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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

September 29, 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 29th day of September, 2012, between the hours of 9:01 a.m. and 11:59 a.m., at the South Texas College of Law, 1303 San Jacinto Street, Houston, Texas 77002.

INDEX OF VOTES

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

Documents referenced in this session

12-14 Small Claims Task Force Report

12-18 Supplemental Small Claims Task Force Report

12-19 Letter from Andrew Lemanski (9-29-12)

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CHAIRMAN BABCOCK: All right. I believe we left off on issuance and form of citation, and it's kind of odd that that's listed as Rule 511, and the rules we did before that were 524, 523, and 522, but anyway.

HONORABLE RUSS CASEY: We kind of messed up the world. I apologize.

CHAIRMAN BABCOCK: That's all right. Judge, are you going to talk about that, or is Bronson when he gets his bagel going to talk about it?

MR. TUCKER: Here.

HONORABLE RUSS CASEY: I will let Bronson talk about it.

CHAIRMAN BABCOCK: Okay.

HONORABLE RUSS CASEY: You know, I've had a tough time today. I had a horrible time trying to find my way out of my hotel room. There was only three doors, one was the bathroom, one was the closet, and the other said "Do not disturb."

CHAIRMAN BABCOCK: I've had that problem.

MR. KELLY: I had a general question about the numbering since you raised it. We go from 506 to 506.1. Then 743 goes to 743(a), (b), (c). Is there a reason for the point 1 as opposed to (a), and if not, can we make it consistent?

HONORABLE RUSS CASEY: Our numbering was very -- I guess I could say haphazard. We weren't really concerned with trying to keep the numbering correct because we were told that that would all come in time, so we just kind of fit things in. We tried for the most part to keep the numbers as close as we possibly could to the existing rule, so that's where our numbering, I guess, generated from. When we added things in, we just kind of threw it in as best we could.

MR. TUCKER: Yeah, and we were basically instructed don't waste a lot of time worrying about the numbering and things like that, it's going to get straightened out and ironed out. That wasn't really what our goal was, was to have it book ready but to have the substance of it. And, Chair, I'm sorry, what was the issue that Bronson was going to talk about?

MR. ORSINGER: 512, service.

MR. TUCKER: Okay.

CHAIRMAN BABCOCK: 511.

MR. ORSINGER: I'm sorry, 511.

CHAIRMAN BABCOCK: Issuance and form of citation.

MR. TUCKER: Oh, and I wanted to raise also before we got to 511, we were talking yesterday about 523, and Richard and myself and a couple of other people talked

afterwards about a possible proposal that may work better. In talking with Russ and talking about our judges, you normally have someone file a motion to recuse, our judges would be inclined to do that. I think most judges, at least at our level, have that thought. If someone really feels they're not going to have a fair trial, what is the benefit of me being their judge against their will. So we had proposed possibly rewriting that to say if someone files a motion with the judge to recuse, the judge will evaluate the motion and can recuse himself. If the judge declines to recuse himself then, despite my joke earlier, the county judge could evaluate the motion and appoint a visiting judge or an exchange of benches if necessary, and we really -- in talking about it, I don't think the volume of times that would go to the county court would be that high, so I think that might be a thing. It doesn't put any burden on the presiding judge, but it does give someone an actual avenue for an evaluation if there really is going to be a fair trial issue.

CHAIRMAN BABCOCK: Okay. Let's talk about issuance and form of citation.

MR. TUCKER: Yes, sir. Okay. Issuance and form of citation, one of the things that we did, we gave them a little bit more information in the citation. We also changed the time frame for the defendant's answer.

Currently it says, "The Monday next following the expiration of 10 days." We went ahead and just changed that to the 14th day after service, thought that was a little bit easier to understand, less calculation there. We also -- and we did this a couple of times, and I guess it's not actually in this rule, but a couple of times in our rules we also added a provision that if the court is closed before 5:00 o'clock on a day that's the day something is due, they can file that the next business day with the court. Just to avoid the situation, especially in our rural areas and things like that where the judge frequently has many things they have to do. They may be out on an inquest and don't have clerks or something like that. Someone shows up at 4:30 the day their answer is due, the court is not open, that gives them the opportunity to come back in and have that time to file.

HONORABLE RUSS CASEY: Where we address that particular issue was in our computation of time.

MR. TUCKER: And in the answer due.

HONORABLE RUSS CASEY: Yeah. And on our computation of time, and I understand and that goes back to what we previously discussed, but I wanted to remind everybody, we had it if a court doesn't keep 8:00 to 5:00 business hours that everything basically extends it, and there was some kick back to that, but we have a lot of

justice courts that are not open every day of the week and some that close early because of the nature of the court, I guess.

MR. TUCKER: Yeah. Yeah. So we --

HONORABLE RUSS CASEY: In a lot of counties the justice of the peace is expected to have a full-time job other than just a justice.

CHAIRMAN BABCOCK: Uh-huh. Okay. Comments about 511?

MR. ORSINGER: I have a question. Somewhere, I can't find it in the rules, but somewhere I had the idea that you can't serve process on a Sunday. Is that a misimpression or is that correct?

MR. TUCKER: Yeah. That's a great point. Judge Starkenburg had mentioned that to me also. Yeah, Rule 6 currently says no service can be served on a Sunday, and given that we have excluded the district court rules from directly applying to our courts, that may be something we want to include in one of these rules just to clarify -- perhaps in Rule 512 where we talk about service -- that issue that service cannot be -- or process cannot be served on a Sunday.

MR. ORSINGER: Well, it's in paragraph (c) here. It says that if the 14th day is a Saturday, Sunday, or a legal holiday, so reasoning backwards if the 14th day

is a Sunday, the date of service would be a Sunday, and someone might argue that this authorizes service on a Sunday, which maybe it's an old tradition, but it may be a good tradition that we should perpetuate.

MR. TUCKER: Actually, the 14th day, since day one is the next day, that would be -- the 14th day would be a Sunday if you were served on a Saturday.

MR. ORSINGER: Really? Okay.

MR. TUCKER: No. No, never mind. It's too early on a Saturday for math, man, I'm sorry. Yeah, you're right. I'm sorry.

MR. ORSINGER: There's no zero in Roman numerals. That's where you got off.

MR. TUCKER: Never mind. One plus seven.

MR. ORSINGER: So we should drop Sunday out of here.

MR. TUCKER: Well, I think just stylistically rather than dropping Sunday out, just having a clause that service cannot be effective on a Sunday, just because everywhere else in those rules where it says if this day is a Saturday, Sunday, or legal holiday it goes on to the next day. I think having it be different, my thought at least, would be just have this uniform and then just have a specific explicit clause, service can't occur on a Sunday, but --

MR. MUNZINGER: But Rule 6 has exceptions.

MR. ORSINGER: It does?

MR. MUNZINGER: "No process issued or service served on Sunday except in cases of injunction, attachment, garnishment, sequestration, or distress proceedings."

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

MR. TUCKER: Yeah.

MR. ORSINGER: Do y'all do that?

MR. TUCKER: Some of those things.

MR. ORSINGER: Why don't you just copy this rule over in your rules?

MR. TUCKER: Yes, I would agree we should just add the clause for Rule 6 into our rules.

CHAIRMAN BABCOCK: Okay. What else? Yeah, Lamont.

MR. JEFFERSON: Was the original answer date the Monday next after 20 days?

MR. TUCKER: It was after 10.

MR. JEFFERSON: After 10.

MR. TUCKER: Yeah.

MR. JEFFERSON: I was just thinking 14 sounds as little short.

MR. TUCKER: We actually gave them a little

bit more.

CHAIRMAN BABCOCK: Yeah, Peter, and then Richard.

MR. KELLY: Just a clarity question. As we shift between bringing as the plaintiff -- well, in sub (a) you say "the requesting party of citation," which would only be the plaintiff. Sub (c) you refer to plaintiff several times and then sub (d) you say "the party filing the petition," it could be only the plaintiff. I think it might be more clear if you just said "the plaintiff" throughout.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: This citation that we're talking about does not apply in eviction cases; is that right?

MR. TUCKER: Yes, sir. Yeah.

MR. MUNZINGER: The eviction cases have their own citation?

MR. TUCKER: Yes, sir. Yeah. And -- yes.

CHAIRMAN BABCOCK: Okay. Any more comments about 511? Okay, let's go to 512.

MR. TUCKER: Okay. 512 lays out what the proper method of service is, makes it explicit both that the plaintiff is responsible for having service occur, but also that the plaintiff personally can't do the service,

that it has to be someone that's not interested in the case and lays out the four methods of service, which are by the sheriff or constable doing personal delivery; by the sheriff, constable, or court doing certified mail or registered mail; employing a certified process server who is authorized by the Supreme Court; or filing a written request with the court to name any other person who is at least 18 and not interested in the case.

All of this is how it is now. It's just not laid out right now, and we thought this would be helpful. Again, if we're trying to make this a playbook for lay parties, someone that comes in and says, "Okay, well, I have to get it served, what does that mean?" Here are the things you can do, pick one of those things.

CHAIRMAN BABCOCK: Okay. Comments about 512?

MR. TUCKER: And I apologize, one other thing that we did add, again, which is not a new thing, it's just not written down, is that the defendant's signature has to be present on the return receipt for that to be valid service.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: 512(a) says "sheriff or constable," but also that could be a private process server, couldn't it?

MR. ORSINGER: (c) is, (c) covers private process servers.

MR. HAMILTON: Oh, (c) covers that?

HONORABLE RUSS CASEY: The reason we bifurcated those is because you could get a pauper's affidavit on a sheriff or constable, but you can't on a private process server.

CHAIRMAN BABCOCK: Okay. Peter.

MR. KELLY: It seems that this goes (a), (b), (c), (d), and then it goes back out to the main text of the rule and says "method utilized, registered mail or certified mail." It seemed to make more sense just to include that under subparagraph (b), which is the registered mail or certified mail provision.

MR. TUCKER: Yeah, but the reason why we didn't do that is because (c) could also -- the private process server could also serve it by certified mail or registered mail, so it could apply to (b) or (c), but wouldn't also apply to (c) depending on the methods, so that's why we just split it out with that.

CHAIRMAN BABCOCK: Anything else?

MR. HAMILTON: Yeah, I have a question.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: If a -- if a private person serves it by certified mail, how does that get to the

court? Because a private person gets the return receipt and then takes it to the court or something?

MR. TUCKER: Yes, sir. Yeah. If a private person is authorized by written court order to serve, they're still going to have to do a return of service just like anybody else. They're held to that burden, so they would do that, they would get the receipt, and they would file that with the return of service just like the private process server or the constable would do.

CHAIRMAN BABCOCK: Okay. Anything else? All right. 513.

MR. TUCKER: Okay. 513. This talks about, well, what happens if these methods are insufficient to get service. One thing we did clarify here or change, the way it is right now, under the eviction rules the constable can request alternate service. The constable can just go back to the court and say, "Hey, I wasn't able to serve this guy. Judge, give me permission to do alternate service," and they can do that. In our current regular justice court rules, it says a motion has to be made for alternative service, which I think most people interpret to mean that the plaintiff would have to file the motion for alternative service rather than the person who is doing the process serving.

The task force thought it would make more

sense to allow the person who is doing the service, just like they do currently in eviction cases, could make the request for alternative service. They're going to be the ones who have the facts and can tell the judge, "This is what happened when I went to serve it. This is what I think will actually be effective in getting this person served. You know, I've gone out there, they have this fence," and you know, or "They have this post by their door. If I post it there then they'll see it." Whereas the plaintiff often won't have that information. We did not include just a regular private person as being able to request alternative service. It would have to be a sheriff, constable, or a certified private process server, but we thought those people should be able to request alternate service, and then if they do get alternate service, we required it to be mailed first class to the defendant's address and then either left with someone at least 16 at the residence or, of course, the catchall, any other method that the court agrees is reasonably likely to provide the defendant with notice of the suit.

CHAIRMAN BABCOCK: Okay.

MR. TUCKER: So really the main change is allowing a sheriff, constable, or private process server to request the alternative service rather than making the plaintiff actually file a motion for it.

CHAIRMAN BABCOCK: Comments on 513? Lisa.

MS. HOBBS: You wouldn't be able to do that in district court or county court, right? Like the plaintiff would have to go in and request it, the alternative service?

HONORABLE RUSS CASEY: Yeah. I think that's right.

MR. TUCKER: Yeah, because that's how it was under our current rules.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: (b) says "any other method that the movement feels." Do we mean to say "that the court concludes is reasonably likely"?

MR. TUCKER: Well, no, the next part it says, "The judge shall determine if the method requested is reasonably likely" and if so, shall approve. If not request a different method.

HONORABLE DAVID PEEPLES: All right. Good, thanks. Yeah.

CHAIRMAN BABCOCK: Any other comments? Okay. Let's go to 515. Oh, 514.

MR. TUCKER: Yeah, 514 talks about service by publication. All we do is refer directly to the specific Rules of Civil Procedure that cover that. It's really a pretty rare occurrence in our court, so our

choices were to totally ignore it, which we didn't think was good, recopy all the rules for service by publication which are pretty voluminous, which we thought was kind of confusing and a waste of space and time or just direct people to those rules when that becomes necessary.

CHAIRMAN BABCOCK: Okay. Any comments on that? Lisa.

MS. HOBBS: Just to go back to 513, I would just point out that in the prior rules that we've looked at this weekend we did not distinguish between a person who is authorized to serve by written order and a certified process server, which unfortunately, I know what that means having worked on 103 as rules attorney, and I just think we should be consistent or at least have some reason why in eviction cases we don't want a certified process server, but you could get a written order and in these cases we do.

PROFESSOR ALBRIGHT: And if I can throw something in, we're talking about that, one thing I noticed about the landlord-tenant is that they could be served -- an authorized method of service was handing the service to anyone over 16 at the place of abode. That's the Federal rule. That's not the state rule for usual authorized service, so if you didn't intend -- I don't know if you intended the tenants to be different or not.

MR. TUCKER: Okay. Give me the distinction again. I'm sorry.

PROFESSOR ALBRIGHT: It's when you -- the authorized service without an order from the judge --

MR. TUCKER: Are you talking about regularly or the eviction thing?

PROFESSOR ALBRIGHT: For the eviction.

MR. TUCKER: Okay.

PROFESSOR ALBRIGHT: For eviction the rule was you can serve someone by serving their 17-year-old son at their house.

MR. TUCKER: Right.

PROFESSOR ALBRIGHT: The Texas rules, generally they don't allow that unless you have an order allowing it. They're like this rule that we're just talking about, Rule 513.

HONORABLE RUSS CASEY: That's the way it currently is, and it was purposeful.

PROFESSOR ALBRIGHT: I'm wondering if it was purposeful to make the eviction service different than other service of process.

HONORABLE RUSS CASEY: We didn't really change it. I mean, that's the way it currently was, and it's currently different, but we -- I think that in eviction process the Legislature has determined that I

guess it's more important to serve the premises than a particular person.

PROFESSOR ALBRIGHT: Okay.

MR. TUCKER: Yeah, and --

HONORABLE RUSS CASEY: And that way they have allowed that of if they're at that property and this is the property that's being evicted let's get them service.

PROFESSOR ALBRIGHT: And that is -- under the Federal rules you can serve someone -- you can serve anyone under 16 at their usual place of abode. One thing, your eviction rule says "usual place of abode," if the property is an office then the service is not at that place. It is at their residence instead of their workplace.

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

MR. TUCKER: Right. Yeah, and currently Rule 742, yeah, for an eviction it's just straight up valid service to leave it with someone who's 16 without alternative service. For a regular suit it's not. That person has to be -- you either have to get permission to leave it with someone who's at least 16.

PROFESSOR ALBRIGHT: Right. Yeah, and that was what I realized when Lisa was pointing out the

difference on that issue. I just wanted to point out it's different on this issue as well.

HONORABLE RUSS CASEY: I think that if we feel that we should -- that we could match that here in justice court, I think that we wouldn't really have a problem with that.

MR. TUCKER: I mean, we weren't trying to change the current system. We wanted it to be where an eviction suit regular service can just be leaving it with someone who's at least 16. As civil small claims or justice suit that would have to be alternative service.

HONORABLE RUSS CASEY: But I think it's a really valid point.

MR. TUCKER: Right. Right. As far as why private process servers are not eligible to serve evictions, the two main reasons that I've heard as far as not allowing that, number one, eviction citations often are in a heated situation. We did just have a constable get killed serving an eviction citation in Brazos County a couple of weeks ago, so obviously a constable is a peace officer who has a weapon and a private process server is not.

Another issue is on evictions, there's the method of alternative service is just to say "I did this, and now it's prima facie served." There's a method there

that says, "This is good enough, even though we don't have proof that this person saw it, this is good enough," and if you have a private process server who is being paid by the landlord to do the service, that can raise issues, I think are the two main arguments against it. I'm not saying that can't happen, but that would be the arguments to keep the eviction citations to a constable or sheriff.

HONORABLE RUSS CASEY: Well, the argument that I would make is, you know, the JPs and the constables work together. In fact, our association is the Justice of the Peace and Constable Association. Our offices are usually right next door and on an almost hourly basis we have employees going back and forth, bringing papers here, taking papers there, and the majority of those are evictions. Timing is essential in the eviction cases to the -- to the plaintiff and to the court to try to accommodate, and I think the inconvenience of trying to deal with someone who does not even office at the same building would prove difficult, but I don't think the private process servers are wanting to do evictions so I don't think we're taking away something from them.

CHAIRMAN BABCOCK: Okay.

MR. HAMILTON: I have a question.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: Is there some reason why

lawyers can't serve these by certified mail? Lawyers issue subpoenas, and anybody in my office over 18 can serve the subpoena. Can anybody in my office serve citation by registered mail, or is that an interested party?

MR. TUCKER: I mean, I'm not sure if there's been a ruling on that. My first blush impression would be, yeah, someone who works with the plaintiff's attorney in the plaintiff's attorney's office would be an interested party.

CHAIRMAN BABCOCK: Okay. Anything more on 513 or 514? All right. Let's go to 515 then.

MR. TUCKER: Okay. 515, as I put in the little paper there, it's kind of our version of Rule 21a. This is our methods of service of papers other than citation, so papers between the parties, things like that, other pleadings, motions, et cetera. We list out certain ways that it can be done. We included fax on there, and we included e-mail if the party has provided an e-mail service or an e-mail address and consented to e-mail service. Remember when we talked about in the petition the plaintiff could include in there an e-mail address where they were willing to receive documents, and so we wanted to include that to try to help bring people along with that idea, and we added a catchall, (e), "Any other

manner as the court in its discretion may direct."

CHAIRMAN BABCOCK: Doesn't the e-mail service, doesn't the consent to e-mail service need to be in writing?

MR. TUCKER: That's -- I mean, that would make sense, yeah. I mean, ultimately I guess it would shake out to the party said, "Well, I served them e-mail," and they said, "Well, no, you didn't. I never consented to e-mail service," and they say "Yes, you did," and you say "Prove it." So I guess it would work out that way ultimately, but, yeah, the thought process I think of the task force was a party that had included that when they filed the papers, but that's a valid point, yes.

CHAIRMAN BABCOCK: Stephen.

HONORABLE RUSS CASEY: The reason why we wanted to put the e-mail was basically as a convenience to attorneys, when attorneys are serving back and forth. Generally speaking, in our court we like to keep the costs down as much as we can, and this was something where they thought it would be pretty easy, you know, "Hey, I'm sending you this e-mail."

MR. TUCKER: Right.

HONORABLE RUSS CASEY: Make sure you got it kind of thing.

MR. TUCKER: Right.

HONORABLE RUSS CASEY: And anything that we can do to, I guess, accomplish that goal would be good. If our wording wasn't good. If our wording wasn't good, we would need to redo the wording, but we would like to accomplish that.

CHAIRMAN BABCOCK: Yeah, I've heard disputes about e-mail service where the argument is made, "Well, I served you by e-mail and then you responded by e-mail so that's consent," and then I've heard situations where the lawyer who is the proponent of e-mail service will say, "Well, I spoke to your paralegal, and they said it was fine," or "I spoke to somebody, I remember who, and they said it was fine" and then you get in this big debate about whether you've been served or not.

MR. TUCKER: I would say that's a fantastic point.

PROFESSOR CARLSON: Oh.

HONORABLE RUSS CASEY: But this is pending hearing for us, so if you have in a schedule --

HONORABLE TOM GRAY: First fantastic.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: In this day and age is there really a reason to require parties to consent to e-mail service when we don't require them to consent to fax service?

MR. TUCKER: Our thought was when we discussed these issues is a lot more people will have an e-mail address than a fax machine. If I don't have a fax machine at all, it doesn't matter if I consent to fax service. You're not going to serve me by fax because I don't have a fax, but I might have joeblow@yahoo.com as my e-mail address, but I'm not willing to receive legal documents that I'm required to know at my Yahoo address because I don't think it's reliable. So that was kind of our thought process on that.

CHAIRMAN BABCOCK: Stephen, in answer to your question, there's a lot of trickiness about e-mail. For example, if I'm -- if there's counsel on the other side in Los Angeles, this wouldn't apply to the JP cases so much, but if somebody's in LA, you know, their e-mail time and day, you know, could be different on their e-mail stamp than on mine, and there are a whole bunch of issues that come up, but, yeah, Richard.

MR. MUNZINGER: People don't always open their home e-mail address. I mean, I don't open mine everyday, and so here's some fellow who doesn't have a law office e-mail address and he doesn't look at his e-mail address for three, four, five, six days, he's in a real bind if he's been served by e-mail. If you're going to allow consent to service by e-mail it ought to be formally

displayed in some way, either with the clerk or the court or something else for the very reasons that Chip outlined.

MR. TUCKER: No, I think that's a really good idea.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I agree you need to do something with consent, because another issue with at least my e-mail, if it's from someone I don't know I don't want to open it and I don't know if it's spam, so I'm going to delete it thinking I'm not losing anything.

CHAIRMAN BABCOCK: Okay. That's a good point.

MR. ORSINGER: I'll add to that that my junk mail filter will filter out many e-mails from strangers, particularly if they have attachments, and so I might not even be aware that the e-mail came in because I don't regularly check my junk mail.

CHAIRMAN BABCOCK: Yeah, everything I get from Hecht goes right to --

HONORABLE NATHAN HECHT: Contempt citations.

CHAIRMAN BABCOCK: Contempt citations. Justice Gray.

HONORABLE TOM GRAY: Since we're headed towards letting the document be served by e-mail, it concerns me that (d) says that e-mail service is by

sending an e-mail message and doesn't say the document that you're actually attempting to serve.

CHAIRMAN BABCOCK: Yeah.

MR. TUCKER: Yeah.

CHAIRMAN BABCOCK: That's a good point. Star for you. Lisa.

MS. HOBBS: The proposed Rule 515 does track Rule 21a, but it seems to me that a better rule might specifically say that every document needs to be served on the other -- like it says, "Every notice required by the rules to be served," and I'm sure we're not catching everything that we actually do want served, and I might just make a general statement that anything you file with the court should be served, or I don't know, some general rule about you need to hand the other side a copy of everything you give to the judge.

MR. TUCKER: Right. Yeah, and that makes a lot of sense. Depending on how we ultimately shake out with discovery we might not want to have everything because our current plan was to, again, have it go to the judge first as the gatekeeper, but, yeah, I would agree that, yeah, we want to make sure they know you've got to serve it on the other side.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Right now you have

Rule 508 is your rule that requires service, but it's way away from Rule 515, and so you might consider putting those two together so that -- because I thought -- I thought the same thing that Lisa thought, that this rule seemed to imply that there's things you don't have to serve.

MR. TUCKER: Right.

HONORABLE JANE BLAND: And it would be better if you end up doing that with discovery, which I strongly oppose, you know that, to carve out an exception in that rule and make a blanket requirement that everything be served instead of leaving the door open for somebody to conclude by looking at a particular rule that they need not serve whatever it is they're filing.

MR. TUCKER: Sure, yeah. I think that makes a lot of sense to say something like "except as provided by Rule 507 all," blah, blah, blah, blah, "must be served on the other side."

HONORABLE JANE BLAND: Right. Right. And maybe move 508 closer --

MR. TUCKER: Yeah.

HONORABLE JANE BLAND: -- so that everybody -- and make 508 as broad as Rule 21.

MR. TUCKER: Uh-huh. Yeah.

CHAIRMAN BABCOCK: Okay. What else?

HONORABLE TOM GRAY: We are drawing a distinction here for the first time that faxes and e-mails don't get the three-day addition that mail service does.

MR. TUCKER: Yeah, I'm sorry, I meant to mention that. We discussed that within the task force and we thought, you know, it makes sense to have it extended by mail because the mail takes time, but faxes and e-mails are instantaneous, so we didn't see the -- I guess the reason or the justification other than that when those were added they were kind of the idea of mail so they also included the three days, but for those of you who do deal with that, if you think that would still be a necessary three days, we're open to that as well.

MR. ORSINGER: Members of the committee that have a long memory will remember a vicious fight over that very same subject, and --

MR. TUCKER: I saw some smiles and laughing going on, so I understand that.

MR. ORSINGER: Many years ago, this is in our early days on the committee, Chip, I remember Harriet Miers almost led a group to delete fax service altogether if we didn't add three days to it, so we decided to cut and run and take the three days and get the fax service, but we may be comfortable enough with the technology now that we can eliminate the three days even in the general

rules.

CHAIRMAN BABCOCK: We could bring Harriet back. She probably still has some ideas about it.

MR. ORSINGER: Another little historical note, our Chair at the time, Luke Soules, says, "Well, I'm not exactly sure, when you send that fax isn't it kind of floating around out there in space somewhere?" So we were just barely on the edge of technology at that time.

CHAIRMAN BABCOCK: All righty. Yeah, Professor Carlson.

PROFESSOR CARLSON: I want to mention, too, that there are court of appeals cases, one that I know of, that says you don't have a Rule 11 agreement in an e-mail unless it has -- and Richard is going to fill this in for me -- the slash slash S under the Federal --

MR. ORSINGER: Oh.

PROFESSOR CARLSON: -- Telecommunication blah, blah, blah.

MR. ORSINGER: Yeah. Frank Gilstrap is the one I rely on for those details.

PROFESSOR CARLSON: So be careful there.

CHAIRMAN BABCOCK: Is Frank here?

MR. ORSINGER: No.

CHAIRMAN BABCOCK: Okay. Anything else about 515? All right. Moving right along to 516, answer

filed.

MR. TUCKER: Okay. 516 is where we're telling the -- we're laying out the rule of when the answer is due. Some people didn't like having this rule because they said, well, we already say that in the citation rule, but what the task force thought -- and that's how it kind of is right now, is one rule is saying this is what the citation has to look like. This is the rule that's telling the defendant this is why the citation has to say this, because this is the rule of when the defendant answers; and, again, like I said, we changed that to the 14th day after they were served, so if we modified the citation language like Richard had mentioned a take out Sunday there, we would also need to take out Sunday on the 14th day in this rule. And then we -- if they're served by publication then they have to answer by the 42nd day, which is currently the standard rule.

HONORABLE RUSS CASEY: Actually, this rule was called "appearance day," and I've always hated that because it makes someone sound like they had to be at court that day. You know, appearance, attorneys may know what appearance means, but most pro ses do not, and so we decided to make it this is when your answer is due. You have to answer the court and just kind of make it clear, spelled out, here it is, and it's even longer than we had

wanted, but we just had stuff we had to put in, but we hope that we have made it clear to someone what they need to do when they get served.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: Under subdivision (a), second sentence, it starts with the word "Generally, the defendant's answer is due by the end of the 14th day." I think that's a very dangerous word, "generally." Is it possible for you to say "except as provided by rule so-and-so," because anybody in the world could try to say, "Well, that may be generally the rule, but I have a special situation like, you know, my car broke down or whatever."

MR. TUCKER: Yeah. I think we can say "except as provided below," because I think those are the -- those are going to be the exceptions are when the 14th day is not a business day and when the court closes before 5:00 o'clock on the day it's due, so we could say something like that. "Except as provided below, the defendant's answer is due on the 14th day. If the 14th day is" blah, blah, blah, then "it goes to the next day; if the court closes before 5:00, it goes to the next day."

MS. ADROGUE: But "below" is confusing. Maybe just take out the "generally" and just say the defendants, and just say, "however," comma, or something

like that.

MR. TUCKER: Yeah, that would make sense, too.

MS. ADROGUE: It doesn't make people more confused.

MR. TUCKER: Yeah. Whatever the Court thinks is clearer and more understandable we would be very happy with.

CHAIRMAN BABCOCK: Okay. Any more comments on this, on this rule? Okay.

MR. HAMILTON: How does the defendant know when the 42nd day is, gets served by publication?

MR. TUCKER: Well, I mean, you know, that's kind of one of those problems that's inherent in the idea of service by publication, frankly. Generally how does the defendant know that it's been published? I have never looked in a newspaper ever to see if there's a citation suing me, serving me by publication. So that's kind of one of those problems. We basically took how the rule is now and just imported it there. I agree, service by publication, pretty problematic, and that's one of the problems.

HONORABLE RUSS CASEY: Well, the reason we have that on there is so people can decide when your time frame is over so that you can proceed with your default

hearing.

MR. TUCKER: Yeah.

HONORABLE RUSS CASEY: If the Court decides that we could remove service by publication from our court, I don't really think it would make a huge impact on us, but we just kind of copied the current rule.

CHAIRMAN BABCOCK: Well, Carl, isn't the answer to your point that if there's a publication and sometime within 42 days I find out about it, I can look at the publication, say, "Whoops, that's June 1, the publication was June 1," and then look at the rule, and now I have 42 days from June 1 to --

MR. HAMILTON: But you don't know when it was first published. You might see the last publication.

MR. TUCKER: They've got to publish it four times.

MR. ORSINGER: How many days apart?

MR. TUCKER: A week.

MR. ORSINGER: So it's a month worth of -- from beginning to end is a month-long process?

MR. TUCKER: Uh-huh.

MR. ORSINGER: Huh. That's a longer 42 days.

MR. TUCKER: And you still have 14 days after the last one just like you -- you have 14 days after

the citation, but, yeah, I mean, this is one of those things I think makes most people fairly uneasy, but we imported it because we know that there are times when a plaintiff doesn't have any other option.

CHAIRMAN BABCOCK: Right.

MR. TUCKER: When a defendant is transient or whatever. It's not common at all in our courts.

MR. ORSINGER: Is there a conflict between 14 days added onto the last day of service? When is service effected, on the day of the fourth publication at the end of one month? Because that's 44 days.

MR. TUCKER: Well, it's four weeks, so it's 28. They have to serve it four times one week apart.

MR. ORSINGER: Okay. So that's 42 days.

CHAIRMAN BABCOCK: Carl, maybe you could put something in the rule that made it clear to anybody who's been served by publication who happens to look at the rule that there have been -- this could be one of the -- the one he's seeing could have been one of four, that's not necessarily the first one. May be going to too much effort.

MR. TUCKER: And, again, we just referred people to the regular rules, but one thing that could happen is the regular service by publication rules could be modified to say, look, the citation must include what

the date of first publication is when it's published so people can count from that.

CHAIRMAN BABCOCK: Yeah.

MR. TUCKER: That's the same method that's used in counting the days in district and county court, too, so that might be something that would be --

CHAIRMAN BABCOCK: Right. Richard.

MR. ORSINGER: The word "generally" comes up again in the second sentence. If there's a way for you to handle that better I think it would be good.

MR. TUCKER: Yeah.

CHAIRMAN BABCOCK: That would be good. Okay. Anything more about this rule? Justice Gray.

HONORABLE TOM GRAY: I'm just a little bit confused, which is nothing new, but the oral pleadings that we discussed yesterday, is that something that is only in eviction proceedings, or can you plead orally in regular JP?

MR. TUCKER: Yeah, no. Currently you are still allowed to do oral pleadings unless the judge directs you. We changed that rule in 508 to say everything has to be in writing unless we're doing an oral motion at trial or at a hearing with both parties there, so everything else would have to be in writing.

HONORABLE TOM GRAY: Okay.

CHAIRMAN BABCOCK: All right. Professor Carlson.

PROFESSOR CARLSON: Yeah, I see you incorporated the publication rules from the statewide rules, but did you also incorporate the provisions that provide two years for a defendant served with publication to file a motion for new trial and requires the trial court to appoint counsel?

MR. TUCKER: Yes. We incorporated the entire section of service by publication.

PROFESSOR CARLSON: I think that's back in the 200 series.

HONORABLE DAVID EVANS: What rule provides in the group of rules for the appointment of attorney ad litem? That's what I was looking for, which one of the 109 through 117 provides for the appointment of attorney ad litem. It does place on the court the duty to ensure that the service prior to publication is reasonable, but I was trying to look through those rules and find which one said attorney ad litem and then I didn't find it.

HONORABLE RUSS CASEY: What we could do is change that instead of specifying the rule section and saying that service by publication would be in the same method as described in county or district court. That way any changes that they make are -- because I have never

been asked for service by publication. I don't foresee getting a whole lot of them any time soon --

CHAIRMAN BABCOCK: Right.

HONORABLE RUSS CASEY: -- and I really don't have a problem with trying to limit as much as we possibly could and still encompasses --

PROFESSOR CARLSON: Sure.

HONORABLE RUSS CASEY: -- the necessary feelings.

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: And I was looking at Rule 114, one of the questions before is what day are they required to answer, how do you calculate the 42 days, and Rule 114 of the Texas Rules of Civil Procedure states specifically that you're supposed to state the exact date in the service of one of the answers, so if you -- you won't have to look anywhere if you put it on it, 42 days from this, which is whatever date that is. So I would suggest that that should also be stated in this rule.

HONORABLE DAVID EVANS: Rule 114 also has a sentence about JP.

HONORABLE ANA ESTEVEZ: Yeah, in a separate one.

CHAIRMAN BABCOCK: All right. 517, general denial.

MR. TUCKER: Okay. For 517 we just wanted to include that if you generally deny the plaintiff's cause of action you're not barred from later raising specific defenses. Again, that was to try to avoid lay people getting trapdoored out. They're told to just deny it, and then they try to raise something specific and are told, well, no, you had to plead that and you've waived that.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: Even the rationale you offered for using the term "answer" rather than "appearance" in Rule 516, is there good reason to do the same in Rule 517 to eliminate any confusion with regard to whether the defendant has to physically appear before the court?

MR. TUCKER: Yeah, that would probably make sense to change -- to change that. Yeah, I just I was trying to run through my head if there would be any other piece that would move, but I think that would make sense.

MR. TIPPS: I mean, you seem to be assuming that the only way to appear is to answer.

MR. TUCKER: Right. Right.

PROFESSOR CARLSON: Is that true?

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I think our rules use the word "affirmative defenses." I'm not sure they use the

words "specific defenses," but it seems to me the rule would be perfectly clear if you said "bar the defendant from raising any defense" --

MR. TUCKER: Yeah.

MR. MUNZINGER: -- "at trial" and then you don't have to worry about whether it was specific or affirmative or anything else.

HONORABLE RUSS CASEY: I like that idea.

MS. ADROGUE: And the good thing there is --

HONORABLE RUSS CASEY: Excellent point. Really excellent point.

CHAIRMAN BABCOCK: Excellent point.

MR. MUNZINGER: First time in many years.

CHAIRMAN BABCOCK: As opposed to an impassioned point.

MR. HAMILTON: It's not outstanding, though, Richard. I'm still ahead.

CHAIRMAN BABCOCK: Carl's still the leader as we come down the track. Stephen, we instituted yesterday in your absence a gradation of points from good to great to excellent to something else, fantastic, overwhelming. So anyway, be thinking about that as you make your points.

MR. TIPPS: That's a commendable idea.

CHAIRMAN BABCOCK: All right. Anything else

on general denial? Solid point was another one.

MR. TUCKER: Workman-like I think came out once.

CHAIRMAN BABCOCK: Workman-like point. Okay. Counterclaim?

MR. TUCKER: Okay. Counterclaim, we had -- we have sometimes a confusing issue that can happen where we have compulsory counterclaims where I sue Russ for $5,000, he has a claim against me from the same instance for $17,000, okay, so he has a compulsory counterclaim, but it's outside the jurisdiction of the court I filed it in. We just clarified here that for our rules that a counterclaim is compulsory if it's within the jurisdiction of the court and also explain what -- kind of what a compulsory versus a discretionary counterclaim would be.

CHAIRMAN BABCOCK: Okay. Justice Hecht.

HONORABLE NATHAN HECHT: The res judicata effect of a justice court trial is provided by statute, isn't it? Isn't there a statute on that? It's limited.

MR. TUCKER: Right. Right. Yeah. Just because of the fact that if it -- I mean, if it were to be appealed or anything like that it just vanishes and goes away, meaning, though, that it -- I'm not sure, frankly. I don't recall seeing that statute on that.

HONORABLE NATHAN HECHT: But if it's

compulsory, does that -- do you mean to suggest that it couldn't be brought later?

MR. TUCKER: No, certainly not. And that was what we were trying to clarify, is that if I sue Russ in justice court for 5K and he has what would normally be a compulsory counterclaim against me for 17K, that he is not going to be barred from bringing that later on in a higher court because he couldn't have asserted it at the time when I was suing him.

HONORABLE NATHAN HECHT: But if the counterclaim is only for a thousand dollars --

MR. TUCKER: Yes.

HONORABLE NATHAN HECHT: It could still be brought later, too, or not?

MR. TUCKER: Well, our thought was not, but, frankly, when we were discussing that we weren't aware of a statute or rule that would allow that to occur, so if there is one then that might be the case.

MR. HAMILTON: You mean the res judicata rules require that it be brought with that suit?

MR. TUCKER: Meaning the 1,000-dollar one?

MR. HAMILTON: Yes.

MR. TUCKER: That's what we thought. That was our understanding of the rules and the law when we were doing it. Yes.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: Yeah, you know, the 97a compulsory counterclaim, it's not compulsory if it's outside the jurisdiction, and there is a statute, Justice Hecht, that does define the res judicata and collateral estoppel effect of a JP judgment.

MR. TUCKER: Okay.

PROFESSOR CARLSON: I believe, and I would have to verify this, but I think it says it's binding on the party, so if nobody does anything else, to that extent it's binding, but an issue determined in JP court is not collateral estoppel in a higher court proceeding. So if you had a car accident or something, and there was someone -- you know, wrongful death or something, you could still bring a wrongful death, and you're not barred by the JP finding of negligence or not.

HONORABLE NATHAN HECHT: But would there be a bar of the what would in a court of record be a compulsory counterclaim?

PROFESSOR CARLSON: You know, I'm just not sure of that.

HONORABLE NATHAN HECHT: Yeah, I'm not sure either.

HONORABLE RUSS CASEY: One of things that --

CHAIRMAN BABCOCK: Justice Gaultney is sure

of it.

HONORABLE DAVID GAULTNEY: Well, if we're not sure, I mean, what is a compulsory counterclaim and what is not is a -- I don't think that a pro se litigant is going to necessarily know that. Why don't we change "must" to "may" rather than, you know, make the rule make it a requirement?

HONORABLE NATHAN HECHT: But I'm just wondering if there is such a thing as a compulsory counterclaim absent some rule that bars something with litigation.

MR. ORSINGER: Well, the doctrine of res judicata, which is not based on a rule, I think kind of carries compulsory counterclaim with it because --

HONORABLE NATHAN HECHT: Yeah, but it doesn't apply to JP courts, or it doesn't apply the same rules.

MR. ORSINGER: But it would if it's within the jurisdiction of the court and arises from the same transaction or not?

HONORABLE NATHAN HECHT: I'm not sure if there's a statute on it.

MR. MUNZINGER: There's a section in the Civil Practice and Remedies Code, 31.004(a), "A judgment or a determination of fact or law in a proceeding in a

lower court" -- "in a lower trial court is not res judicata and is not a basis for estoppel by judgment in a proceeding in the district court, except that a judgment rendered in a lower trial court is binding on the parties thereto as to recovery or denial of recovery." There are other sections to the statute, but that's section (a).

CHAIRMAN BABCOCK: Is that it, though? I mean, is that the JP rule that we're talking about?

MR. MUNZINGER: Well, this is from the Civil Practice and Remedies Code, and as David points out that he touched my device and screwed it up, and he can't read it.

CHAIRMAN BABCOCK: What's the number?

MR. MUNZINGER: (c), "For the purposes of this section a lower trial court is a small claims court, a justice of the peace court, a county court, or a statutory county court."

MS. HOBBS: And there's an opinion by a very brilliant justice, Justice Jane Bland, that explains that this does -- let's see here. "Texas courts have interpreted this statute to mean that res judicata and collateral estoppel only bar claims actually litigated in courts of limited jurisdiction; nonetheless, prior county court judgments are binding as to recovery or denial of recovery. 31.004 does not include the res judicata effect

of a county court judgment on matters actually tried."

HONORABLE JANE BLAND: It has to be actually tried, I think.

MR. ORSINGER: What does that mean?

CHAIRMAN BABCOCK: I'm not sure what that means.

HONORABLE DAVID GAULTNEY: Why can't we just instead of --

MS. HOBBS: You have to actually try it in county court.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Well, I mean, all we're really trying to say here is you can do it, you may do it, so instead of saying you must file a counterclaim, why don't we just say you may, and that permits the counterclaim, but it doesn't deal with the issue of whether you're later precluded?

MR. TUCKER: Yeah. I mean, the reasoning we had of wanting it is, you know, again, judicial efficiency and efficiency for the parties. If I'm suing Russ for $5,000 in justice court and we bring all our witnesses and everything and then he wants to sue us right back in justice court for the same thing for a thousand dollars, it's kind of a waste of our time and a waste of the court's time, and so our thought was, yeah, if it's within

our jurisdiction and arises from the same transaction or occurrence, then, yeah, he should have to bring it now.

HONORABLE RUSS CASEY: I think one of the things that has always come up is the same thing of what if my counterclaim is over the jurisdiction, and we didn't want to have any way of barring someone from appealing a decision and then asserting a counterclaim at the county court at law. So if Bronson sues me for 5,000, my counterclaim is for 17,000, I can go ahead and take that judgment, appeal that judgment to the county court, and then assert my counterclaim for the 17,000.

Maybe we didn't do a real good job, but I think that if we are -- especially if we are going to limit the Rules of Civil Procedure in regards to this that the Court address those issues and make that decision.

CHAIRMAN BABCOCK: Yeah, Eduardo.

MR. RODRIGUEZ: Yeah, it just seems to me like, you know, we've got all of these rules and we're using language that people in this -- that are going to be in this jurisdiction have no idea what a counterclaim is. I mean, they don't -- what's a general denial? I mean, is there any way that we can find some language that will tell somebody in the JP court, you know, if he owes you money, he says that you owe him money, but if he owes you money you have to tell us, but just use language that they

can understand. I mean, this is language that lawyers -- we're having an argument here about what's a counterclaim and what isn't. I mean, we're expecting them to understand this. It just doesn't make sense to me.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Yeah, and I think this may go directly to what the statute is saying when it says, "Formal pleadings are not required," because, I mean, I agree that trying to decide what is arising from the same transaction or occurrence that's the subject matter of the plaintiff's suit, whether that must be filed or whether it may be filed, I just -- that may be a complex issue.

CHAIRMAN BABCOCK: Yeah. Judge Peeples.

HONORABLE DAVID PEEPLES: The first sentence seems to me to say, you know, based upon what I know about this area of the law, that if A and B have a car wreck and there's minor property damage and minor personal injuries, and A sues B, B is barred if B does not make a counterclaim in this proceeding. Now, that's what I think the first sentence is intended to say. It's flatly contradicted by this statute, 31.004 of whatever code, and I just think we shouldn't -- there are some things that are in the statutes that I think can be changed by rule, but this is not one of them. It would be too big of a

stretch for the Court to do that.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: And the policy reason is you've got people without lawyers, and there's no insurance in this little car wreck I'm talking about, and B shouldn't be barred from bringing his case later on just because A, you know, got a default judgment or whatever. The statute does say whatever you try is res judicata.

CHAIRMAN BABCOCK: Yeah. Okay. Let's move on to 519.

MR. TUCKER: Okay. 519, cross-claim doesn't -- no substantive changes there. It just makes it explicit that you have to pay if you want to file a cross-claim and that a citation is only necessary if who you're trying to bring in has not filed a petition or an answer as appropriate, because the cross-claim defendant could be a plaintiff or a defendant in the original suit, so they may have filed a petition or an answer.

CHAIRMAN BABCOCK: Okay. Comments about this? Justice Bland.

HONORABLE JANE BLAND: Just taking note of what Eduardo said, I agree that we have gotten in this particular section more than maybe some of the others overlawyered, and could we do 518, 519, and 520, which are

counterclaims, cross-claims, and third party claims, and just call it something like "Other claims"? "If you want to raise a claim against the plaintiff or someone else you must file a pleading with the court and pay the filing fee."

MR. TUCKER: Sure.

HONORABLE JANE BLAND: Now, I guess for cross-claims I guess you don't have to pay a filing fee, but we can figure that out in a way that we're not calling them counterclaims, cross-claims, or third party claims. We're just calling them claims and that you may bring them, not that you must.

MR. TUCKER: Sure. Yeah. I think that makes sense. We do have the definitions page also to try to clarify some, but I think, yeah, right, anything that we can do to clarify the language and make it simple for people to understand, we're a hundred percent on board with that. Yeah. Absolutely.

CHAIRMAN BABCOCK: Sofia.

MR. RODRIGUEZ: Mr. Chair, you didn't give me a solid for support of --

CHAIRMAN BABCOCK: Totally solid. Also solid. Sofia, let's see if you can do better.

MS. ADROGUE: No, this is not going to be formidable. Just the same sort of "filing parties" back

in here, it's going to probably clarify the way Justice Bland just proposed it, but I would just -- to the degree possible we have a great definitions section at the front. We should try to use words that are in the definitions and stick to "plaintiff."

CHAIRMAN BABCOCK: Justice Frost.

HONORABLE KEM FROST: I was just going to point out earlier we had a discussion when we were talking about Rule 11 about changing some of the nomenclature from "requesting party" to "plaintiff," but given that there are other requesting parties, we might want to leave that nomenclature the same in Rule 511.

CHAIRMAN BABCOCK: 511, yeah, good. Judge Estevez.

HONORABLE ANA ESTEVEZ: Just in the nature of simplifying it, Rule 517 is going to fall in something of a general denial. I would spell out "An answer that states," quote, "the plaintiff generally denies," ditto, ditto, ditto, whatever you want to do and tell them what the answer is supposed to look like instead of calling it something and wondering whether or not it is that.

CHAIRMAN BABCOCK: Okay.

MR. TUCKER: Our concern with making a general denial have to have a set language that then when someone doesn't have that exact language there's going to

be an argument that that doesn't count as a general denial. That would be our concern.

MS. ADROGUE: You have a definition at the front.

MR. TUCKER: Yeah.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: In some of the statutes they have what I call safe harbor language saying that "the following language," generally describing the language you want, but saying if you use this language you automatically know you're safe. You could write a rule that says, "Generally denies in the following language or similar language" and then give them something to copy, because I suspect what they'll do is get a copy of these rules and hand write out something that's -- I think it's a good idea to have an example of a general denial, but don't limit them to that in case they drop a word or something.

MR. TUCKER: Right. Yeah, that would make sense.

HONORABLE RUSS CASEY: One of the things in the small claims, Chapter 28, there was a form for the plaintiff to file a case, and we talked about using forms for an answer even, having the court -- you know, "do you agree/disagree," check one, sort of thing, but we never

could come to agreement on that, but if you guys want to revisit that that would be --

CHAIRMAN BABCOCK: I think what Richard just suggested was a form.

HONORABLE RUSS CASEY: Yeah.

CHAIRMAN BABCOCK: And he is a big proponent of forms.

MR. ORSINGER: It's not a form. If it's in the rule it's not a form.

CHAIRMAN BABCOCK: So if it's a form that's in a rule it's not a form. Okay. All right. Any other comments about this rule? Okay. 520.

MR. TUCKER: Okay. 520, again, no substantive changes, and this probably falls into the same thing that Justice Bland was talking about as far as combining these things and making it simplified and more understandable for what we're talking about.

CHAIRMAN BABCOCK: Okay.

MR. TUCKER: Again, we just wanted to clarify that you have to pay the filing and service fee and that a citation is required.

CHAIRMAN BABCOCK: Bobby.

MR. MEADOWS: I'm stretching.

CHAIRMAN BABCOCK: You've got both your hands up.

MR. TUCKER: That indicates an extreme point.

CHAIRMAN BABCOCK: Any other comments about this? Richard.

MR. ORSINGER: Well, I would just like to ask a question about the defendants generally. If someone comes into JP court and wants to make an appearance by filing an answer but doesn't understand the process, will the clerk tell them, "No, you can't come orally and report to me; you have to file the answer"?

MR. TUCKER: No. As it is currently the rules say you can respond orally unless directed in writing, so generally what they would do is notate that the person appeared on the docket.

MR. ORSINGER: And that's actually -- is that just a general appearance, or is that taken as a general denial?

MR. TUCKER: Frankly, I think there's -- there's a provision that an appearance or answer will be treated as a denial. I can't promise you that off the top of my head.

MR. ORSINGER: So when a person comes in and says, "I've been sued, and I didn't do it" or whatever then that gets written down in the court's docket as a --

MR. TUCKER: Yeah, that would be a denial.

MR. ORSINGER: So we aren't necessarily going to have a written answer, and a lot of these rules are triggered by written answers being filed.

MR. TUCKER: But in this we require that it be written. In the new rules we require it to be written.

MR. ORSINGER: So you're changing the practice from an oral appearance. Now it's going to be required that you make a paper appearance.

MR. TUCKER: That's right.

MR. ORSINGER: And so then my question, I guess I'm okay with that as long as someone who comes in to orally appear is told you must appear in writing.

MR. TUCKER: Yes.

MR. ORSINGER: But I don't know if they say that's giving legal advice and they refuse to say it or what.

MR. TUCKER: Right. It would be questionable from the court. I think it would be acceptable. I would advise a court that that would be procedural information and not legal advice as long as you're not telling them what should be in the answer, just that a written one is required. It's also, remember, going to be on the citation that explicitly directs them that they have to file a written answer with the court.

MR. ORSINGER: And what was the policy

driving that change?

MR. TUCKER: Just that we felt that, you know, it's -- the trying to kind of update things and, you know, have that on file and just having someone just come in and say, "Well, I'm here," the way it works now is they say they're there and then it just goes to trial, just trying to streamline the process and have it not debatable.

CHAIRMAN BABCOCK: Judge Casey.

HONORABLE RUSS CASEY: Personally I wasn't real happy with that change, but it was the majority of the committee that voted on it, and in my opinion if we go back to 508 on pleadings and motions and change that "must" to "should," I would be happy with that, because that way we tell them you should put it in writing, but if it's not in writing it's not a failure.

CHAIRMAN BABCOCK: Okay. Judge Estevez.

HONORABLE ANA ESTEVEZ: And just to go back to that writing and not writing, I mean, when I'm swearing in panels I have people come up and tell me they can't read or write in English.

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: And that's a concern. I mean, we were talking about eviction and other types of suits, and there's going to be a lot of people

that -- is Eduardo in here? He's always taking care of the Hispanic population and other populations that may not be able to file an answer in English or even in Spanish, but they won't be able to do it.

CHAIRMAN BABCOCK: Okay. Judge Wallace.

HONORABLE R. H. WALLACE: You know, when you get a traffic ticket the citation has a place you can check "guilty," whatever, you want a hearing, and you mail that back. Is it feasible that with the papers that are served with the citation there could be some form for the defendant to say, "I disagree"?

CHAIRMAN BABCOCK: Judge Casey.

HONORABLE RUSS CASEY: When the creditors bar association first made their presentation to the committee they had performed a form exactly like that to be served with their citations for their types of cases. We love the idea of supplying something to a defendant, an easy way to answer, an address to mail it to, mail back to this address, check whether you agree or disagree, and Rule section of -- you know, if you disagree, what you disagree about sort of thing, but I guess it's one of those things when you're talking about what a form should be exactly it gets to be a very long debate. We talked about even hiring someone professionally that does forms to do that. We ran out of time. But yet again, I would

love to -- I love that idea of having something on the citation we give to give back to the court, sign this, send it back. And the form that the creditors bar had presented to us should still be on file. If not, we can provide it as maybe a possible avenue for that.

MR. TUCKER: Yeah, I can't think of any reason not to do that, honestly.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: How does it work now, the plaintiff comes in and makes an oral claim? In small claims court.

MR. TUCKER: In small claims court it's actually required to be in writing and sworn to. In justice court they could come in and do it orally, but it's generally in writing.

MR. HAMILTON: If they do it orally then you just make some kind of notation on the docket?

MR. TUCKER: Write it all down in the docket, yes, sir.

HONORABLE RUSS CASEY: It's not considered a pleading, though. It's a statement suggesting what the case is about, so it's not like a specific pleadings. It's just a form in Chapter 28 of the Government Code, this amount of money; it's about this, you know, particular instance, and it's sworn to.

MR. HAMILTON: Somewhere in here I remember you referred to serving a statement on the defendant. Is that what you're talking about?

MR. ORSINGER: I think that was the sworn statement for immediate possession. Isn't that what it was?

MR. TUCKER: That or the statement of inability to pay costs is probably what that was. Yeah, I would reiterate. I think that's a good solution, a good idea to have, you know, with the citation "Here's your response form and send it back to the court." I can't think of any reason not to do that.

CHAIRMAN BABCOCK: Rule 521, insufficient pleadings.

MR. TUCKER: Okay. Insufficient pleadings, this was basically us trying to simplify and implement the concept of special exceptions. We didn't want to call it special exceptions because nobody knows what that is, so this was just a method for a party to say, "Hey, I don't understand what they're saying, make them clarify it."

CHAIRMAN BABCOCK: Okay. Comments about this? Peter.

MR. KELLY: I don't know if I missed it, but I was looking for the rule allowing free amendment of pleadings. It doesn't seem to be cognated to Rule 62 in

this, and the way it reads now, if there is no rule providing for amendment of pleadings you're sort of stuck with what you file initially, and I was thinking about the way this could be structured, and instead of saying "insufficient pleadings" say "amendment of pleadings," that, first, any party can do it at any time, and the court may order it on motion or on its own motion, because you're going to have pro se parties here. The judge may be looking at it and saying, "I can't figure out what you want," and the judge may be able to order special exceptions.

MR. TUCKER: Absolutely. Yeah, that's great.

MR. KELLY: Do I get an excellent for that one?

CHAIRMAN BABCOCK: What did you say, "That's great"?

MR. TUCKER: That's great.

CHAIRMAN BABCOCK: Would you give him an excellent?

MR. TUCKER: I would give him an excellent for that.

CHAIRMAN BABCOCK: Watch out, Carl. Peter's climbing on you. All right. Any other comments about this rule? All right. 525.

MR. TUCKER: Okay. This is a major rule for our courts. This is our justice court default judgment rule. The way we currently have our default judgment rule set up is it's split on whether the damages are liquidated or unliquidated. The problem with that is that obviously many of our parties don't know what liquidated versus unliquidated damages are. The other problem that we're having when we're trying to teach on things like credit card cases and stuff like that is there's splits on the appellate court level on what is liquidated damages versus unliquidated damages, and there's disagreement there.

So our thought was let's not define it based on something that has an amorphous definition that changes when these courts rule. Let's just explicitly say when a hearing is required and when a hearing is not required. (a) is kind of the analog to the liquidated damages part. If a plaintiff's claim is based on a written instrument, executed and signed by both parties, and that instrument has been filed with the court and served on the defendant, along with a sworn statement from the plaintiff that's true and accurate, all payments and offsets, et cetera, et cetera, then the plaintiff gets a default judgment if the defendant doesn't answer, with no requirement of a hearing.

We also add that the plaintiff's attorney in

that situation could submit affidavits, supporting an affidavit or an award of reasonable and necessary attorney's fees and the court could also award those fees, so based on a written instrument, and it's been filed with the court, no hearing necessary proceeding.

(b) ties back to what we talked about some last time with the debt claim cases, which are generally credit card cases, and if you'll recall in Rule 578 we laid out specific documents that the company could file, and we say if you file all of these documents in a debt claim case, the plaintiff gets a default judgment without necessity of a hearing. Any other situation the plaintiff must request orally or in writing a default judgment hearing if it seeks entry of default judgment. And then we also add from case law if the defendant files a written answer before judgment is granted default may not be awarded. If defendant doesn't answer, plaintiff must appear at the hearing and provide evidence of damages and then the judge will render judgment.

We do also allow by permission of the court party to appear at that hearing by means of telephone or electronic communication system to try to address some of the concerns, specifically with the debt claim cases. Again, you know, their concern with the time and expense of going to the hearing when it's just based on

submission, so if the hearing is just based on submitted written documents it would be reasonable for the judge to allow the party to make a telephonic appearance and say, "Judge, we would like you to rule based on what we've submitted to you."

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I was wondering why we use the word "instrument" and is it something broader or different than a contract? I don't know that they would be looking for a violin or a French horn, or I just -- I don't think that's a normal word that the common person would know to indicate a contract, if that's really what we're looking for.

HONORABLE TOM GRAY: Especially when it's followed by "executed." You wonder if they got electrocuted or given a needle or I mean --

MR. TUCKER: Yeah, our -- we didn't want to do contract just because we didn't want to take it out of things where there may not be -- you know, I guess mostly it would technically be a contract, but even like a loan note or something like that, we wanted to make --

CHAIRMAN BABCOCK: Could you say "document"?

MR. TUCKER: Yeah, I was thinking -- yeah, I think that might -- I think that would probably work. I was just trying to make sure there wasn't some other trap

door that that might fall in, but I think that will work.

CHAIRMAN BABCOCK: Any other comments about this?

HONORABLE KEM FROST: Where is the word?

HONORABLE ANA ESTEVEZ: First part of (a).

MS. ADROGUE: "Written instrument" and "executed."

CHAIRMAN BABCOCK: "A written instrument executed."

HONORABLE ANA ESTEVEZ: It doesn't bother me, but I'm thinking now about my 12-year-old reading this and what she thinks.

MR. TUCKER: These rules are PG-13.

HONORABLE ANA ESTEVEZ: She wouldn't get this. I don't know that she's going to get it next year either.

CHAIRMAN BABCOCK: Tell your 12-year-old to stay out of trouble and not sign any written instruments and for God's sakes don't execute them.

HONORABLE ANA ESTEVEZ: It's about how much understanding she would have if she's reading it.

CHAIRMAN BABCOCK: Right. That's a good point. Richard.

MR. ORSINGER: I have a couple of points. First of all, if we decide to go back to the idea of an

oral answer, which I strongly support, this rule is premised on there being a filed written answer, so we would have to change the introductory part and then also (c), both of which contemplate written answers. Then under subdivision (a) I'm concerned about the provision saying that it has to be a written instrument signed by both parties because I think it only has to be signed by the party who is to be bound. So, for example, a promissory note is not signed by the lender --

MR. TUCKER: Right.

MR. ORSINGER: -- but it's still binding on the borrower.

MR. TUCKER: Yeah.

MR. ORSINGER: So signing of both parties is one way to prove an exchange of promises, but it's not, in fact, required. So that I think should say "signed by the party to be bound" and then the next phrase --

MR. TUCKER: What about "a written agreement entered into by both parties"?

HONORABLE JANE BLAND: Still doesn't cover it.

MR. TUCKER: Nope.

HONORABLE RUSS CASEY: I would like just written -- "based upon a contract" or "based upon a written agreement," something along those and just stop.

MR. ORSINGER: Well, are you-all saying that an oral contract is an unliquidated claim, because I'm not sure I agree with that? Is anybody taking that position?

HONORABLE TOM GRAY: A what?

MR. ORSINGER: That an oral contract is an unliquidated claim. I think an unliquidated claim is a claim where the damages cannot be established with certainty. So to me an oral contract is just as much a liquidated claim as a written contract, but I'm not an expert in that area at all. At any rate, if you -- it may not need to say "written." It could just say "based on a contract" and forget writing and forget signing.

Okay. So then the next phrase is "a copy of the instrument that's been filed with the court and served on the defendant." Yesterday I made the suggestion that we attach any kind of contract that was the basis of a lawsuit to the petition and have it served, and the answer was, no, frequently these are oral contracts, but this requires for a default judgment that a copy have -- of the instrument had been served on the defendant. So --

HONORABLE RUSS CASEY: This is default judgment without hearing.

MR. TUCKER: Right.

MR. ORSINGER: Okay.

MR. TUCKER: Yeah, if we have an oral

contract they're going to get default judgment. They're just going to have to prove up their damages, and I think we would feel pretty strongly about that just because the whole -- what our thought was as far as the kind of liquidated idea is if it's written the court can look at the face of the document and understand, yeah, this is where they're coming up with the damages, how they calculated it, but when it's no hearing and all that they had was in our petition was "We had an oral contract and they said it would be $500," that's pretty vague for the court to just rule on with no hearing or anything.

MR. ORSINGER: Well, I was actually making a different point. If you want to take a default judgment under (a) you're going to have to have served a copy of the written contract on the defendant, but we don't require that if there's a written contract that it be served on the defendant when you look at the rule that talks about what gets served on the defendant, so why shouldn't we go back to the rule where we're talking about what your petition should contain and say if it's a suit on a written contract you should attach a copy of the contract to the pleading. That sets up the default judgment at the end of the process, so we're not giving them the assistance they need at the beginning to know to attach the contract, and so they're not going to attach

the contract because there's no rule that requires it, and they come in to take a default judgment, and unfortunately their petition doesn't have the contract attached so they can't take a default under (a).

CHAIRMAN BABCOCK: But if they're thinking ahead and they've read 525 and they know that the defendant is likely not to answer then they'll attach it even though they're not required to.

MR. ORSINGER: Okay. That's my point. And then under (c), the first sentence talks about entry of a default judgment, and we've been struggling with the difference of rendition and entry, although we've been using "granting" around here some. I'm not sure that we like "entry," but why don't we just say "seeks a default judgment" and just avoid the question of whether it's an entry or a rendition or a granted?

MR. TUCKER: Yeah.

HONORABLE RUSS CASEY: I like that.

CHAIRMAN BABCOCK: All right. What other comments about 525? Peter.

MR. KELLY: On the attorney's fees award, the (a) and (b), first of all, there's no mention of court costs, which we had yesterday. Secondly, as discussed yesterday, one rule had "attorney's fees," another rule has "reasonable attorney's fees," this one has "reasonable

and necessary attorney's fees." Just should be consistent. And then finally it says, "The court may also award those fees." We had this come up on some workers' compensation cases, judicial immunity cases. Does "the court" mean it's a jury issue, which is what the Supreme Court found, or does "the court" mean a judge award? If you want the judge to award it, you need to say the judge should award it.

HONORABLE ANA ESTEVEZ: Well --

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Well, I'm just going to piggyback on what he started. The judge can award those fees under the Texas Civil Practice and Remedies Code if there's a certain notice that was provided under the law, and so -- or if it's in a contract, but this doesn't distinguish between the two, so if they didn't get that notice then how come they're going to get attorney's fees when other people wouldn't have gotten attorney's fees? I mean, another reason to come to small claims court instead of district. You don't have a condition precedent for that. You're just saying that the court can award attorney's fees based on a written contract, which it can, but there is some things that have to be done if it's not provided for in the contract.

MR. TUCKER: And that's what we were trying

to address, was that if they are so entitled rather than it being an automatic.

CHAIRMAN BABCOCK: Okay. Anything else?

HONORABLE ANA ESTEVEZ: No, I thought that went to the first part.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I've got something on 521. The last sentence, it says --

CHAIRMAN BABCOCK: Wait a minute. Wait a minute. We're back to 521, insufficient pleadings?

MR. HAMILTON: Yeah.

CHAIRMAN BABCOCK: Okay.

MR. HAMILTON: Last sentence says that "the pleadings may be dismissed." We don't normally dismiss pleadings. We dismiss their suit. Are we talking about striking their pleadings or just dismissing their suit, or is that the same thing?

MR. TUCKER: Our intention was, yes, to eliminate or strike that specific pleading, which may or may not result in the dismissal of a suit.

MR. ORSINGER: They could refile.

MR. TUCKER: Yeah.

MR. HAMILTON: "Pleading may be stricken."

MR. TUCKER: Okay. Yeah, makes sense.

MR. ORSINGER: While we're on that rule

could I make a comment?

CHAIRMAN BABCOCK: Yeah, that's okay. Backslider.

MR. ORSINGER: The second to last sentence says, "if it is insufficient," and that scares me, because it's such a long paragraph as to what "it" is, so I would suggest we say "if the pleading is insufficient."

MR. TUCKER: Yeah.

CHAIRMAN BABCOCK: Okay. Peter.

MR. KELLY: Just picking on the attorney's fees issue, do these courts have jurisdiction over declaratory judgment actions?

HONORABLE RUSS CASEY: I don't think so.

MR. TUCKER: No, sir.

MR. KELLY: Because, again, going down to reasonable and necessary attorney's fees, that is akin to the statutory award of attorney's fees under 38.001. Dec actions, it's reasonable and necessary and just and fair or just and equitable or something like that, and so it might be better instead of specifying "reasonable and necessary attorney's fees" to say "attorney's fees as specified by statute" or "made available by statute," so that way you don't have to define the type attorney's fees are, but you're making a clear reference to whether it's Chapter 38 or Chapter 37 or otherwise.

MR. TUCKER: Right. Okay.

CHAIRMAN BABCOCK: All right. What else? Justice Gray.

HONORABLE TOM GRAY: Chip, I'll just add that I'm not as concerned about the distinction between liquidated and unliquidated as I am the multiple -- whether or not you're entitled to a hearing or whether or not there will be a hearing. There's as much confusion as to what can constitute a hearing as there is liquidated or unliquidated damages, and I would rather it be addressed by the definitional, if the damages can be -- you know, are pled in some sufficient manner in the pleadings and it can be established that you're entitled to get the -- go to the default judgment without having to attach a lot of stuff to the pleadings, that you -- in other words, you can come into the default judgment hearing if they are unliquidated and bring your documents and do what you need to do, or you can plead it, and I don't -- I understand what they're trying to do as far as create the different structure, but to me that's a layer of complication that we don't even have in district court on the default judgments, so --

CHAIRMAN BABCOCK: Okay. Good point. All right. Anything else? Yeah.

MS. HOBBS: How does the defendant against

whom a default judgment has been rendered get notice of the judgment?

MR. TUCKER: The court has an obligation to immediately mail that judgment to the defendant.

MS. HOBBS: Where is that obligation in these rules?

MR. TUCKER: It is --

MS. HOBBS: I couldn't find it. I saw later in Section 5 where you can move within 10 days to set aside a default judgment, but I didn't actually see the rule that requires that notice be sent.

MR. TUCKER: That requires that it be sent.

CHAIRMAN BABCOCK: Okay. While we're looking for that, any other comments on 525?

Let's find that at a break, okay. 526.

MR. TUCKER: Okay. 526, this is kind of our replacement for summary judgment process. There was some discussion with the committee -- with the task force of whether we needed a summary judgment process in justice court. We ultimately decided we probably do because we need to get rid of cases. If I get sued, and it's something that doesn't have a real basis, or if I sue a defendant and there's no dispute as to what the facts are, there should be a way to dispose of that case quickly and not be required to go through the whole process. The

current process is obviously complicated and laypeople don't know it, can't do it. The whole, well, you had to file a controverting affidavit seven days before your hearing, so sorry, you can't say your side at the hearing, that's obviously very complicated, so what we set up is a party can file a motion requesting judgment in its favor without need for trial, and we explain why they might do that. Plaintiff would say there is no disputed material fact; defendant would say that the plaintiff has no evidence of its claim. If that motion is filed, the judge must hold a hearing unless all parties waive the hearing in writing. Parties may respond to the motion orally at the hearing -- so we're eliminating the controverting affidavit requirement -- unless the court orders them in writing to reduce their response to writing, which may or may not be sworn at the discretion of the court.

Our written proposal was just to allow them to orally state it at the hearing. Some judges said they really thought it would be helpful to have something in writing at the hearing so they could be prepared, and so we compromised with that and said, okay, they might have to put it in writing, but only if the court warns them you're going to have to put something in writing for us and not just assume that they know what Rule 166a is like right now.

CHAIRMAN BABCOCK: Okay. Judge Estevez.

HONORABLE ANA ESTEVEZ: Just looking at (a), they've left out opportunities for defendant to use the summary judgment practice for an affirmative defense, and I think that's usually the one they use the most is the statute of limitations and so --

MR. TUCKER: Okay.

HONORABLE ANA ESTEVEZ: They've narrowed it to a no evidence for a defendant, and there's traditional, and then I think you need to broaden it.

MR. TUCKER: Fantastic point. Yeah, absolutely.

CHAIRMAN BABCOCK: Fantastic point?

MR. TUCKER: Yeah. Agreed.

CHAIRMAN BABCOCK: Okay. Richard.

MR. MUNZINGER: I don't understand this rule. It seems to me -- I mean, I understand what it says, but I don't understand its -- I understand its intent. I don't think that it will accomplish its intent. I think it will make a mess of things. So here I am, I'm a pro se defendant or a plaintiff, and I file a suit in justice court, and I start looking at these rules, and it says I can get a judgment without a trial, and I read this rule. What am I going to bring with me? How am I going to prove that I'm entitled to a judgment? Am I just going

1 to go down and talk to the judge? If I am, isn't that a
2 trial? There's nothing in here that tells me I have to
3 marshall my evidence and my facts with affidavits, et
4 cetera, and make the evidence admissible as Rule 166a
5 does, and so I think this is just an invitation to -- if
6 there are -- to the lay litigant at least to ask for a
7 mini trial. I think you're just asking for two trials.
8 If you're going to have this rule, I also
9 point out, this subsection (a) says that the defendant may
10 say you have no evidence of one or more essential
11 elements. Well, that's not the only thing that a
12 defendant can do in a motion for summary judgment.
13 There's two kinds of summary judgment motions, no evidence
14 and traditional, and are you taking away the traditional
15 from the defendant in this case? There may be situations
16 where a traditional motion for summary judgment would
17 apply, and the defendant would want to assert it. It
18 seems the way this rule is written, you've taken that away
19 from him. My personal belief is this is just an
20 invitation to clog your dockets and to confuse lay
21 litigants, and I don't think it's a good rule and ought
22 not to be adopted.
23 CHAIRMAN BABCOCK: Lisa.
24 MS. HOBBS: I guess I may have -- I wasn't
25 really focusing on your introduction. Like you said

something about we need this -- we don't currently have summary judgment proceedings in small claims; is that right?

MR. TUCKER: We don't have it in small claims. We do have it in justice court right now.

MS. HOBBS: And you said, well, this is a complicated -- I guess I just think of JP court as you come in, and you come in and you stand before the judge, and he says, "What do you say," and you say this, and the other side says this, and I just don't understand why this can't just happen at the trial if there's some reason why this should just be dismissed. To me it just seems like a really complicated insertion into a process that we're trying to make more simple.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I would suggest that we have this summary disposition process, only it should be court-driven, and let's expect it to happen when they show up for trial, and if the plaintiff says, "I loaned him $500 and he hasn't paid it back," and the judge asks the defendant, "Did he loan you $500?"

"Yes."

"Have you paid it back?"

"No."

"Why?"

"Well, I don't have the money." Well, you don't need a trial. Maybe the judge could just have a summary disposition based on the fact that the plaintiff's claim is uncontested. Now, that's really tantamount to a trial, but maybe this process shouldn't be a separate pretrial proceeding but should be an option for the court to decide what the real bona fide fact issues are and then limit the trial to just those bona fide fact issues.

CHAIRMAN BABCOCK: Okay. Justice Hecht.

HONORABLE NATHAN HECHT: There's no specific rule currently on summary judgments? You just borrowed from the civil rules?

MR. TUCKER: Yes, sir. Yeah. Rule 166a governs us currently in justice court. In small claims court there's dispute right now because those rules don't apply to small claims court. Some judges feel they have an inherent judicial ability to do a summary judgment and some don't.

CHAIRMAN BABCOCK: Okay. Justice Gaultney.

HONORABLE DAVID GAULTNEY: I would just join the comment Richard made that I don't think the rule is necessary, and I think the whole concept is a JP court is a summary -- is a summary process. That's the whole deal, is to keep it simple, have one hearing. So you've got a very summary process set up where the rules don't apply

and judge can make whatever rules they want, so I think you're unnecessarily complicating it. I think there was, in fact, a comment that you had seen problems with its use, right? Because from --

MR. TUCKER: Problems with what? I'm sorry.

HONORABLE DAVID GAULTNEY: Problems with the summary judgment procedures in JP court because of its formal nature, and as I understood it, right?

MR. TUCKER: Yeah, and the requirements that you have to file an affidavit seven days before the hearing, and the parties don't understand.

HONORABLE DAVID GAULTNEY: Right, and so the statute that's requiring us to write the rules is saying, "Look, try to eliminate some of these formalities," and this is, it seems to me, the perfect one to eliminate, as the purpose of the JP court is a summary disposition. You get your hearing and --

MR. TUCKER: Right, and I would just also just to kind of give a little bit of justification of why we kind of thought this would still be necessary, I mean, keep this in mind also. We do have some -- especially in urban courts that have literally tens of thousands of cases filed in a year, and it can be a long time before we can get on a trial docket, especially if someone is saying "We need a jury trial," and these things, and we have

parties that may be paying attorneys, and so this process can drag out for a long time, and so this was kind of our way of trying to quickly get some of these cases off the books and off of litigants where there's really no legitimate need to keep stringing this out for a trial.

CHAIRMAN BABCOCK: Okay. Any other comments? Richard.

MR. MUNZINGER: But the way the motion is written it doesn't require that the party produce documents that are attached and sworn to, et cetera. It's an invitation to have a pretrial oral hearing in front of the judge on the merits of the case. If the dockets are so crowded that it takes a year to get there you're crowding your docket even more because you're inviting these preliminary hearings. It doesn't make sense to me.

MR. TUCKER: I guess the type of case we're talking about a lot of times is where the -- there's a loan situation. The defendant files an answer that says, "Well, yeah, but I lost my job and I've been in the hospital" and so on and so forth. That's a pretty open and shut -- it's not -- we're not going to have a big mini trial hearing, but I definitely understand. I agree we want to make it a streamlined process. I was just trying to illustrate how sometimes this might help with that, but I do agree that there's also situations where it could

hurt with that.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I don't really see any difference in this and just a trial before the judge himself. It overly complicates things to try to turn it into a summary judgment proceeding. You're just going to have the judge decide it, just have the parties appear and show him what the evidence is, and let him decide it. Why do you have to go through the summary judgment proceeding?

CHAIRMAN BABCOCK: Okay. Last comment before our break, Justice Gray.

HONORABLE TOM GRAY: I was just going to ask the judge if this was a kind of a back door way of keeping the nonrelevant facts out from in front of a jury and have that summary hearing on only the relevant law and facts.

HONORABLE RUSS CASEY: That's kind of what we were aiming at. You know, for example, what I had in my own mind when I was thinking of this is I had a car wreck with Bronson and I'm suing Bronson and State Farm Insurance. State Farm Insurance is not a correct party, and this is a way I could just remove them from that without the necessity of a trial, making them prepare for a trial things. We could just come in and talk about it and get it done. You know, it was not meant to have a mini trial on the plaintiff's bar as much as it was to be

able to protect defendants that are incorrectly named or if I'm suing in a personal capacity instead of in a corporation capacity, things along those lines. And it -- there is other ways that we can do about it, and if it's too problematic, I would -- the situations where it comes up, we could still handle if you don't have this in here. It's not a problem.

CHAIRMAN BABCOCK: We'll take our morning break. We'll be back at a quarter of.

(Recess from 10:35 a.m. to 10:44 a.m.)

CHAIRMAN BABCOCK: Okay. We're back on the record. Richard.

MR. ORSINGER: I was going to make a suggestion that we consolidate the idea behind Rule 526, summary disposition, into the Rule 531, pretrial conference, only add to the pretrial conference something that I'm borrowing from the current summary judgment Rule 166a(e), and that provision in the rules of procedure is "If summary judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the judge may at the hearing examine the pleadings, the evidence on file, interrogate counsel, ascertain what material factors should exist, and make an order specifying the facts that are established as a matter of law and direct such further proceedings in the action as

are just," and my idea is that instead of having the summary disposition process that you would have a pretrial conference and one of the things that the court can do under (e) is identification of facts that are not in dispute between the parties and then borrow this language and make an order specifying facts that are established as a matter of law, and that way at the pretrial conference through interviewing or whatever the judge can say, well, the only issue here is whether -- whether you had notice that limitations was running or whatever, but through interviewing the judge can do that. We beef up the pretrial conference rule to let at the end of the conference the judge can issue an order saying, "The only triable issue is X and so we'll go to trial on that next week."

MR. TUCKER: Yeah.

MR. ORSINGER: And that might allow you to avoid the complications of a summary disposition but do it in the context of a conference where it's more likely people can show up and not get caught up in the technicalities. They can just have a direct discussion with the judge. He can figure out what the triable issue is.

CHAIRMAN BABCOCK: Okay. For the next five or so minutes we're going to have an outside speaker,

Andrew Lemanski, pursuant to our rules on public speakers, requesting the right to talk to us. He's got some written materials as well, and Angie will distribute those in the normal way by posting. So, Andrew, you're on the clock.

MR. LEMANSKI: Mr. Chairman, Justice Hecht, members of the committee, thank you for giving me this time. I will keep my comments brief. I read the entire transcript from the last hearing, so I know some of the issues that have been going back and forth. The first thing I want to discuss is that small damage personal injury claims could be adversely affected by these rules, specifically Rule 405 stating about the application of the Rules of Evidence could really be hurt if we are required in small damage injury cases to bring experts into court and pay them. The cost of such things can easily eclipse the -- or make the case very risky for the plaintiff or even eclipse the potential recovery, and that obviously is a bar to bringing these cases in court.

Similarly under Rule 507, doing formal discovery in these types of cases, and once you do an expert deposition you're going to look at spending at least generally speaking five, six, seven hundred dollars in a case involving $1,500 in medical bills over a car wreck. That's just not a feasible option. Perhaps -- and I made a couple of suggestions, but perhaps adding a

factor where the court or the judge has to weigh the actual cost to the parties of implementing the rules might be effective. Another thing is if the party requesting the discovery has to pay for the discovery, so if they want to take, for example, the plaintiff's deposition, they have to pay for the defendant's deposition to be taken, too. That will make it a little bit more fair when you have disparate positions, one party along the line.

With respect to the summary disposition, I think the best thing to do on that one would be require a sworn response. There is some concern that pro se defendants or even plaintiffs won't understand what that means, and actually, Judge Patronella, who is a JP here in Houston has a great solution to that. When we file summary judgments in JP court and the defendant shows up at the hearing and doesn't file a response, he resets it for two weeks or a month and says, "You have to file a written, sworn response by such and such date," and we go to the second hearing, and if they haven't filed a response at that point, then we just -- he proceeds with a summary judgment hearing. If they have filed a response, he considers it, and that would alleviate the entire problem and the concern of pro ses not understanding the process, because the judge is telling them right there. He sets it to a date that they know about right in front

of him or her, and the whole issue of notice goes away. The whole notice of not knowing the rules goes away.

Rule 564, this is really quick. It said something along the lines of "new matters may be pleaded" and then the rule goes on to say on appeal that new matters may not be pleaded. I was thinking maybe change the title to make it a little more consistent with the rule because right now it almost contradicts one another.

Rule 565 should make clear that in a trial de novo in county court the same procedures and rules should be used. For example, we shouldn't have to require a formal discovery or the Rules of Evidence be applied to the trials. We've had this issue come up in appeals of justice court cases where, for example, there might be deemed admissions against a pro se. They get an attorney on board who appeals the case, and the question is, well, in the county court case do the deemed admissions still apply, because there was no motion on deemed admissions filed in the justice court case. Some clarification, just stating maybe explicitly that the procedures of small claims court as far as Rules of Evidence and discovery still apply in the trial de novo would be very helpful.

In my written comments I attached a couple or three documents. The first one is an excerpt from the Federal Register discussing the Fair and Accurate Credit

Transactions Act of 2003. This deals with something called red flag rules, which are protections put in place by Federal law that require banks to have procedures to detect and stop identity theft. The reason I put those in there, to kind of dovetail to my next point, which is I was actually one of the attorneys who briefed Simeon. I understand -- I read the comments from the task force about they prefer the Martinez case versus Simeon. I would be happy to submit the briefing if y'all think it would be helpful. I didn't bring it with me today because it's rather extensive, but the fact of the matter is one thing I want to make clear is that in Simeon -- the issue in Simeon was not debt collection cases. It was simply the way modern society works, and that is businesses on an everyday basis incorporate other business' records into their own records and rely on them every single day.

We see this, in fact, in appellate courts when they get records from trial courts. That's a document that's not generated in the appellate court but certainly relied upon by the litigants and the court. There's nothing -- there's nothing abnormal about someone saying that in the ordinary course of our business we acquired these records and we're making business decisions on them. I think that to require a Martinez style affidavit from the original creditor would be a -- would

be not only inconsistent with the Rules of Evidence, but also inconsistent with just the way the practical way things work in society today.

Also, I'd point out under Rule 802, the hearsay rule, the second sentence does say "inadmissible" -- or, I'm sorry, excuse me, "Hearsay that is admitted without objection shall not be denied probative value merely because it is hearsay." So under the default rules with all the stuff that's attached to the original petition in a small claims case, you're in fact, at a disadvantage is it -- compared to what the Rules of Evidence were on, and there was no objection, and that seems to be a little contrary to what the purpose of these small claims courts is. Their purpose is for a fast, speedy resolution of these claims.

And also on the default judgments I wanted to point out that is it someone -- I do this type of work. I also do some personal injury, fraud, consumer rights, employment law, civil rights law, so I see a wide gamut of stuff, and one of my concerns about the default judgments is that most of the time the people don't answer because they owe the money. They say, "Why should I pay a lawyer $750 to defend me in a case involving a 2,500-dollar debt that I owe," and almost without exception that's the reason these people do not answer the lawsuits. There's

nothing nefarious going on. With the way that modern process servers work with GPS -- our process server actually adds a physical description of the person -- we are very sure that in the vast, vast majority of these cases people are being served with process and they're not showing up because they owe the money. Even down the road 5 or 10 years if an issue of fraud comes up, there is so much legitimate debt out there that can be bought and sold, it would almost be foolish for any creditor to really fight an issue of actual fraud, if it comes across their desk. It's a very rare occurrence, and the consequences for doing it are Fair Debt Collection Practices Act claims and things like that that really make it cost prohibitive to pursue these claims, and attached as B and C to my written comments are a couple of counter-claims that were filed in low value cases, one was $2,500, one was $3,500, to give everyone an idea of the type of battle that the debtors can put up and easily and I think unfairly make legitimate debt uncollectible. I have redacted the names of the individuals, the attorneys, and all that identifiable information, so hopefully I got everything.

I've tried my best, but that way there's no names involved, but I wanted to give the committee an idea of some of the things that we have to face because when

there's legitimate debt out there that's being sued upon, the only thing can you get is judgment. You can't get paid, and in Texas with some of the most -- the broadest protections for debtors, it's very difficult to collect judgments, and that's something that should be taken into account.

Professor Spector in the previous hearing mentioned that similar rules to the default provisions here in Texas are -- were adopted in Maryland, but the problem with that analogy is there was no discussion of what the collection laws are in Maryland, and I don't know what they are for sure. I'm not -- I'm not licensed to practice there; but I'd sure like to know if they have wage garnishment; I would sure like to know if, unlike Texas, you can get their house or their car or their tools of the trade or their cattle or pigs or chickens or livestock, guns.

CHAIRMAN BABCOCK: Andrew, could you wrap it up?

MR. LEMANSKI: Yeah, sure, but my point is there is no analogous situation here in Texas. Like I said, I appreciate the opportunity to come speak, and if you have any questions, I'll be happy to answer them.

CHAIRMAN BABCOCK: We'll get your materials distributed. Thanks very much.

MR. LEMANSKI: Thank you.

CHAIRMAN BABCOCK: Okay. Back to the grind here on 527, new on setting.

MR. TUCKER: Currently obviously we have two courts. Our current rule in small claims court doesn't have a specific time of when the trial setting or pretrial setting would occur. In justice court the standard rule that it has to be at least 45 days' notice does apply, so we kind of combined those and say after the defendant answers case will be set on a pretrial docket or trial docket at the discretion of the judge, okay, so the judge can decide if there's a case that needs a pretrial, which could play into what Richard had mentioned, which I thought was a good suggestion, of wrapping the summary disposition into a pretrial conference. I thought that might work pretty well. And then we established a default of at least 45 days' notice, but the judge can make an earlier setting if that's required in the interest of justice. There's something about the case if both parties are willing to go forward quicker there's no reason to wait the 45 days.

CHAIRMAN BABCOCK: Any comments on 527? Yeah, Justice Frost.

HONORABLE KEM FROST: I would just suggest that that last sentence be reworded to say "notice of all

subsequent settings must be sent to all parties at their addresses."

MR. TUCKER: Yeah. Yeah.

CHAIRMAN BABCOCK: Good point. Any other comments? Yeah, Lisa.

MS. HOBBS: I guess I'm confused about why we have 527 separate from 532. And I guess either way I'm looking for something that tells this individual this is a very -- this is the day that's very important. This is when you bring in your witnesses, this is when you bring your documents, this is when you bring your -- you know, this is who has to prove their case. I mean, just, I mean, I'm reading these rules and I'm just like how would somebody even know, like this is the big deal. Do not miss this hearing. This is when you bring your buddy and you tell your side of the story. It just -- I'm just kind of overwhelmed at what I would do if I didn't have a law degree and wanted to go to JP court and try to fly through these rules. This is kind of overwhelming to me.

CHAIRMAN BABCOCK: Okay. Other comments about 527? All right. 528 I think we can skip.

MR. TUCKER: Yeah.

CHAIRMAN BABCOCK: I can't imagine there is anything there. How about 529?

MR. TUCKER: 529. Again, that --

CHAIRMAN BABCOCK: Let's read them together, by the way, 529 and 530.

MR. TUCKER: Okay, yeah, 529 and 530. Currently the system we have is that any party can request a jury up to the day before trial. Similar to what we had mentioned in evictions, not quite as bad as it is in evictions because of the super speedy time frame that we're trying to do there. That obviously creates a significant problem when someone comes in on Wednesday and says "Hey, my trial is tomorrow. I need a jury." That creates some difficulties, so we modify that to say they need to submit a written request for a jury and pay the jury fee no later than 20 days after the day their answer is filed, which is also the same day that we required them to file a motion to transfer venue if they decided to do that.

CHAIRMAN BABCOCK: I noticed in here that there was no provision for allowing a late jury demand, and it seems to me that if we are a justice system that is geared toward jury trials, as opposed to away from them, that it might make sense to have some -- particularly when you're dealing with pro se litigants -- to have some way for them to demand a jury even though they haven't done it in compliance with this rule.

MR. TUCKER: Yeah. And, I mean, I think

that makes sense also. Again, our concern was just the -- it being used as a delay tactic when, you know, we've had people who, you know, they've already taken off work and everything for the next day and then, oh, well, whoops, I'm requesting a jury, so we're going to delay this a couple of weeks and things like that, but, yeah, your point is well-taken, and we might be able to instead of -- we used the 20 days after the date the answer was filed because, again, that was the venue time frame, and so we thought after that 20 days we know where the case is going to be and whether or not we're going to have a jury or not, but it may make sense to maybe count backwards from the trial date instead and say "at least seven days before the date before trial" or something along those lines.

CHAIRMAN BABCOCK: Well, and you could say, "If the jury is not timely requested, the right to a jury is waived unless excused by the judge for good cause" or something like that.

MR. TUCKER: Yeah. That would make sense.

CHAIRMAN BABCOCK: Okay. Any other comments about 529 and 530?

MR. ORSINGER: I do have a question. Is there minimum notice of trial in JP court like there is in county and district?

MR. TUCKER: Yeah, well, currently in small

claims court, no. In justice court, yes. It's the 45 days, and that's what we tried to implement in the 527, that the default is at least 45 days' notice unless an earlier setting is required in the interest of justice.

MR. ORSINGER: Well, I think that the way -- the way it operates in the district courts right now is that you have enough notice to make a jury demand after you receive the notice of trial. Maybe that's not right. Your only absolute right to a jury trial is if you file it with your answer and then after that it's -- it can affect whether you file a -- get a jury after that depends on the court's docket and things like that, but there's -- in district court there's always the opportunity to request a jury after you receive the trial notice. This doesn't do that.

MR. HAMILTON: Sure, it does.

MR. ORSINGER: It does?

MR. HAMILTON: You get 45 days under 537.

MR. ORSINGER: No, your deadline on the jury trial is based on the day your answer is filed, and it has nothing to do with when the trial is set, so that's a different approach to the problem.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: I wonder if it's necessary. Maybe the purpose of this rule is to warn

somebody that not timely requesting a jury trial may -- may waive it as opposed to absolutely waive it. I think the law -- current law is that in our rules that you have to make it by a certain time, but we don't make the statement that it's waived at the district court level. It's within the court's discretion, and that discretion has to be granted if it won't interfere with parties' rights, and so maybe this sentence should be rephrased to say it may be waived if you don't make it timely as opposed to being absolute.

CHAIRMAN BABCOCK: Yeah, and Richard -- yeah, I agree.

HONORABLE DAVID EVANS: That's what I was saying.

CHAIRMAN BABCOCK: And Richard's point about the timing, this looks to be more restrictive than what the district court rules are.

MR. ORSINGER: Yes, it is, and there is a constitutional right involved. Even though it is not a court of record it still has a judgment that may go final and be enforceable, so I think that what we do here is in fact implicated by the Constitution, and I don't like this absolute bar, if you miss the 20th day, you don't get a jury trial. I'm not sure that's constitutional.

CHAIRMAN BABCOCK: Is a JP case a suit of

common law?

MR. ORSINGER: I don't know.

CHAIRMAN BABCOCK: We don't need to debate that. Yeah, Lisa.

MS. HOBBS: This is kind of overlapping in all that we're talking about, but who is sending out the notice of the trial setting? Is that the plaintiff, or is that the court?

MR. TUCKER: Court.

MS. HOBBS: Okay. That is not clear from here. I would say "The court shall send out" -- I think that would be in 527, and if it is the court --

MR. TUCKER: Yeah, that -- I'm sorry. That's what we had intended 527 to mean, but I see that it doesn't explicitly state that, but yeah.

MS. HOBBS: Yeah. And then if it is the court then I would support linking the jury demand with the notice of the hearing because then that's something coming from the court, and the court can say, "If you want to demand a jury you need to do that within 20 days."

CHAIRMAN BABCOCK: Okay.

MR. TUCKER: So I think -- I like all the ideas. I think what would make a lot of sense is to do both of those things, is to tie it and say from the time you receive notice of the trial setting you have X amount

of days to do it and then add the point that you guys made that failure to do so -- you know, the language about it may be waived, but the court must accommodate a late demand for a jury if it can be done without adversely affecting the rights of the parties, something like that.

CHAIRMAN BABCOCK: Right. Good. Okay. Let's go to 531, pretrial conference.

MR. TUCKER: Okay. Pretrial conference, we just wanted to kind of lay out -- again, in 527 we give the judge the option on which track to put these cases on, on the pretrial track or trial track, handle some of these issues at pretrial. There may be issues about discovery that need to be talked about. There may be summary disposition issues, limitations on number of witnesses. So we're kind of relying on the judge's discretion as far as which cases are complicated and need a pretrial and which ones don't. One thing that was objected to about this rule, and we would be happy to put in a statement, the TAA was not in favor of this because they were reading this as applying to eviction cases, because the 500 rules generally apply to evictions if there's not a specific rule in eviction cases. It wasn't really our intent to apply these to eviction cases, so we would be happy with either a statement that this rule doesn't apply to an eviction case or this rule only applies to an eviction

case to the extent that the conference can be had without delaying the time for the trial beyond what is laid out in the rules.

CHAIRMAN BABCOCK: Okay.

MR. TUCKER: We don't want to delay the eviction process.

CHAIRMAN BABCOCK: Any comments on 531? Richard, and then Judge Wallace.

MR. MUNZINGER: Mediation and mandatory alternative dispute resolution to me is very expensive. I mean, good God, you can spend several thousand dollars for one day's worth of mediation in most litigation, and we're going to give a justice court the power to force people to go to mediation in a case? I just don't see that. First off, if you can't pay, where are you? Second off, I mean, I understand it may help clear the dockets, but goodness gracious, for $5,000, I mean, we're making this thing terribly expensive for litigants, I think.

MR. TUCKER: There are a lot of programs that do low and no cost mediation. I know I have talked to some judges that have mediation that will provide for $10 for our courts and things like that. We certainly don't have any intention of allowing a judge to make someone pay $5,000 for a mediation or something like that. But where it's -- where there is an option available and

where that makes sense, what we were going for at least.

CHAIRMAN BABCOCK: Judge Wallace, and then Sofia.

HONORABLE R. H. WALLACE: The way I read that is if either party asks for a pretrial the court must have a pretrial. Is that what you intended? I mean, it sounds like the court on its own could order a pretrial, but it says, "Any party may request or the court may order a pretrial conference." What happens if a party requests it and the judge looks at it and says, "We don't need a pretrial conference for this"?

MR. TUCKER: Yeah, and I'm trying to remember, frankly, the discussion we had about that, and I can't remember if we thought that it would be automatic if a party requested it. My recollection is that the party can request it, but the judge would not be bound to order it unless they thought it was necessary in the interest of justice.

CHAIRMAN BABCOCK: Sofia.

MS. ADROGUE: Responsive to his note that the TAA had recommended to make it clear it doesn't apply to eviction cases, if we do that there let's just be cognizant that there's other times we've talked about this doesn't apply, and let's not confuse people by knowing one doesn't apply but others may not apply, not making it

consistent.

CHAIRMAN BABCOCK: Any other comments on 531? All right. Let's talk about 531a. Any noncumulative comments from Richard's observation about 531a? Lisa.

MS. HOBBS: I might just suggest instead of having a separate ADR rule that you just move that into things that the judge can consider at the pretrial conference.

CHAIRMAN BABCOCK: Okay. Any other comments?

MR. TUCKER: And we would also -- it's been requested and we would be amenable to a similar statement here, that this is not a process that we necessarily -- this is not a process that would apply to eviction cases unless it can be accomplished within the time frame set out in Section 10 of the Rules of Civil Procedure.

CHAIRMAN BABCOCK: Judge Casey.

HONORABLE RUSS CASEY: I would like to point out that I would hate to totally exclude this from eviction cases because especially in the case where we have a jury trial for an eviction case sometimes the limitations of what we're going to go to trial on are necessary.

CHAIRMAN BABCOCK: Yeah, by "this," do you

mean 531 or 531a?

HONORABLE RUSS CASEY: By 531.

CHAIRMAN BABCOCK: Okay. So you would not want to totally exclude eviction cases from 531?

HONORABLE RUSS CASEY: Yes.

MR. TUCKER: I think setting it up as these don't apply unless they can be accomplished within the time frame addresses both of those well, because it allows you to apply it, and it also doesn't make it a bar where then you're assuming these other rules do apply or don't apply by the point that you made. Yeah.

CHAIRMAN BABCOCK: Okay. Anything more on ADR in JP? Okay. Let's go to 532, trial setting.

MR. TUCKER: Okay. That specifies what's going to happen on trial day. There is a little bit of discussion about this part. We say, "If the plaintiff fails to appear, the judge may either postpone or dismiss the suit. If the defendant fails to appear, the judge may postpone the cause or proceed to take evidence." So there are some people -- there was a discussion about that. Some people thought, well, if the judge can postpone it if the plaintiff doesn't show up, you know, what is the harm in giving the defendant one free postponement also? Other people said, "No, that's not fair, the plaintiff is there. They're entitled to a default judgment." So that was the

discussion that occurred there.

CHAIRMAN BABCOCK: Anybody have any views on that? Justice Frost.

HONORABLE KEM FROST: Given what we've talked about today about the claims going back and forth among the parties, it may be better to reword the second sentence in 532 to say, "If the party making a claim fails to appear when the cause is called in its order for trial, the judge may postpone or dismiss the claim" as opposed to "the suit" so that it would apply equally to counterclaims.

CHAIRMAN BABCOCK: Yeah. Okay. Anything else about 532? Any comments about making it reciprocal for the plaintiff and the defendant if the judge has the authority to postpone the case? I would think he would anyway. Yeah, Carl.

MR. HAMILTON: What does this mean, "call in its order for trial"? Does that mean order on the docket or what?

MR. TUCKER: Yes, sir. Yeah, and that's just the language that's currently in the rule, and that's how we've always interpreted that, just, you know, you may have -- depending on where you're at you may have six cases, you're going to call down the six cases, and when you call those cases, if plaintiff's not there then

that's --

MR. HAMILTON: I just wondered why we need that in there? Can't he say "call for trial"?

MR. TUCKER: Yes.

CHAIRMAN BABCOCK: Any other comments?

PROFESSOR CARLSON: The last sentence you might want to put "If the plaintiff fails to prove its case, judgment must be rendered against the plaintiff." I don't think you really enter judgment in favor of the defendant.

MR. TUCKER: Okay. That makes sense.

CHAIRMAN BABCOCK: Okay. All right. 533, drawing jury and oath.

MR. TUCKER: Okay. We didn't really change a lot of this, but just added the "if no method of electronic draw has been implemented." Very rare counties use this write names on pieces of paper and put them in a box and mix them up. It does still occur. The Government Code provides for electronic method of draw, and so we just put "if no method of electronic draw has been implemented" and moved forward.

CHAIRMAN BABCOCK: Okay. Any comments on this? Is that Lisa with your hand up? Yeah.

MS. HOBBS: Yeah, sorry, I'm just trying to find the Government Code provision that applies to writing

things on pieces of paper in district and county court. I thought someone had to be present while you were writing it down. I thought you had to have -- and, I'm sorry, I was trying to find it before I made my comment, but that's one thing we might want to make sure we're being consistent. I think you need to have two people in the room when you're drawing names.

CHAIRMAN BABCOCK: Okay. Any other comments on 533? Yeah, Richard.

MR. ORSINGER: At the very end there where the oath is required, "so help you God," and I don't remember if we do that at the district court level. I thought we took out -- we had a swear or affirm that took out a reference to God, but I can't remember. Does anyone remember? And is there an issue with that about religion and government and all that?

MR. TUCKER: This is what was specifically in the rule currently, but if we want to modify that then --

MR. ORSINGER: Well, I don't have a preference, but I just think that there's been some litigation somewhere. I can't remember. I don't know if -- separation of church and state kind of thing.

CHAIRMAN BABCOCK: Okay, Madeline O'Hare, we'll take that as --

MR. ORSINGER: It doesn't offend me, but --

MR. MUNZINGER: She was my client, Chip. Madeline O'Hare was my client when I was a second year law student. They tried to extradite her to Maryland, and I -- my boss and I, Arthur Mitchell, kept her from being extradited to Maryland because the jury's oath in Maryland was "so help you God," and she attacked it on that basis, and we succeeded in keeping her here in Texas to my chagrin.

CHAIRMAN BABCOCK: Where apparently the same oath --

MR. MUNZINGER: I'm in favor of leaving it in the oath. I don't think we need to do that.

MR. ORSINGER: Now that I know that he worked for Arthur Mitchell I understand where his streak comes.

HONORABLE DAVID PEEPLES: I'm moving my chair a little bit away from him.

MR. MUNZINGER: If you've got 30 seconds I'll tell you a great story. I'm Catholic, and my mother died. I go to mass everyday and have for many, many years, and so Madeline is setting in the office there with Arthur and her then husband, and she's cursing like a sailor that's been drinking for a month, and the church bells start ringing, and my mother had just died, and

Arthur looked at me, and he said, "Dick," he said, "isn't it time for you to go to mass," and here's old Madeline Murray O'Hare just purple streaming, just going, and she just stopped dead in her tracks. It was a great moment.

CHAIRMAN BABCOCK: There we go. Okay. See what we can come up with if we work hard enough? Rule 534, voir dire.

MR. TUCKER: 534, we tried to basically just explain the voir dire process in a couple of quick sentences. I would actually, thinking about it, be in favor of probably renaming that rule.

CHAIRMAN BABCOCK: "Pickin' a jury."

MR. TUCKER: "Pickin' a jury." "Questioning the jury panel" or something like that because when they're looking like through a table of contents they're not going to understand what that means.

CHAIRMAN BABCOCK: Any other comments on 534?

HONORABLE TOM GRAY: As long as you get the spelling correct on pickin'.

CHAIRMAN BABCOCK: P-i-c-k-i-n.

MR. TUCKER: Apostrophe.

MR. ORSINGER: Are we not going to say anything in here about commitment questions?

CHAIRMAN BABCOCK: I don't know, hang on.

Justice Frost may have that comment.

HONORABLE KEM FROST: There is actually something on that, but I was just going to comment on 534, 535, and 536 we don't use "venire person." We do use "juror," which is easier to understand, but we may want to insert "potential juror" in all of the references there until you get to actual seating the jurors.

MR. TUCKER: Yes.

CHAIRMAN BABCOCK: Thank you. Sofia.

MS. ADROGUE: "Judge" is defined. We may want to define "juror," "jury." You've got great definitions. I would just think "juror," "jury" needs to be defined, too.

CHAIRMAN BABCOCK: Okay. Good. All right. Let's go on to 536, peremptory challenges.

MR. TUCKER: Okay. Again, we didn't try to change -- nothing changed substantively. We just tried to give a fairly straightforward description of what that means.

MR. ORSINGER: You don't define "constitutionally protected class," do you?

MR. TUCKER: No.

MR. ORSINGER: That's up to the judge to explain that comment to the --

CHAIRMAN BABCOCK: It's a -- I mean, it's

not amorphous. It's expanding. Yeah.

MR. TUCKER: Exactly. Yeah. That's why we didn't want to enumerate what those might be because that might --

CHAIRMAN BABCOCK: All right. 537, the jury.

MR. TUCKER: Okay. 537, again, straightforward, call the first six names that are left, and they are the jury.

CHAIRMAN BABCOCK: Okay. No controversy about that, I wouldn't think. 538.

MR. TUCKER: 538, again, no substantive changes. There was some debate over do we still want to have the constable go out and round up people to serve on the jury.

HONORABLE RUSS CASEY: Yes.

MR. TUCKER: And the general answer was "yes." I realize that's kind of a complicated and difficult situation, but, again, as we've talked about a lot of the times, we're trying to do something speedy and fair, and postponing these trials a lot to keep busting jury panels doesn't make a lot of sense.

CHAIRMAN BABCOCK: Yesterday we heard that this doesn't happen very often, but that when it does happen sometimes the jurors are not from the precinct

where the case is being heard. I'm okay with that, but is that all right with the law?

MR. TUCKER: Yeah. Yeah. I think the constables know how to implement it.

CHAIRMAN BABCOCK: All right. Anything else about this rule? 539 then, jury sworn.

MR. TUCKER: Okay. No changes to that so far. It would have the same issues that Richard mentioned of "so help you God," but we didn't change anything.

CHAIRMAN BABCOCK: Got anything you want to say about that, Richard, about the "help you God" thing?

MR. ORSINGER: I don't take a position on that. I just want to be sure it's constitutional. I don't know. I don't follow that law closely.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Just going back to the peremptory challenge. I'm sorry if someone already made this comment, but we never say what that means.

MS. ADROGUE: That was my comment. It needs to be defined.

MS. HOBBS: You never tell them you get to strike these people just because you -- you know, whatever.

MR. TUCKER: Well, it says on there, "which means they may select up to three jurors whom they may

dismiss for any reason or no reason at all," other than maybe constitutional protected class.

MS. HOBBS: Oh, okay.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: Chip?

CHAIRMAN BABCOCK: Judge Peeples.

MS. ADROGUE: You still may want to put it in the definition section.

HONORABLE DAVID PEEPLES: 539 and 533 have antiquated ways of doing the oath, and I think we ought to feel free to reword those a little bit better. I have been doing it for a long, long time. You know, "You will a true verdict render." "You and each of do you solemnly swear." There are just ways to word that just a little bit more colloquially, and I think we should do it.

MR. TUCKER: Yeah.

CHAIRMAN BABCOCK: It's part of the majesty of the law.

MR. ORSINGER: You've never been mandamused or reversed for doing that?

HONORABLE DAVID PEEPLES: Not yet.

CHAIRMAN BABCOCK: All right. 540, judge must not charge jury.

MR. TUCKER: 540 is --

CHAIRMAN BABCOCK: Isn't that good.

MR. TUCKER: -- as it currently stands. We had some discussion about that, considerable debate really, over whether this was a good rule to keep. The benefits of explaining the law to the jury are pretty clear, especially in cases like we mentioned earlier like eviction where there's something that's really emotionally charged being able to charge the jury that you're supposed to decide this case on the facts and not, you know, take into account this, and here's what the law is: If they haven't paid their rent and they don't have legal justification, they have to be evicted. There's benefit to that.

The drawbacks of that, there can be long, drawn out arguments over what's supposed to be in a jury charge. Those of you who have been involved in civil litigation I'm sure know that, but it can take a long, long time and be very heated. If you have an attorney on one side and a pro se person on the other, we may end up with a jury charge that is extraordinarily slanted to one side or the other, and so dealing with a lot of lay parties, a lot of lay judges, we ultimately just decided to leave the rule in.

CHAIRMAN BABCOCK: Okay. We've talked about this yesterday. Any noncumulative comments about 540, about charging the -- or not charging the jury?

HONORABLE DAVID PEEPLES: I'd strike the words "in his court."

MR. TUCKER: Oh, yeah. I agree.

CHAIRMAN BABCOCK: Okay. Anything else? That was a great comment. 541.

MR. TUCKER: 541 has no change. These next several rules don't really have changes there. That just says if I sue Russ because he has my gold watch that the jury must decide how much the gold watch is worth.

CHAIRMAN BABCOCK: Okay. Justice Frost.

HONORABLE KEM FROST: In 541, this is another instance where instead of "plaintiff" it might be better to insert the words "party making the claim."

MR. TUCKER: Yes. Yeah.

CHAIRMAN BABCOCK: Okay. All right. Anything else? Justice -- Lisa. Not Justice Lisa, just Lisa.

MS. HOBBS: What do you mean? I don't -- as a lawyer I don't understand what "when the suit is for recovery of specific articles."

MR. ORSINGER: This is a conversion case.

MR. TUCKER: Yeah. I'm suing him to get my watch back. He has my gold watch. I'm suing him to get my gold watch back. If the jury finds in my favor they also have to say how much they find the gold watch is

worth because when I go to enforce the judgment he may say, "Guess what, I don't have your gold watch," so now I have to execute on the value of the gold watch.

HONORABLE RUSS CASEY: Or more likely, they return the gold watch, you know, at the business end of a sledgehammer that got hold of it.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: So this is just personal property, right?

MR. ORSINGER: Right.

PROFESSOR CARLSON: You might just say that.

MS. HOBBS: Yeah.

MR. ORSINGER: I would suggest "physical items." I don't think a juror is going to know what "personal property" is. Couldn't you say "specific physical items" and then you don't have to be a lawyer to understand it?

MS. HOBBS: And I would change the title so that you realize that this is a specific rule for a specific thing and not generally a jury verdict, which is what I was trying to understand.

MR. TUCKER: Right, no, totally agree. We copied and pasted that, and I agree that it could use a lot of improvement.

MR. ORSINGER: You could say "jury verdict

for the recovery of property" or something --

CHAIRMAN BABCOCK: Or "physical items."

MR. ORSINGER: Or "physical items." Let me say this, though. There is an issue as to whether it's the value on the day of taking or the value on the day of trial, and should you say, or are you leaving that optional? I believe a conversion is valued on the day of taking? Does anyone know?

HONORABLE TOM GRAY: Well, if it's been hit with a sledgehammer it's not worth much on the day of trial.

MR. TUCKER: Yeah. I mean, I think it should be on the day of taking because that's what the person was deprived of, but I think --

MR. ORSINGER: Why don't you just say "value of each physical item on the day of taking"?

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: 541 comes from 560, which included interest, and y'all have left interest out.

PROFESSOR CARLSON: Right.

MR. HAMILTON: The other question I have was is the -- is the value then supposed to be put in as a part of the judgment so that if the articles can be found the plaintiff gets the amount?

CHAIRMAN BABCOCK: Money.

MR. HAMILTON: Money judgment.

MR. TUCKER: Yes.

MR. HAMILTON: I don't think it's clear from these rules that that happens.

MR. TUCKER: Well, 560 we have in another spot. This actually -- this came from -- this came from 555. 541 came from 555. 560 is separate, and we have that in another place. 560 is now in our 549.

CHAIRMAN BABCOCK: Okay. Continuing on the hunt for 560, let's go to Rule 545.

MR. TUCKER: Okay. 545, "When the case has been tried by a jury and they return a verdict, the judge shall announce the same in open court, note on the docket, and render a judgment."

CHAIRMAN BABCOCK: Any comments on that? Let's go to 546.

MR. TUCKER: 546, when there's no jury the judge has to announce the decision in open court and note that in the docket and render judgment.

THE COURT: Any comments?

MR. ORSINGER: Does that mean at the conclusion of the case, or can he render judgment in open court at a later time?

MR. TUCKER: He can do it at a later time.

CHAIRMAN BABCOCK: 547.

MR. TUCKER: 547, judgment, this is again no substantive changes. As it is now, judgment has to be recorded in the docket and signed by the judge. We did include that it's effective from the date of signature, clearly state the determine of the rights of the parties, who has to pay costs, and direct issuance of process that's necessary. It's a standard judgment rule that we have.

CHAIRMAN BABCOCK: Any comments on 547? 548, costs.

MR. TUCKER: 548, costs. This is also the current rules, successful party will recover costs. There's -- I think we need to make one of two changes. Currently in justice court costs are not excluded from the amount in controversy, and this rule says costs must be awarded if I win. So if I sue Russ for $10,000 and I win, this rule says I must be awarded costs, and the Government Code doesn't exclude costs from the amount in controversy, so now my judgment for $10,031 is outside the jurisdiction of the court. So what I think should happen is either Chapter 27 of the Government Code needs to be -- in our jurisdiction needs to say "exclusive of costs" or 548 should be modified to say, "The successful party" and "the party will recover its costs upon request" to allow me to just waive my $31 of court costs so I can get my $10,000

in judgment.

CHAIRMAN BABCOCK: Okay. Anything else? 549. Is this the illusive 560?

MR. TUCKER: Yes. We have located the 560. Yeah, and this is the part it says they -- we eliminated the specific six percent because that might change, so we just put "at the prevailing post-judgment interest rate," but everything else in 549 is just as 560 is currently.

CHAIRMAN BABCOCK: Well, if we do nothing else today we've been successful in finding 560 here.

MR. TUCKER: Right. Victory.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I think that the earlier jury verdict rule would do better if it was more like this rule, and I like the idea of "physical items" instead of "articles," but you also need the date of the conversion in order to calculate the prejudgment interest.

HONORABLE RUSS CASEY: Yeah.

MR. ORSINGER: So what do you think about somehow asking them to figure out or to state the date of conversion and the value on the date of conversion, and with that information you can get a complete judgment?

HONORABLE RUSS CASEY: I like the idea of doing that and also maybe even combining the two rules together.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Okay. Rule 550, to enforce judgment.

MR. TUCKER: Okay. Again, this just talks about the court's authority to do a writ of seizure, basically a writ of execution for a specific article. In the gold watch, as the judge I can issue an order to the constable to go get my gold watch from Russ. Currently the language in that says, "In addition to the other relief granted enforce its judgment by" -- I'm trying to think of the word, oh, "attachment, fine, and imprisonment," and we had some concern with that. We're not sure how you can enforce a justice court judgment with imprisonment. We did mention -- we replaced it with "contempt" because ultimately if Russ refuses to turn over the gold watch, the judge could issue a turn over order and Russ could be held in contempt for not doing that.

CHAIRMAN BABCOCK: Can the judge put him in jail for contempt until he purges himself of contempt?

MR. TUCKER: I don't think so, not on that issue. Not on that issue because he just may not have it.

CHAIRMAN BABCOCK: Well, let's say he says, "You're in contempt because you haven't paid 500 bucks. So off to jail until you pay the 500."

MR. ORSINGER: You better not do that. That

violates the Constitution.

MR. TUCKER: Yeah, that would be a problem.

CHAIRMAN BABCOCK: Wouldn't you think?

HONORABLE RUSS CASEY: Okay. This is where I differ from Bronson and actually a great number of judges. Chapter 27 of the Government Code has a section on there on extraordinary remedies on what is allowed as a jurisdiction, and I feel that that list is what that list is, is that's what we can do. We can do garnishment, attachment, and execution. A great number of judges feel that the Civil Practice and Remedies Code allows us to do turn over orders, receivership, such things, and I do not. I feel that this particular rule were put in place in replacement of a turn over order to allow us to force someone to do a particular article. "I told you to give that motorcycle back. Here's my order to give that motorcycle back." And that's where I feel that this is from, why it's spelled out here and where that came from, and the penalties were put on there as so extreme because, you know, hey, we're JPs, we do things right, but that's where I see where it came from and sort of the history behind it.

CHAIRMAN BABCOCK: Okay. 551, enforcement of judgment.

MR. TUCKER: Okay. And that, we just added

that to clarify that this court has the tools available in district and county court. We didn't want to write out "execution, sequestration, garnishment," et cetera, that apply to us, but are in a different section of the rules, and we mentioned that those rules don't directly apply, so we wanted to make sure that those are available for our courts.

CHAIRMAN BABCOCK: 555, setting aside default judgments and dismissals.

MR. TUCKER: Okay. Clarified -- right now there's some dispute over whether 165a as far as reinstatement applies to us and things like that, so what we say here is if you get a default judgment against you or your case gets dismissed, you have 10 days to file either a reinstatement or a motion to set aside the default. Currently you have five days to set aside default. We extend that to 10. You have to serve the other side with a copy of that motion, and we explained how they have to do that, and then say, "The court may set aside the judgment or the dismissal and proceed with the trial setting on good cause shown." We then also provide that if a court denies either of those motions, that the party making the motion is entitled to an appeal. So those are dispositive orders by the court and so now they can appeal.

CHAIRMAN BABCOCK: Okay. Any comments on 555? Yeah, Richard.

MR. MUNZINGER: It seems to me like that's a motion for new trial. Plaintiff gets his case dismissed, I don't know why it would be dismissed, but a judge has acted on it, and now he says, "I can come back," and that's a motion for new trial.

MR. TUCKER: Generally it's going to be a dismissal for want of prosecution. The plaintiff doesn't show up for the trial date, so the judge dismisses the case for want of prosecution. Now the plaintiff comes back in and says, "I'm asking you to reinstate the case on the docket." We have separate -- separately coming up we have a new trial provision for if somebody loses where they can ask for a new trial. This is where the case gets disposed of before we had a contested trial.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Technically you're appealing the judgment or the order of dismissal, and you're preserving your complaint by filing the motion to reinstate or the motion for new trial. I don't think that it's sensible, consistent with the way appeals are done to the appellate court, to say you're appealing the ruling on the motion. Really, aren't you appealing the judgment or order of dismissal?

MR. TUCKER: Yes. Yes. Yeah. And that's why -- I mean, we explain later they're going to get a trial de novo to explain that it's not -- you're not appealing that decision and then the county court is going to say, "Yes, you should have reinstated it, and we're sending it back." But keep in mind we don't have any preserving error or complaint because we're not a court of record.

MR. ORSINGER: Right.

MR. TUCKER: Basically the reason for this thought process, the default judgment part is the same as it is right now, other than expanding it from 5 to 10 days. The dismissal part has come up with controversy because there's some case law makes it confusing as when can you appeal a dismissal of your case and what is -- when has your case been disposed of, and what we decided was your case is disposed of if the judge dismisses it, and then you ask him to bring it back and he says, "No, I'm not going to bring it back." We think that's a dispositive ruling, and so that could be -- you can now appeal to the county court.

MR. ORSINGER: So is the appeal date deadline running from the date of dismissal or from the date that the judge overrules the motion to reinstate?

MR. TUCKER: The date that the judge makes

the ruling on the motion.

MR. ORSINGER: That is not at all clear to me from this language.

MR. TUCKER: Well, I think it comes up in the -- yeah, it comes up somewhat in 560 where it says "the 20th day after the judgment is signed or the motion for new trial, if he is denied." I think maybe it would be helpful to add in that rule "after the judgment is signed or the motion for new trial or order to set aside a dismissal or default judgment is signed," but that was the objective, was to give them 20 days from the date that the case becomes ready for an appeal.

MR. ORSINGER: Okay. And they don't get -- I mean, they essentially get their case in the county court at that point.

MR. TUCKER: Yeah.

MR. ORSINGER: Whether they have default judgment or a dismissal.

MR. TUCKER: They're going to get a trial de novo, full case.

MR. ORSINGER: And if there's a limitations problem the trial is going to relate back to when they filed their pleading in JP court even if it was dismissed?

MR. TUCKER: Yes, sir.

CHAIRMAN BABCOCK: Does the litigant have to

take this step in order to perfect an appeal to the county court?

MR. TUCKER: No, sir.

CHAIRMAN BABCOCK: No, okay. All right. Let's go to 556, new trials.

MR. TUCKER: Okay. New trials, the process is exactly the same. Party may file a motion for new trial within 10 days of signing of judgment, must give notice to the other party by the next business day, and we make it explicit here party does not need to file a motion for new trial in order to appeal.

CHAIRMAN BABCOCK: Okay. Any comments on that? Justice Gray.

HONORABLE TOM GRAY: I'm sorry, I'm still one rule back, only because of the timing of notice of appeal and perfecting appeal. If you file a motion for new trial or to set it aside, is there a date by which it is overruled by operation of law?

MR. TUCKER: Yes, sir. That comes up in Rule 558.

HONORABLE TOM GRAY: Okay.

CHAIRMAN BABCOCK: Okay. Anything else on this? All right. 557, is this new?

MR. TUCKER: No, sir.

CHAIRMAN BABCOCK: Only one new trial, how

long has this been the rule?

MR. TUCKER: What's the date there?

HONORABLE RUSS CASEY: No date.

MR. TUCKER: It came from --

CHAIRMAN BABCOCK: From the beginning?

MR. TUCKER: From the beginning, yeah.

HONORABLE RUSS CASEY: Yeah, 1845.

MR. TUCKER: Yeah. Yeah. And the thought process there I think is, look, you know, if you ask for a new trial and you lose again, I mean, you still then can -- you get your de novo appeal in the county court, so you're still going to have options. We can't just keep resetting for new trial in the justice court.

CHAIRMAN BABCOCK: I wish I had read this rule 30 years ago when I tried a case in JP court three times. The JP kept granting a new trial.

MR. TUCKER: Now I see why you're so interested in how long it had been there.

CHAIRMAN BABCOCK: That's right.

HONORABLE RUSS CASEY: It's been burdening you that long.

CHAIRMAN BABCOCK: Forgot to read the rule. All right, 558.

MR. TUCKER: 558, this is the rule that was just mentioned. This talks about when they're

automatically denied, and we say automatically denied 5:00 p.m. on the 20th day after the date that the judgment is signed, so currently the system is you have five days to file a motion for new trial or to set aside a dismissal, and they're denied on the 10th day. We expanded that a little bit to say you have 10 days to file the motion and it's automatically denied on the 20th day.

CHAIRMAN BABCOCK: Okay. Any comments on this? All right. 560, appeal.

MR. TUCKER: Okay. Appeal, made a couple of changes on this. First of all, we extended the time period. We currently have 10 days to appeal. We extended that to 20. We also changed what the appeal bond is for a plaintiff who is seeking to appeal. Currently it's double the justice court costs plus double the estimated county court costs less the justice court costs paid. We changed that to $500. That was a rough estimate of what that generally works out as, but it's much -- obviously the language is complicated, and, you know, why have it different all the time.

Imported the provision from earlier in the Rules of Civil Procedure, I think Rule 12 or 13, that cash bonds are acceptable in lieu of sureties; and then there's also been debate over the current rules say the party has five days to correct any deficiency in the appeal bond;

but it doesn't make it explicit if it's our court or the county court who is supposed to give that party the five days; and we made it explicit that it's supposed to be the county court that did that; and the thought process there and some discussions we've had with the commission and things like that is that they really prefer that the appellate court at least is able to get their hands on it, that the party is served by at least the gatekeeping function being at a different court than what they're appealing from, so that's why we decided to make that.

CHAIRMAN BABCOCK: All right. Carl.

MR. HAMILTON: You say "the plaintiff or his agent or an attorney" should file a bond. You're just talking about the physical filing of it and not the signing of it.

MR. TUCKER: Yes, sir.

CHAIRMAN BABCOCK: Okay. Other comments?

HONORABLE NATHAN HECHT: But the bond was based on the JP court costs which have already been paid.

MR. TUCKER: Yes.

HONORABLE NATHAN HECHT: And the county courts, which have to be paid or it's not going to be docketed, so why would the plaintiff pay anything or put up any bond at all?

MR. TUCKER: Well, because I guess the base

reason is because Rule 571 makes them at this point. Basically if the defendant loses and they get a 5,000-dollar judgment against them, they have to post a 10,000-dollar bond to appeal that to the county court. Well, it's double the judgment. If the plaintiff loses, almost always it's a plaintiff take nothing judgment if they're seeking appeal. So we can't double the judgment for their appeal bond, so what Rule 571 contemplates is the bond that they have to put up to say, "Yes, I'm going to prosecute my appeal" -- which is separate from the costs. They have to post the bond that includes the costs and pay the costs in the county court, so that's kind of where that comes from.

HONORABLE NATHAN HECHT: Why?

MR. TUCKER: Just to I guess preserve -- you know, to show that they're serious about actually prosecuting their appeal, protect the rights of the other party in case they drag it out and then decide, oh, I'm not going to prosecute my appeal.

CHAIRMAN BABCOCK: Anything else on this? Justice Gaultney.

HONORABLE DAVID GAULTNEY: If there were any way the court could have vesting of the county court's jurisdiction based on the filing of the notice of appeal and then let the county court then deal with the

sufficiency of any bond that's required as a matter of law, that would simplify the process. I mean, don't you have pro se litigants just saying -- filing notices of appeal in county court and being deprived of their appeal because they didn't realize they had to comply with the specific bonding requirement?

MR. TUCKER: No, I would say that our courts will tell them. If someone just came in on the notice of appeal our court would say, "You have to post a bond," and they would be directed on how much the bond would be.

HONORABLE DAVID GAULTNEY: Right, but it's a big state. I mean --

MR. TUCKER: Say again.

HONORABLE DAVID GAULTNEY: The practices throughout the state may not be uniform, right?

MR. TUCKER: Yeah, I mean, that's possible, but I would say 98/99 percent of the time that would occur. I have never heard of a judge that would just take their notice of appeal and then just let the clock run out.

CHAIRMAN BABCOCK: Lisa.

MR. TUCKER: If anything, I have to fight my judges to give less legal advice rather than more. Our judges really are interested in making sure the process is fair for all the litigants.

MS. HOBBS: Well, and (c) says you can't dismiss it if it's -- I guess that's talking about a defect in the actual bond and not a defect in the method of perfecting the appeal.

MR. TUCKER: Right.

MS. HOBBS: But it certainly does contemplate like giving five days' notice that they did something wrong and giving them a second shot at it. Maybe you could expand that language a little bit so that it includes defects in the perfection in general and not just a defect in the actual bond itself.

MR. TUCKER: Yeah, that makes sense.

CHAIRMAN BABCOCK: Okay. Judge.

HONORABLE RUSS CASEY: Well, the appeal is perfected when we get a bond or a inability to pay.

MS. HOBBS: Well, Justice Gaultney is saying we get that, but some people might file a notice of appeal thinking that did perfect the appeal, because that's what you do everywhere else; and my point is if you want this to say "a defect in perfecting" like make it a broader problem with perfecting the appeal that says, "County court, you need to give them five days to cure any deficiencies in what they did to evoke your jurisdiction."

HONORABLE RUSS CASEY: Okay. I was not understanding that correctly then.

CHAIRMAN BABCOCK: All right. 561.

MR. TUCKER: Okay. Again, organized and clarified the information on affidavits for inability to pay costs, and we also -- we give them 20 days to appeal with an affidavit of inability. Currently the system is you have 10 days to appeal with an appeal bond, 5 days to appeal with an affidavit of inability; and we thought that was pretty inequitable to cut the time in half to appeal just because you can't afford to post an appeal bond. We made that equal, 20 days either way, and then broke that information down as what has to be in the affidavit of inability, provide the process for contesting it, and we extended the time. Currently you have to have a hearing within five days on that if it's contested. We expanded it to 10 here. We left it at five in the eviction rules, again, because we really need to crank those out, but we thought 10 days is reasonable here.

CHAIRMAN BABCOCK: Okay. 561, any comments? No. 563, transcript.

MR. TUCKER: Okay. And this is exactly as it stands right now.

CHAIRMAN BABCOCK: 564, new matter may be pleaded.

MR. TUCKER: Yeah, and this is as it stands now, too, and this is one of those rules that not a big

fan of honestly, and Mr. Lemanski mentioned this as a rule that was confusing also, and I kind of agree with what he said about that.

CHAIRMAN BABCOCK: Well, the title doesn't exactly match the body of the rule.

MR. TUCKER: Right, yes. "New matter may be pleaded" except for the rule says it may not.

MR. ORSINGER: Put a "no" in front of it, "no new matter."

MR. TUCKER: Yeah, so -- yes. Yes.

HONORABLE RUSS CASEY: And that's exactly the way it is right now. That's what it says, and that's what it says.

MR. TUCKER: Right.

CHAIRMAN BABCOCK: Do we think that's okay?

MR. ORSINGER: I think the title should say "No new matter," but what does this mean? I'm not -- I'm getting --

MR. MUNZINGER: Well, the old rule has an introductory sentence that this one doesn't that seemed to me to make it more clear, but they are not identical.

MR. ORSINGER: What is the purpose of this rule?

MR. TUCKER: If I sue Russ for breach of contract in justice court and it gets appealed to county

court, I can't also say, "Oh, and also I'm going to add in here some property damage that he did to me also."

MR. ORSINGER: What if the court didn't have jurisdiction over that claim before the appeal? Would you add it then?

CHAIRMAN BABCOCK: Like the counterclaim we were just talking about.

MR. TUCKER: Right. Not as this rule is written, but I think it would be a very reasonable addition to say "unless the claim was not within the jurisdiction of the original court," something like that.

MR. ORSINGER: Well, that creates a real problem with compulsory counterclaim because --

MR. TUCKER: Right. Yeah.

MR. ORSINGER: -- all of the sudden you've lost your right to counter-sue because they sued you in JP court, you couldn't counter-sue them, and you can't add that to the suit in county court now, and it's a compulsory counterclaim that's foreclosed.

MR. TUCKER: Theoretically you could bring a separate suit since what we were talking about under that statute says what happened in the justice court doesn't bar that -- it doesn't render that compulsory counterclaim that's waived so you could still bring it as a separate suit, but I think it would make sense to add to this rule

"unless it was not within the jurisdiction of the justice court."

CHAIRMAN BABCOCK: Judge Casey.

HONORABLE RUSS CASEY: This is one of those things that after I've had a couple of months to reflect upon I just absolutely dislike at all. It would be my personal opinion to just remove that rule entirely, allow the county court to decide any kind of issues in regards to that.

CHAIRMAN BABCOCK: Okay.

MR. MUNZINGER: But there's a problem about that, and that could be some res judicata as well. I'm a person who lost, or won rather, in the justice court. They appeal it for some reason. I change and now the case that's res judicata that's in county court is a completely different case than the one that I tried below for whatever reason I left. I might not have left the case or not contested the appeal. I think you have to be very careful about that.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: And I don't even know how you enforce that. I mean, can't you be in the middle of trial in a JP court and add something? Can't you do an oral amendment to your pleadings or something? And it's not a court of record. We don't know what happened.

MR. TUCKER: Right, and that's the huge problem. There's no record, so how --

MS. HOBBS: This is just a bad rule.

CHAIRMAN BABCOCK: Bad rule.

MR. TUCKER: I probably second what Judge Casey said honestly, let the county court handle it.

MR. MUNZINGER: But the rules have to address the issue, it seems to me. The issue is one that I would suspect arises from time to time and certainly has some importance to it, whether you can or can't raise new causes of action or new claims in the county court that weren't asserted in the justice court. I think it is a rule that -- it is a problem that needs to be addressed. The old rule seemed to me to be pretty clear.

MR. TUCKER: Our problem with the old rule, here's the language from the -- the exact language from the old rule, and it seemed like it conflicted. "Either party may plead any new matter in the county or district court which was not presented in the court below, but no new ground of recovery shall be set up nor shall any setoff or counterclaim be set up which was not pleaded." So it says you can bring up new things in the court except for any cause of action or setoff or counterclaim. Well, so what else -- what else is there?

MR. MUNZINGER: Well, maybe you wanted to

plead facts. Maybe you wanted to plead some statement from a document or something she felt was particularly persuasive. I don't know what they had in mind, but I do think that there are things in pleadings that are not necessarily limited to causes of action, but the rule --

CHAIRMAN BABCOCK: Could be an affirmative defense.

MR. MUNZINGER: This is an important rule, I believe.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I find it very troubling that the proceeding in a court that is not a court of record can compromise rights that you have in county court, and frequently by the time there's an appeal there may be a lawyer or two lawyers, certainly the judge is a lawyer, and if people's rights can be permanently cut off in a trial in JP court then I'm starting to feel entirely differently about this whole lax attitude we have about what happens down there. I thought that no matter what happened you could go to county court and you could get a conventional trial. Now I'm finding out that some things might happen and you can't get a conventional trial in county court and all of the sudden that makes these procedures in JP court a lot more important.

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: Well, it just seems to me like -- if I understand what's going on, if you don't -- may not plead a counterclaim in the JP court, but that doesn't prevent you from after you -- from filing it -- from filing a counterclaim in the county court. I mean, the JP court. So am I right about that or have I been asleep all morning?

MR. TUCKER: I -- if I understand what you're asking, if I did not file the counterclaim in justice court --

MR. RODRIGUEZ: Right.

MR. TUCKER: -- but now I want to file the counterclaim in county court.

MR. RODRIGUEZ: Well, do I have to go back to justice court and file a new claim?

MR. TUCKER: Well, right now what it says is on the appeal the current rule says you can't add a counterclaim on the appeal that you didn't do at the justice court level. I would think that what we would want to do probably is at a minimum allow you to do it if the counterclaim wasn't in the justice court's jurisdiction, because you couldn't have brought it before. But I -- after hearing the statements and everything, I'm more inclined to kind of agree with what Richard had said about not limiting your rights in the county court on the

appeal, especially based on that we don't have a record, we may not know exactly what was brought up. There may have been an oral trial amendment, an oral amendment of pleadings at trial we don't even know about.

CHAIRMAN BABCOCK: Okay.

MR. RODRIGUEZ: My point was why do we have to go back to the JP court to try something when, you know, let's just -- if it's appealed to county court, let's just let it be done there instead of having to --

MR. TUCKER: Right.

MR. RODRIGUEZ: -- make a whole new thing.

CHAIRMAN BABCOCK: All right. Let's move on and look at Rule 570 on plenary power.

MR. HAMILTON: What about 565?

CHAIRMAN BABCOCK: Yeah, but, I'm skipping that because we know you get a trial de novo.

MR. HAMILTON: Yeah, but I want to object to something this gentleman over here said.

CHAIRMAN BABCOCK: Okay.

MR. HAMILTON: He said that he wanted to -- the Rules of Evidence and discovery not to apply in the county court, and I disagree with that. I think the Rules of Evidence and discovery, everything should apply in the county court.

CHAIRMAN BABCOCK: Okay. I don't see rule

565 taking a position on that.

MR. HAMILTON: No, it doesn't, but he was asking that that be changed so that --

CHAIRMAN BABCOCK: Oh, okay. I'm with you.

MR. HAMILTON: -- would be put in the rules.

CHAIRMAN BABCOCK: I'm with you.

MR. JEFFERSON: I think on 565 also it would be helpful to explain what "de novo" means. I don't know, I think most folks in this court aren't going to understand that, and it's important.

MR. TUCKER: Yeah. We do have it in the definitions I think, but definitely the point is well-taken that it might be helpful to have it where it says -- yeah, "Trial de novo means an appeal where a new trial will be held in which the entire case is presented as if there had been no previous trial."

MR. JEFFERSON: I was looking up "de novo." You've got "trial de novo" defined?

MR. TUCKER: Yes, sir.

HONORABLE RUSS CASEY: I think that that actually conflicts with the current 574(a) in our -- our proposed 564 that you can't have a de novo if you're counting on things from the lower court to decide what the trial is now.

MR. TUCKER: Right. Yeah, absolutely.

HONORABLE RUSS CASEY: So I think if nothing else there's conflicting with those two rules that needs to be addressed.

CHAIRMAN BABCOCK: What comment about Rule 570, plenary power?

MR. TUCKER: Plenary power, apparently there's a little bit of dispute of how long the justice court has plenary power. The general plenary power statute allows -- rule allows 30 days, but there's argument that that's based on because the appellate time frame is 30 days, and since our appellate time frame is only 10 days that really our plenary power would only last 10 days. So we decided to just make it clear that our plenary power lasts for the appellate window, and we lose plenary power when an appeal is perfected or 20 days have expired since the judgment was signed if there was no motion for new trial or 20 days have expired since motion for new trial was overruled.

CHAIRMAN BABCOCK: Okay. Any comments? Lisa.

MS. HOBBS: I would just comment that this is not practice in county or district court. Your jurisdiction -- a trial court's jurisdiction extends even if a notice of appeal has been filed, and this would change that. This would cut off your jurisdiction the

second the appeal is perfected, and that's not true in district and county court.

MR. TUCKER: Yeah, but it is -- that's also -- that's how it works in justice court right now. There's a provision that says as soon as an appeal is perfected our judgment goes away, and since it's trial de novo it's like it never happened in our court.

HONORABLE RUSS CASEY: There's Supreme Court cases on that, too.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I think for clarity of the timing, if there is a motion for new trial pending and then someone perfects an appeal, you're saying the court loses plenary power to grant the motion for new trial because the appeal was perfected?

MR. TUCKER: Yes, sir.

MR. ORSINGER: So you better say "the earlier of" --

MR. TUCKER: Yes.

MR. ORSINGER: -- because you may have plenary power on the motion for new trial running on one timetable, and then a notice of appeal is filed, and that's different cutoff, right?

MR. TUCKER: Well, yeah, but "the earlier of" should only apply to (b) or (c). We can't say "the

earlier of" because the first one is 20 days after judgment, and that's always going to be the first thing that hits.

CHAIRMAN BABCOCK: Levi.

HONORABLE LEVI BENTON: Back on this issue of plenary power, you know, sometimes there's reasons to change it. Sometimes a district court will look at papers filed in an appellate court and might be persuaded to change an order or judgment. You might give the JP the opportunity to change an order or judgment if the plenary power is not cut off, and it might cut off the whole necessity for an appeal.

MR. TUCKER: Yeah. The problem is it's really statutorily once the appeal goes up to the county court we lose authority over the case.

HONORABLE LEVI BENTON: Okay.

MR. TUCKER: That part, the part about when an appeal happens, there's nothing I don't think that we can do about that. That's statutory. The real -- the question is what if there's no appeal how long does our plenary power last, and that's what we were trying to address.

CHAIRMAN BABCOCK: Okay. Rule 571, looks to me like you're talking about forms. Why don't we spend tomorrow talking about that, and we'll have public

comment? What sort of forms did you guys have in mind?

HONORABLE RUSS CASEY: The Justice Court Training Center has lots of different forms for various things, you know, and they're really neat. They're really simple. They're well-prepared, and we would like to have -- at least have a rule saying that if we chose to hand out some forms to people, such as a military affidavit, you have to file a military affidavit in all cases, we can give them a form for that.

CHAIRMAN BABCOCK: Would the Supreme Court approve these forms?

MR. TUCKER: No.

HONORABLE RUSS CASEY: No.

CHAIRMAN BABCOCK: All right.

MR. TUCKER: And one of the things that was mentioned on there was kind of what Judge Wallace had mentioned earlier when we discussed this. If the court wanted to provide a blank form for a defendant to file an answer, that would be acceptable. "May provide blank forms to enable a party to file documents that comply with these rules." So if I want to give somebody a blank form that allows them to file an answer, we're just saying that's okay. That's not legal advice. Here's giving them a blank form.

CHAIRMAN BABCOCK: Okay. What are you

getting at on Rule 572, the docket?

MR. TUCKER: That is actually just transferred from the current rules which just talk about what records the court has to keep.

CHAIRMAN BABCOCK: Justice Frost.

HONORABLE KEM FROST: I would just make a general comment on 571, something that might be helpful to parties given how many things they need to comply with, is if there were just a master checklist of, you know, the filing fee, the petition, or something that a layman could go in and say, you know, I have all of these rules, but here's the checklist of what I need to have to initiate a case or something.

CHAIRMAN BABCOCK: Okay.

HONORABLE RUSS CASEY: I would say that some people would consider a checklist legal advice.

CHAIRMAN BABCOCK: Okay. We'll check with the JP bar about that. But 572, any comments about that? It's just what we've always had; is that right?

MR. TUCKER: Yes, sir. Yes, sir.

CHAIRMAN BABCOCK: Okay. 573, any changes that you made to that?

MR. TUCKER: No, sir.

CHAIRMAN BABCOCK: 574, did you make any changes to that?

MR. TUCKER: No, sir.

MS. HOBBS: I've got a question about 574.

CHAIRMAN BABCOCK: Okay.

MS. HOBBS: We seemed to have discussed this in all the separate service rules, so I'm not sure what this encompasses that those specific provisions don't.

MR. TUCKER: This also talks about writs, like writs of execution, writs of garnishment, things like that.

MS. HOBBS: Oh, okay. Yeah.

CHAIRMAN BABCOCK: Okay. 575, you meddle with this?

MR. TUCKER: I'm sorry?

CHAIRMAN BABCOCK: Did you meddle with this?

MR. TUCKER: No, sir. We would never dane to interfere with --

CHAIRMAN BABCOCK: No meddling.

MR. TUCKER: We took the Supreme Court's order as perfection on its face.

CHAIRMAN BABCOCK: Okay. Any comments about 575? All right. Seeing no hands, seeing no comments, we're done early today by having gotten through these rules. And, Bronson, Judge Casey, thank you so much. Your work has been outstanding, and thanks for putting up with us.

MR. TUCKER: I just would like to thank you and Justice Hecht and the committee for allowing us to present and all the wonderful comments that you guys have given. You know, I think I mentioned I don't have any skin in this game, any dog in the fight, other than really wanting a system that works well for our litigants and our judges, and you guys have given us so much help developing that system. It's been very, very appreciated.

CHAIRMAN BABCOCK: Thanks very much.

HONORABLE RUSS CASEY: I'd like to say thank you for bringing me to Houston. I don't get to come down here very often, and you guys have a great city down here.

CHAIRMAN BABCOCK: Thanks. Our next meeting will be October 26 and 27th. It will be back at the TAB, the Texas Association of Broadcasters, and Levi wants to say something or --

MS. HOBBS: No. We should thank Elaine for hosting us.

MR. TUCKER: Yes, thank you very much.

(Applause)

CHAIRMAN BABCOCK: And Angie will let people know whether it's a one or two-day. Right now it's looking like a one-day, but you never know, and we're going to get back to the ancillary rules and finish them for sure, and somebody tell Judge Peeples that he has the

materials for the ancillary rules and that he can review, and we'll go from there and be in recess, and thanks again, everybody.

(11:59 AM adjourned.)

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2 **REPORTER'S CERTIFICATION**
MEETING OF THE
3 SUPREME COURT ADVISORY COMMITTEE

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