the Rules of Appellate Procedure immediately stop enforcement? And what we should do is just provide for the sheriff or the deputy to return the writ of execution. It's already been levied but -- or could have already been levied, return the writ of execution unexecuted rather than get a new writ of suspension out, because we're already familiar with the

guys that file bankruptcy, the automatic stay is automatic, and the rule that was just read that Richard just read said the superseding of the judgment is automatic. So I would suggest let's forget the writ of supersedeas and let's just say that the executing officer needs to return the writ unserved or unexecuted.

CHAIRMAN BABCOCK: Sarah has a counterpoint to that point. Maybe.

HONORABLE SARAH DUNCAN: The way it is in JP court now is the way it used to be in district court, and an appeal bond was a supersedeas bond. The problem was it was in multiples amounts of damages and it was declared unconstitutional; and that's when we moved over to having a supersedeas, whether it's a bond or some other type of equivalent, an appeal bond; and actually, relating back to our discussion yesterday about having different points in time when various enforcement measures can be pursued, if we went back to having the -- what's now a notice of appeal, effectuate supersedeas, we could then measure everything from the same point in time; and if you -- if you could stop enforcement as of the date you file your notice of appeal, but then have to somehow secure payment of the judgment at some later date, we could do that. We could have a notice of -- we could have a supersedeas bond be the equivalent of a notice of appeal, and somebody would

know as soon as I file my notice of appeal/supersedeas bond, enforcement stops.

The problem with getting rid of the writ of supersedeas, in my view, is how does one communicate to an officer who is trying to collect on a judgment, enforce it? How do you communicate that you can't do that anymore because I've got a supersedeas bond or negotiable instrument or whatever on file, and I've -- you can't do that anymore. How do you communicate that without a writ of supersedeas?

MR. ORSINGER: Just fax him a copy of the supersedeas bond. There's going to be a certificate from the clerk if it's cash or there's going to be a bond that's been signed by a bonding agency or sufficient sureties, and it will be a certified copy, and you fax it to the constable or the sheriff, and it's immediately stayed.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: In fact, I was just -- I agree with Richard. This extra mechanics of having a writ of supersedeas seems to be a kind of old time, you know, procedure. Why not just say something like you said for justice court for county and district courts, "Upon" --

CHAIRMAN BABCOCK: Did you get that?

PROFESSOR DORSANEO: "Upon the posting of a

sufficient security pursuant to Texas rules" -- well, you know, "Texas Rules of Appellate Procedure, enforcement of the writ of execution is suspended," period.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: That was really going to be the tenor of my next question, but I think it was more broadly as along Richard's line, is we have this rule that says what happens to the writ of execution. We don't have any rule pertaining to garnishment, turnovers, receivers, et cetera. I don't know how it's handled in practice, but it seems to me that the idea of an analogy to the bankruptcy stay, which many of us are familiar, is a good idea and that we -- and I hate to -- I know the committee has worked very hard, but I think there needs to be an across the board rule, you file a supersedeas bond, everything shuts down, because -- especially with a turnover. If you're talking about holding the debtor in criminal contempt for violating an order after he has filed a supersedeas bond, that's a little scary.

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: Well, I actually -- I'm not completely positive this is so, but I actually think the word "execution" got a narrow interpretation over time and that it once meant "enforcement," that it meant everything.

MR. ORSINGER: They didn't even have garnishment at one time.

PROFESSOR DORSANEO: Right, but, you know, maybe instead of saying -- maybe instead of saying "enforcement of the writ of execution is suspended" say "enforcement of the judgment is suspended" and put it somewhere else.

CHAIRMAN BABCOCK: Yeah. Dulcie.

MS. WINK: I think -- I think realistically speaking, we need to have some sort of notice provision as well going out. Even in a bankruptcy situation, if I'm in a district court and someone files a bankruptcy in another state, I'm not going to know about it until their counsel files a notice of suggestion of bankruptcy, so in between that time I don't think the law is going to penalize me for, you know, prosecuting the lawsuit until I know about the suggestion of bankruptcy, until I know about it. Similarly, and I'm not disagreeing with the principles here, I think what we have to do is provide a means for which notice of that filing, whether it's a -- whether it's a supersedeas, gets out to those.

Now, we can put the onus on the secured creditor if at the time of filing supersedeas you're required to give that creditor notice so they can get the word out to the sheriff or constable or whomever, but there

has to be some kind of notice to make sure that the process is actually achieved.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I agree totally, but it's my understanding the automatic stay is it's effective even if you don't know about it, so that if a sale went through it's void. You're not going to be held in contempt of the bankruptcy court, but once the stay goes into effect, it's self-executing and automatic, and anything that happens in violation of it is void, is my understanding.

CHAIRMAN BABCOCK: Frank.

MR. ORSINGER: Unless y'all have a different experience.

MR. GILSTRAP: Why is the suspension suspended by the appeal in justice court but not in district court or vice versa, and why do we have two different rules?

HONORABLE SARAH DUNCAN: Because it was --

MR. FRITSCHE: Because the only time that you can possibly have a writ of execution issue in justice court within the 10-day period is if the judgment creditor expedited the issuance of the writ. Once it's final and unperfected, the judgment out of justice court has become final because it was never perfected, then you can execute on it. There is no further appeal unless you do a writ of

certiori to county court.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: My understanding is that the reason for the difference is that the bond at issue in *Dillingham vs. Putnam* was a bond in a district court, so after *Dillingham vs. Putnam* issued declaring that requirement of a -- it was triple, wasn't it, three times the amount of damages in the judgment. They said that is an unconstitutional limitation on your right -- your constitutional right to appeal, so the rule changed in cases in district court, but nobody made the parallel change in justice courts, and that's why -- that's what I was trying to say earlier. That's why there are two different systems.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Where is Bonnie when we need her? You file a supersedeas bond, the clerk has to look at it, approve it, and it's not effective until it's approved by the clerk, and then the writ of supersedeas gets issued, so you can't just say that the filing of the bond does it, and I think we have to -- you know, while we're looking at it we should look at Rule 24 --

MS. BROWN: 1(f).

HONORABLE TRACY CHRISTOPHER: -- .1(f), too.

I mean --

MR. ORSINGER: What does it say?

HONORABLE TRACY CHRISTOPHER: Well, it says, "Enforcement of a judgment must be suspended if the judgment is superseded. Enforcement begun before the judgment is superseded must cease when the judgment is superseded. If execution has been issued, the clerk will promptly issue a writ of supersedeas."

HONORABLE SARAH DUNCAN: Chip?

HONORABLE TRACY CHRISTOPHER: So I think you actually have to have that writ for the process to really be in effect, the notice of appeal, the filing of the bond.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: And we did talk about this when Bonnie was here, bless her heart, we do miss her, and what was made very clear is that the clerks hate being in the position of having to approve security that's put up, whether it's a bond or cash or negotiable instrument or anything else, and would really like to be taken out of that business; but what that translates into most of the time is that they simply approve what's tendered; and I say most of the time because I have had supersedeas bonds rejected by a clerk for a reason that was not disclosed to me, which is also a very tenuous spot to be in; but, I mean, Judge Christopher is right. It does

have to be approved, but that's pretty much automatic in most cases unless you're wearing the wrong color of suit.

CHAIRMAN BABCOCK: Roger, and then Justice Bland.

MR. HUGHES: Well, I understand both sides. The bond does have to be approved. My thinking is if the bond is approved then it's stayed from the date of filing; and that's because, as was mentioned, if the creditor is going to have to get knowledge of it so he can tell everybody to stop execution, what often happens is, is people start -- the clerk gets deluged with phone calls. "This is why the bond isn't enough." "No, this is why the bond is enough." I even had one case where the clerk just sat on the bond for three days while the district clerk had talked to a lawyer employed by the district clerk's office for these kinds of purposes. So it may take four or five days; and if it's a good bond, if the clerk eventually approves it, I'm not sure why the -- why the judgment debtor should be penalized by a delay if it's a good bond. If it's a bad bond then it's a nullity, but if it's a good bond then it should be effective from the date of filing.

MR. ORSINGER: Yes.

CHAIRMAN BABCOCK: Yeah, Richard. Oh, I'm sorry. Justice Bland had her hand up.

HONORABLE JANE BLAND: I think the confusion

at least in the subsection (a) that we're looking at is by using "suspended" twice in two different places meaning two different things. It says, "In the event enforcement of a judgment is suspended pursuant to the TRAPs," which I think is, you know, Rule 24, "the clerk shall issue a writ of supersedeas suspending all further proceedings," except the problem is it's already -- the enforcement has been suspended elsewhere, so I think it should say, "The clerk shall immediately issue a writ of supersedeas notifying," you know, whoever we need to notify, "all parties."

MR. GILSTRAP: "That enforcement of the judgment has been suspended."

HONORABLE JANE BLAND: "That enforcement of the judgment under any execution previously issued has been suspended." In other words, it's not the writ that's the operative tool. The writ is just the notice.

HONORABLE SARAH DUNCAN: No. The issuance of the writ is what is supposed to suspend enforcement of the judgment.

HONORABLE JANE BLAND: But that isn't what Rule 24 says.

HONORABLE SARAH DUNCAN: The writ says, "You are now ordered to cease and desist" and all of that.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I agree with Justice Bland.

The rule itself says that the judgment is suspended on the filing of the bond, and the clerk has to approve the bond for the bond to be effective, but the judge -- enforcement of the judgment in the language of the rule is it is suspended by the filing of the bond, so my personal belief is Justice Bland is correct, this rule should be amended so it is a notification rule, and there is no confusion as to the effectiveness of the supersedeas bond. Why would I have a supersedeas bond that obligates sureties to pay a judgment and is not effective until a clerk issues a writ that they've contracted, and you can still shut my business down, you can still do whatever. That doesn't make sense.

CHAIRMAN BABCOCK: Richard, final comment on Rule 7.

MR. ORSINGER: I think that we --

CHAIRMAN BABCOCK: So make it good.

MR. ORSINGER: We ought to segregate the suspending from the giving notice of the suspension, and obviously there's confusion about that because there's people here today that believe that it's not suspended until somebody is served with a writ, which might be delayed three or four or five days while people are campaigning with the district clerk or someone who might be especially closer to the district clerk than an out of town lawyer or something. It ought to be effective immediately

or retroactive to when it's filed, and I'll go back to the bankruptcy paradigm. You don't have to have a writ of supersedeas to stop an execution if there is an automatic stay. That's a constant frequent event, and we could pattern our rules -- and we may need to change more than just this rule, but the Supreme Court has the power to make those changes so that it operates more like the bankruptcy court stay does.

CHAIRMAN BABCOCK: Okay.

MS. GREER: I've always understood that the supersedeas rule was that once the bond was filed and approved it became, quote, "effective," and therefore -- and the method says under these rules the judgment debtor may supersede by filing with the clerk a good and sufficient bond. So I think once the clerk approves it it's immediately effective. The purpose for the writ as I see it -- and I share your concern, by using "superseding" twice it confuses it. The supersedeas effect is already there. Generally writs of execution don't issue because you've got 30 days of automatic supersedeas after the judgment is entered so people typically get their bond on file. The only time you really need to issue the writ is if execution has already issued to get the word to the sheriff, because they usually wait to do anything because they know that for 30 days it's going to be protected.

CHAIRMAN BABCOCK: Okay. We're going to have to break now. I'm sorry we didn't get these rules done today, and I'm sorry you guys have to keep dragging yourselves --

MR. ORSINGER: Too many huddles.

CHAIRMAN BABCOCK: -- back here. Yeah, if it wasn't for you and Roger they wouldn't have to huddle, but I think we'll try to put you on the agenda for April, subject to your availability. That's our next meeting, and, everybody, our meeting in April, contrary to what I said yesterday morning, is going to be a two-day meeting, so we'll go from there. Thanks, everybody. Great two days of meetings.

(Adjourned at 11:49 a.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 28th day of January, 2012, and the same was thereafter reduced to computer transcription by me.

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

Charged to: The State Bar of Texas.

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

_____
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