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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

June 23, 2012

(SATURDAY SESSION)

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 Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 23rd day of June,
2012, between the hours of 8:57 a.m. and 11:38 a.m., at
the Texas Association of Broadcasters, 502 East 11th
Street, Suite 200, Austin, Texas 78701.

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

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Documents referenced in this session

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2	12-13 TRAP Word Limit Amendments 4-14-12
3	12-14 Small Claims Task Force Report
4	12-15a Comments of J. Steisniek 5-11-12
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25	12-17 House Bill 79

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2 CHAIRMAN BABCOCK: Well, welcome, everybody.
3 Just for planning purposes, we're going to continue our
4 discussion on Section 8, the debt claim cases, and then
5 we're going to go from there to Section 10, eviction, and
6 we're going to recess a little early this morning at
7 11:45, my problem, but since it's my birthday I can do it
8 if I want.

9 MR. HAMILTON: So only 15 minutes?

10 CHAIRMAN BABCOCK: Huh?

11 MR. HAMILTON: Only 15 minutes?

12 CHAIRMAN BABCOCK: Only 15 minutes.

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

15 CHAIRMAN BABCOCK: That's the thing, I have
16 all my little buddies at Chuck E. Cheese. All right.
17 Judge, you said that you wanted to talk a little bit about
18 577 and 578. Judge Casey.

19 HONORABLE RUSS CASEY: Well, we talked about
20 577 yesterday, and I think that if anyone has any
21 questions we could address those, but I wanted to go over
22 578 and what we were doing in 578.

23 CHAIRMAN BABCOCK: Yeah, good.

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

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

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

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

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

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

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

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

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

1 point in time before they render a default judgment.

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

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

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

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

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

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

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

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

14 HONORABLE RUSS CASEY: Exactly.

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

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

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

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

13 CHAIRMAN BABCOCK: Judge Yelenosky.

14 PROFESSOR DORSANEO: Or it's not enough.

15 MR. TUCKER: Right.

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

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

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

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

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

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

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

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

12 MR. TUCKER: Right.

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

15 MR. TUCKER: Right.

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

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

1 force thought was, is if we're going to talk about
2 something automatic where the judge doesn't really have
3 the ability to evaluate the evidence then that bar should
4 be high, and then we said, look, if they don't have that,
5 how much strictness do we want to place on a judge over a
6 hearing that they are evaluating, you know -- you know,
7 they are evaluating the in person testimony.

8 Traditionally judges get a lot of leeway in evaluating the
9 credibility of live sworn testimony. So we didn't want to
10 completely pigeonhole things in that sense of, you know --

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

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

24 MR. TUCKER: Yeah, about 70.

25 HONORABLE RUSS CASEY: Is it 70 now? About

1 70 are attorneys. Due to the extraordinary number of
2 cases involving what is evidence, what is not evidence,
3 especially in regards to these cases with different courts
4 of appeals differing even on that subject instead of the
5 JPs trying to keep up with what's today's decision
6 somewhere and what constitutes evidence, we put together a
7 list of what we feel constitutes evidence, and, yeah, it
8 is a high burden, but we feel that there should be a high
9 burden if we're not going to have a trial on the case.

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

24 HONORABLE RUSS CASEY: Yeah, what he said.

25 HONORABLE STEPHEN YELENOSKY: My last point

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

5 MR. TUCKER: Right.

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

9 MR. TUCKER: I think --

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

12 MR. TUCKER: Sure.

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

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

1 CHAIRMAN BABCOCK: Justice Brown.

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

13 CHAIRMAN BABCOCK: Justice Bland.

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

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

9 HONORABLE STEPHEN YELENOSKY: Poor
10 representation on this committee.

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

1 title of the note --

2 HONORABLE RUSS CASEY: It was our
3 intention --

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

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

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

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

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

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

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

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

12 HONORABLE RUSS CASEY: I guess --

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

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

1 MR. TUCKER: Assignee.

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

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

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

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

21 HONORABLE RUSS CASEY: Maybe what --

22 HONORABLE JANE BLAND: -- as regulated.

23 THE REPORTER: Wait, wait.

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

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

3 HONORABLE RUSS CASEY: Okay. Sorry.

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

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

25 MR. TUCKER: Sure, but --

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

8 MR. TUCKER: Right.

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

11 MR. TUCKER: But I --

12 HONORABLE JANE BLAND: Hang on.

13 MR. TUCKER: I'm sorry.

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

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

25 HONORABLE JANE BLAND: I don't see the

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

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

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

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

14 HONORABLE JANE BLAND: Right.

15 HONORABLE RUSS CASEY: That's all I get.

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

20 HONORABLE RUSS CASEY: We're trying to.

21 HONORABLE JANE BLAND: Yeah.

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

1 PROFESSOR DORSANEO: Pick who you like.

2 CHAIRMAN BABCOCK: Richard Munzinger.

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

5 MR. TUCKER: They didn't say that.

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

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

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

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

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

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

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

25 Secondly, what we tried to do was create a

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

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

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

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

9 CHAIRMAN BABCOCK: Judge Wallace.

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

21 MR. TUCKER: Right.

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

1 MR. TUCKER: I understand.

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

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

15 CHAIRMAN BABCOCK: Carl, then Orsinger, then
16 Dorsaneo.

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

1 hearing; is that right?

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

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

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

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

12 MR. HAMILTON: When do they submit them?

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

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

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

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

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

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

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

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

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

23 MR. HAMILTON: Yes.

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

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

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

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

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

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

25 HONORABLE RUSS CASEY: I don't think that we

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

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

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

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

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

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

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

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

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

23 CHAIRMAN BABCOCK: Okay. Professor
24 Dorsaneo.

25 PROFESSOR DORSANEO: Well, a lot of things

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

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

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

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

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

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

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

1 PROFESSOR DORSANEO: Yeah.

2 HONORABLE RUSS CASEY: -- for all 840 of our
3 courts. That was another goal of this, was right now
4 the -- they have problems with each different judge in all
5 840 requiring different things, and we wanted to have some
6 uniformity.

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

9 HONORABLE RUSS CASEY: Yes.

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

16 CHAIRMAN BABCOCK: Judge Estevez.

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

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

8 HONORABLE RUSS CASEY: Exactly.

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

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

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

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

16 MS. SECCO: No, I retract it.

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

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

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

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

17 MR. TUCKER: Yes.

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

21 MR. TUCKER: That would make sense.

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

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

3 MR. TUCKER: Yes.

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

6 CHAIRMAN BABCOCK: That was yes.

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

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

22 MR. TUCKER: Sure.

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

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

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

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

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

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

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

8 MR. TUCKER: Well, no.

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

11 MR. TUCKER: Yeah.

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

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

18 HONORABLE DAVID PEEPLES: Okay.

19 HONORABLE RUSS CASEY: It was not my
20 intention.

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

24 HONORABLE JANE BLAND: A solution.

25 HONORABLE DAVID PEEPLES: -- is the proper

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

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

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

25 CHAIRMAN BABCOCK: Sorry. Justice

1 Christopher, you had your hand up at one point?

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

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

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

18 HONORABLE RUSS CASEY: I like that very
19 much.

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

22 MR. TUCKER: Right.

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

25 MR. TUCKER: Right.

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

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

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

17 MR. GILSTRAP: Okay. When I read 578(a) and
18 (b) it looks like we're talking about two kinds of claims.
19 One is a claim where you have an instrument signed by the
20 debtor. The other is an account, usually a credit card
21 account, but account which doesn't have to be signed.
22 Now, when I flip back over to 576 and I look at the --
23 576(a) and I look at the universe of claims that are
24 covered by Section 8, they talk about consumer debt,
25 revolving or open-ended account, or borrowing money at

1 interest. My question is, are there other kinds of claims
2 in 576(a) that are not -- that don't qualify as a document
3 -- as a claim where you have the original signature or an
4 account? Is there -- is there a larger universe of claims
5 that aren't covered by the default judgment provisions in
6 578?

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

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

11 MR. TUCKER: Yes.

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

16 MR. TUCKER: Right.

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

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

25 MR. GILSTRAP: Signed documentation.

1 MR. TUCKER: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 CHAIRMAN BABCOCK: Kent.

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

19 CHAIRMAN BABCOCK: Anybody know the answer
20 to those?

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

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

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

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

7 CHAIRMAN BABCOCK: Sure.

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

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

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

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

21 MR. TUCKER: Yeah.

22 HONORABLE KENT SULLIVAN: What? I'm sorry.

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

1 HONORABLE KENT SULLIVAN: Okay.

2 CHAIRMAN BABCOCK: Marcy.

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

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

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

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

15 MS. GREER: Exactly.

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

22 MS. GREER: Right.

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

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

11 CHAIRMAN BABCOCK: Judge Estevez.

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

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

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

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

12 HONORABLE ANA ESTEVEZ: Clark?

13 MR. ORSINGER: Is that a case?

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

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

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

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

1 for summary judgment, so --

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

7 HONORABLE ANA ESTEVEZ: You can appear
8 by phone.

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

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

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

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

8 CHAIRMAN BABCOCK: Thanks. Frank.

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

1 CHAIRMAN BABCOCK: Professor Dorsaneo.

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

6 HONORABLE RUSS CASEY: Okay.

7 PROFESSOR DORSANEO: Looking at that
8 initially and then saying, well, does that really have the
9 elements of the claim or cause of action in there right;
10 and then I thought, well, maybe I need to look back to
11 509, which also applies, in order to find out whether the
12 509(a)(5), for example, the basis for the plaintiff's
13 claim against the defendant, you know, needs to be in
14 plaintiff's pleadings for 577 cases.

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

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

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

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

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

2 MR. TUCKER: Yeah.

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

6 MR. TUCKER: Sure.

7 PROFESSOR DORSANEO: Huh? Something like
8 that.

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

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

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

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

20 CHAIRMAN BABCOCK: Justice Frost.

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

25 MR. TUCKER: It would still be required.

1 HONORABLE RUSS CASEY: That's Federal law.

2 HONORABLE KEM FROST: Right.

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

5 MR. TUCKER: Yeah.

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

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

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

20 CHAIRMAN BABCOCK: Carl.

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

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

16 CHAIRMAN BABCOCK: Richard.

17 MR. ORSINGER: I was looking at the
18 interrelation between Rule 525 and this default judgment
19 rule, and 525(b) talks about the right to attorney's fees
20 if you have affidavits to support them, and I believe that
21 525 subdivision (b) is relating to the default judgment
22 with -- without a hearing, meaning necessary paperwork is
23 attached. Is affidavits from attorneys attached to a
24 petition that has all of the listed credit documents, are
25 you entitled to a default judgment on these also without a

1 hearing, or does --

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

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

8 MR. TUCKER: Sure.

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

12 MR. TUCKER: Sure.

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

14 MR. TUCKER: Sure, that make sense.

15 CHAIRMAN BABCOCK: Okay. Roger.

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

22 MR. TUCKER: Right.

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

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

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

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

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

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

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

22 HONORABLE RUSS CASEY: Basically, yeah.

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

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

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

9 MR. TUCKER: No.

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

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

21 CHAIRMAN BABCOCK: Kent.

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

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

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

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

22 CHAIRMAN BABCOCK: Frank.

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

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

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

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

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

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

15 MR. GILSTRAP: What's that?

16 CHAIRMAN BABCOCK: Judge Yelenosky.

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

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

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

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

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

18 CHAIRMAN BABCOCK: Lisa.

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

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

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

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

11 MR. TUCKER: Okay. Thanks.

12 CHAIRMAN BABCOCK: Gene.

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

25 CHAIRMAN BABCOCK: Okay. Yeah, Lamont.

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

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

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

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

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

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

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

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

7 CHAIRMAN BABCOCK: I thought you were just
8 exercising.

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

25 The second thing is that dismissals on

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

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

20 "Objection, hearsay."

21 "Sustained, affidavit is not admitted."

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

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

4 Now, part of the discussion about a cost
5 benefit analysis, that certainly does go on. I have cases
6 in Houston where I have 86 requests for admissions, 90
7 requests for production of documents, and we're on a
8 2,500-dollar case, but because we're in justice court and
9 we're under district court discovery rules, it's a game.
10 It's moving the chess pieces around the chess board, and
11 so in that regard there are cost benefit analyses that go
12 on, but as the industry as a whole, especially over the
13 last three years and sort of the perfection of the
14 industry that has gone on, we do not bring suits unless we
15 intend to take them to judgment. Now, we will on a
16 case-by-case basis make a determination about
17 effectiveness, cost issues, but not as a broad spectrum do
18 we dismiss on answer. We don't do that.

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

25 MR. SCOTT: There's going to be a

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

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

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

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

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

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

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

23 CHAIRMAN BABCOCK: Okay. Justice Hecht.

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

1 the amount is due and owing?

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

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

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

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

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

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

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

1 thing.

2 CHAIRMAN BABCOCK: Okay. Very good.

3 Thanks, Carl. Hayes.

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

18 CHAIRMAN BABCOCK: Okay. Great. Yeah.

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

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

25 PROFESSOR HOFFMAN: I was, in fact, going to

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

3 CHAIRMAN BABCOCK: So your inner Munzinger
4 is coming out?

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

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

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

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

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

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

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

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

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

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

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

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

1 right to have that money.

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

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

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

11 MR. HARDIN: This is good.

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

14 MR. MUNZINGER: Only the system --

15 MR. SCOTT: If I could --

16 THE REPORTER: Wait.

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

19 MR. SCOTT: Oh, I'm sorry.

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

22 MR. SCOTT: Oh.

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

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

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

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

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

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

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

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

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

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

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

15 MR. TUCKER: Yeah.

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

1 size of businesses that we're dealing with.

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

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

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

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

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

25 The first rule is 738 in the eviction rules,

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

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

25 Days later the court receives the appeal,

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

11 Now, since we're eliminating or we're
12 constraining the rights of the appellee, we extended it in
13 another area and said what you can also do is you can fax
14 in your appeal document; and if the court receives it by
15 5:00 o'clock on the day that it's due, that's timely
16 filed, and then you also need to mail it. So if I don't
17 have my appeal prepared until 4:57 on the last day, I can
18 fax it to the court. The court is in receipt of it so
19 they don't issue the writ of possession, and then I also
20 mail it to the court. So we tried to fix this problem
21 where the mailbox rule doesn't work with the time frame of
22 eviction suits while doing no damage to the appellee's
23 time frame. Especially, for example, in commercial
24 evictions, I could be in El Paso, the case is in Austin,
25 it's very hard for me to get it to Austin in the time

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

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

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

17 HONORABLE RUSS CASEY: May I address that?

18 CHAIRMAN BABCOCK: Yeah, absolutely.

19 HONORABLE R. H. WALLACE: Surmise, guess.

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

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

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

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

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

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

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

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

21 PROFESSOR DORSANEO: Okay. All right.

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

1 MR. TUCKER: Except for the jury request.

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

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

8 MS. GREER: Yes.

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

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

13 MR. TUCKER: As a policy --

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

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

19 PROFESSOR DORSANEO: I see.

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

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

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

3 MR. TUCKER: Writ of possession.

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

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

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

15 MR. TUCKER: Right.

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

19 MR. TUCKER: Right.

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

22 MR. TUCKER: Okay.

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

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

4 MR. TUCKER: Right, and --

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

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

22 CHAIRMAN BABCOCK: Richard Munzinger.

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

1 CHAIRMAN BABCOCK: Richard Orsinger.

2 Richard, the younger.

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

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

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

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

10 MR. TUCKER: Sure.

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

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

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

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

21 CHAIRMAN BABCOCK: Marcy.

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

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

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

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

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

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

6 MR. TUCKER: Check's in the mail.

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

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

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

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

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

1 MS. GREER: Okay.

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

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

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

22 CHAIRMAN BABCOCK: Frank.

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

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

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

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

11 HONORABLE RUSS CASEY: Yeah.

12 CHAIRMAN BABCOCK: Okay, Carl.

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

15 HONORABLE RUSS CASEY: Have an original.

16 MR. HAMILTON: Just to have the original?

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

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

1 MR. ORSINGER: Huh-uh.

2 MR. HAMILTON: No?

3 MS. SECCO: No.

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

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

13 MR. TUCKER: That would make sense, and just
14 to -- we didn't really address that part of why we did
15 that. We have courts, especially in rural areas, that are
16 not open full business hours, and so we tried to eliminate
17 kind of the due process problem of I bring in my appeal at
18 4:30 on the fifth day, court's closed, so too bad, you're
19 not timely, so that's why we included that language there.

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

22 CHAIRMAN BABCOCK: All right. Anymore about
23 738? All right. Let's go to 739, Russ. Or, Bronson, you
24 want to talk about it?

25 MR. TUCKER: Sure. Some of the modification

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

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

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

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

22 CHAIRMAN BABCOCK: Lisa.

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

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

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

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

18 MS. HOBBS: Yeah.

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

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

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

25 MS. HOBBS: Oh, okay.

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

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

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

18 CHAIRMAN BABCOCK: Richard Munzinger.

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

23 MR. TUCKER: False.

24 HONORABLE RUSS CASEY: False.

25 MR. MUNZINGER: So Tom now has the right to

1 be served with his own citation.

2 MR. TUCKER: Correct.

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

5 HONORABLE RUSS CASEY: True.

6 MR. TUCKER: Yes.

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

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

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

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

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

1 eviction.

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

5 CHAIRMAN BABCOCK: Judge Yelenosky.

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

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

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

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

25 HONORABLE STEPHEN YELENOSKY: Yeah, but

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

5 HONORABLE ANA ESTEVEZ: It's your house.

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

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

23 MR. MUNZINGER: Is that current law?

24 MR. TUCKER: Yes, sir.

25 HONORABLE RUSS CASEY: Yes.

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

6 MR. TUCKER: Right.

7 CHAIRMAN BABCOCK: Frank.

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

16 MR. TUCKER: Yeah. I would --

17 MR. GILSTRAP: I mean, you know --

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

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

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

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

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

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

1 CHAIRMAN BABCOCK: Gene, then Carl.

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

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

6 CHAIRMAN BABCOCK: Gene.

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

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

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

19 HONORABLE ANA ESTEVEZ: They give you an
20 extension.

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

23 CHAIRMAN BABCOCK: Justice Hecht.

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

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

7 CHAIRMAN BABCOCK: Carl.

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

10 HONORABLE RUSS CASEY: I would say that over
11 90 percent -- in fact, probably even over 95 percent, they
12 come in and file them.

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

16 HONORABLE RUSS CASEY: No.

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

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

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

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

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

6 MR. ORSINGER: How could that be error?

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

9 CHAIRMAN BABCOCK: Roger.

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

13 HONORABLE RUSS CASEY: I believe it is.

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

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

25 MR. HUGHES: Okay.

1 CHAIRMAN BABCOCK: Justice Gray.

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

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

6 CHAIRMAN BABCOCK: Okay. Yeah, Marcy.

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

9 HONORABLE RUSS CASEY: Yes.

10 MS. GREER: Should that be defined?

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

14 MS. GREER: What is the difference?

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

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

20 MS. GREER: Okay.

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

23 HONORABLE RUSS CASEY: Yeah.

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

1 with "tenant."

2 CHAIRMAN BABCOCK: Justice Brown.

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

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

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

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

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

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

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

14 HONORABLE HARVEY BROWN: Thank you.

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

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

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

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

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

3 (Adjourned at 11:38 a.m.)
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2 **REPORTER'S CERTIFICATION**
 3 MEETING OF THE
 4 SUPREME COURT ADVISORY COMMITTEE

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 8 I, D'LOIS L. JONES, Certified Shorthand
 9 Reporter, State of Texas, hereby certify that I reported
 10 the above meeting of the Supreme Court Advisory Committee
 11 on the 23rd day of June, 2012, and the same was thereafter
 12 reduced to computer transcription by me.

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

15 Charged to: The State Bar of Texas.

16 Given under my hand and seal of office on
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