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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

September 28, 2001

(MORNING SESSION)

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Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 28th
day of September, 2001, between the hours of 9:10 a.m. and
1:05 p.m., at the Texas Law Center, 1414 Colorado, Room
101, Austin, Texas 78701.

COPY

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2 CHAIRMAN BABCOCK: We're on the record, and,
3 good morning, everybody. Thanks for coming. We'll start
4 out with a status report from Justice Hecht as to what the
5 Court is doing with our handiwork.

6 JUSTICE HECHT: Well, everything remains
7 pending. We would like to do the appellate rules
8 forthwith, if we can get one last change made. We had an
9 issue come up several times in the last couple of months
10 -- things run in clumps, it seems like -- that I have
11 mentioned to Professor Dorsaneo, regarding the sealing of
12 records in the appellate court; and we don't have any rule
13 on that; and we have had a number of briefs filed just --
14 I don't think there's any plot or anything, it just so
15 happened, referring to settlements and things that have
16 been sealed in the trial court sometimes under 76a,
17 sometimes not, and can those things be sealed in the
18 appellate court. We just don't have a rule on it, and I
19 don't remember the issue having come up before, so I asked
20 him to look at that. Otherwise, I think we're ready to go
21 forward.

22 I was at the judicial conference this week,
23 and my sense is that the judges are pretty much ready for
24 the change in Rule 47, which has to do with the
25 publication of court of appeals opinions and the citations

1 to them. I don't know that the Court of Criminal Appeals
2 is as comfortable with the committee's proposed changes as
3 other judges seem to be and as I hope my Court is, but
4 we'll just have to see about that. But in any event, if
5 we can either get closure on the TRAP rules or decide that
6 what's left is going to take some more time than I think
7 we're ready to go ahead with that and the summary judgment
8 rule and two or three other things that we're just kind of
9 sitting there waiting on enough of a package to justify
10 making a change.

11 The Judicial Council, which is another
12 group, statutory group, that meets and that the Chief
13 Justice is a part of, has adopted some guidelines on
14 cameras in the courtroom. We will send those over. They
15 would like this committee to vent those rules. They also
16 have some -- they're trying to adopt some standards for
17 evaluating the conduct of visiting judges, and they would
18 like this group to look at those rules, too. So as soon
19 as we have those, which I think is eminent, we'll send
20 those over to the committee and get somebody -- get
21 you-all to look at those.

22 Then finally, you may have seen in Texas
23 Lawyer, we formed a committee the other day which goes by
24 the informal name of the committee to fix everything,
25 which is a committee that is going to be chaired by Joe

1 Jamail. Chip is on it. Steve Susman is on it. Ricardo
2 Cedillo from San Antonio, Tommy Jacks, Jimmy Coleman, Lee
3 Kelly, Professor Thornburg at the SMU Law School. I'm
4 probably leaving somebody out, who are going to look at a
5 number of systemic-type problems that the Bar has looked
6 at and this group from time to time has kind of worked
7 around some and see if there are solutions to some of
8 these problems.

9 One of them is referral fees, an issue that
10 the Bar has looked into some years ago and decided not to
11 take any action on. Another one is a settlement rule,
12 something like the Federal courts have, but perhaps more
13 effective, that generally would provide that if you make
14 an offer of settlement and the other side doesn't accept
15 it within a reasonable period of time, some time window,
16 then bad things can happen. That works both ways. The
17 Legislature has worked on this for about six sessions and
18 come up with nothing, so the lieutenant governor wants us
19 to look at that.

20 Maybe whether we -- whether anything can be
21 done about any -- or whether problems exist in the conduct
22 of class actions and whether anything can be done to
23 alleviate those. The Federal system, as you may know, is
24 looking at some -- some fairly insignificant changes and
25 some fairly significant ones, and so is that a good idea

1 or not, and other issues that this group may want to take
2 up; and when they finish and come up with recommendations,
3 then those will come back through here, so you'll get a
4 chance to see those, the finished product, before they go
5 to the Court.

6 But the Court has done this from time to
7 time, to appoint committees that are sort of hooked into
8 this committee but not necessarily part of it, to try to
9 work on issues that those people are interested in and
10 this is such a -- this is such a thing. So it's not a --
11 it's not a deviation from the way that work flows through
12 this committee to the Court, and it will come back through
13 here, but they'll get a chance to work on it ahead of time
14 and give us their thoughts on it.

15 HON. F. SCOTT McCOWN: Can I ask a question
16 about that?

17 JUSTICE HECHT: Yeah.

18 HON. F. SCOTT McCOWN: Are there any -- not
19 that I want to do it, but are there any judges that are on
20 that committee? Because to have a work product be formed
21 and then start floating it up without having any judicial
22 input can lead to paths and problems that you don't want.

23 JUSTICE HECHT: I can't remember. Chris, do
24 you remember? I don't think there is a judge on it.

25 MR. GRIESEL: Just you.

1 JUSTICE HECHT: Me. Yeah. I'm on it.

2 CHAIRMAN BABCOCK: Well, you're a judge.

3 JUSTICE HECHT: Some say. But I think
4 that's a good point, and we'll think about that. The
5 constraints were that the people who were -- who brought
6 up this topic and wanted to do the work on it wanted it to
7 be a small group so that they could get something done and
8 then let people argue about it, as opposed to like the
9 discovery rules subcommittee which worked and worked and
10 worked on many details over a long period of time. So
11 I'll see if they are amenable to that, but they may just
12 want to just come up with something and float it past
13 people around them individually and have that -- I don't
14 know, Scott. I think it's important to have judges on
15 there, at least with respect to the class action issues
16 and the trial issues.

17 They would like to look for ways to
18 facilitate and expedite the trial of mass litigation, and
19 they say that even if class actions are not -- even if
20 the -- they seem to cycle in and out, that you can expect
21 that there will be mass litigation, and how can we help
22 the trial courts and the courts of appeals get through
23 this stuff.

24 HON. F. SCOTT McCOWN: Yeah. My only
25 concern would be that without a judge there at the outset

1 their solution might be "Judge will put aside everything
2 else on his docket and concentrate fully on what we want,"
3 and then if they form it and put it out there and you're
4 opposed to it then you're obstreperous and noncooperative
5 and don't want to do any work.

6 CHAIRMAN BABCOCK: Would it be okay if we
7 limited it to Travis County?

8 HONORABLE SCOTT BRISTER: Is it a
9 legislative committee or a Court committee or a Bar
10 committee or
11 what --

12 JUSTICE HECHT: It's a Court committee.

13 HON. F. SCOTT McCOWN: I mean, if you're
14 going to be there and you're going to be active, I don't
15 have any concern, but I just -- if you're more in a
16 liaison role and there wasn't going to be an active judge
17 there, just one would maybe leaven the bread.

18 JUSTICE HECHT: Yeah. No, I'm going to be
19 there, and I will be active, but there are -- some of
20 their issues are of more concern to them as practitioners
21 than they are to the judges.

22 HON. F. SCOTT McCOWN: That's what I'm
23 worried about.

24 JUSTICE HECHT: Referral fees, I really
25 don't have a dog in, and I don't know that the Court does,

1 but they want to talk about ad litem fees, and I have a
2 little more concern about that, but to the extent that the
3 parties can get together and work out some of those things
4 then that's okay. The systemic court handling of its
5 docket, that's a little bit bigger problem for the judges,
6 I think.

7 Oh, yeah, Harry Reasoner is on it, right.
8 Thank you. And the impetus came from several different
9 directions. First Joe wanted to do it, and so anybody
10 that wants to volunteer these days, we are not usually
11 turning people away. Governor Ratliff wanted us to look
12 at the settlement issue and specifically requested our
13 help on that, and some of the members of this group were
14 opposed to a settlement rule some years ago, so it seemed
15 to be ideal for them to be inside the tent working on it
16 rather than not, so it's possible that they will decide
17 that the solutions need to be legislative, Scott, and will
18 recommend that rather than a change in any kind of rule,
19 or not. They don't have a -- I don't think they have a
20 good idea what the solutions are. And that's all I have.

21 CHAIRMAN BABCOCK: To the extent the Court
22 wants input, Frank Gilstrap, would it be fair to say that
23 there is some level of interest in the Legislature and in
24 the Bar on the recusal rule, since we went over there
25 three or four times?

1 MR. GILSTRAP: I think that's right.

2 JUSTICE HECHT: Okay. And the presiding
3 judges met on the recusal rule at the judicial conference,
4 and they have some recommendations that when I get them
5 I'll send them to you, because they're not congruent to
6 this committee's recommendations.

7 HONORABLE DAVID PEEPLES: I have those right
8 now for you and for Chip.

9 JUSTICE HECHT: Okay.

10 CHAIRMAN BABCOCK: Great. Well, we'll keep
11 working on the never-ending recusal rule. I should have
12 started out by introducing the young lady to my right,
13 which is Debra Lee, who is my secretary now and is taking
14 over Carrie Gagnon's role as the person who takes all the
15 grief from everybody on this committee. So Debra is right
16 to my right, and she's been working very hard to
17 transition from Carrie, who left to move out of Houston
18 and has done a great job, and I know is going to do a
19 great job.

20 There is a sign-in sheet in the back, as is
21 customary, and in terms of scheduling, I don't think we're
22 going to get through all of this today, so I think there
23 will be a Saturday session, and I'd like to end at a
24 quarter of 5:00 today, if that's all right with everybody,
25 just for people's planning purposes. So with that, Elaine

1 and Judge Lawrence, we were in the middle of your FED rule
2 when we last met, and let's continue.

3 PROFESSOR CARLSON: Everyone should have,
4 and if you don't have there's extra copies over there, a
5 packet of information that is Bates stamped, so if you
6 don't have a copy that has a number one on the bottom, you
7 don't have a working copy. In addition there is -- we
8 have a second short handout that says "Handout for
9 Forcible Entry & Detainer."

10 All right. If everybody has their handouts,
11 I'd like to start by giving a little background
12 information. The last time we met we spent some time
13 looking at some -- the really pure procedural aspects of
14 changing the rules, primarily looking at service of FE&D
15 cases and a few other issues. Today I'd like to start by
16 presenting the problem that was presented to us through
17 the State Bar Rules Committee and the background for that
18 problem and some possible big picture solutions, and then
19 we have actually proposed rules, many proposed changes, to
20 almost all of the FED rules to try and tweak them and put
21 together a cohesive scheme.

22 As you know, FE&D cases are within the
23 jurisdiction of the justice courts, regardless of the
24 value of the property; and historically it's been an
25 action in which the only issue that can be litigated is

1 possession, the idea being that a landlord or a party
2 seeking forcible entry and detainer writ of possession
3 ought to be able to go in very quickly, expeditiously,
4 prove up their case, be able to get their writ or not; and
5 other issues that might throw out a landlord-tenant
6 relationship are the subject of separate litigation, so
7 the usual rules of trying everything together
8 transactionally-related simply don't apply in this area
9 for that reason.

10 The FE&D rules were modified, however, to
11 allow an action for back rent to be added to an FE&D
12 claim, so to that extent that issue can be joined and the
13 JP can adjudicate that up to a 5,000-dollar limit because
14 of the subject matter jurisdiction. FE&D cases are
15 supposed to be quick and simple. Most tenants, I believe,
16 represent themselves; is that correct, Judge?

17 HONORABLE TOM LAWRENCE: Substantial
18 percentage.

19 PROFESSOR CARLSON: Substantial percentage
20 represent themselves, but as you see on page three of the
21 handout, Footnote 1, we have a pretty complex scheme for
22 figuring out the applicable procedural rules and statutes
23 that apply. Potentially there are three sets of
24 procedural rules that are implicated in a forcible entry
25 and detainer case. One are -- one, of course, is our

1 regular Rules of Civil Procedure apply in JP court to the
2 extent that that's feasible. Secondly, we have
3 specialized rules that apply in JP court, 529 to 591, and
4 then we have an even finer hone on this. We have forcible
5 entry and detainer rules, 738 to 755. It's that latter
6 group of rules that fall within the authority of the
7 subcommittee and what we were charged with looking at.

8 In addition, the Legislature at Chapter 24
9 of the Texas Property Code has many statutory provisions
10 that affect forcible entry and detainer actions, to which
11 we need to be mindful when we're trying to put together a
12 cohesive scheme.

13 The problem that we were presented with
14 through the State Bar Rules Committee was the problem of
15 what should be required of a tenant when they seek to
16 appeal from the JP court level to county court level.
17 Currently -- and let me just back up there. Of course,
18 you know that that's a de novo trial from JP court to
19 county court, and then there is a second potential appeal
20 from the county court judgment in an FE&D case, if it's a
21 residential property, onto the court of appeals and
22 potentially the Texas Supreme Court.

23 The manner in which the -- the security,
24 I'll leave it that general, that must be put up by the
25 tenant at the JP level to the county court under our

1 current scheme is different than what is provided, really,
2 by the Legislature in Chapter 24 for superseding a
3 judgment and posting an appeal bond going from county
4 court to the court of appeals. Currently at the JP level
5 there is a requirement that an appeal bond be posted, and
6 the JP sets the amount of that appeal bond, but it
7 includes -- through what I understand from practice and
8 reading the rule broadly, that typically that's going to
9 include a requirement that the tenant, if they are the
10 unsuccessful party at the trial court, include in that
11 appeal bond the amount of any judgment, money judgment,
12 that's been interposed as well as attorneys fees, and then
13 there's a requirement to post rent as it becomes due. Is
14 that a fair statement?

15 HONORABLE TOM LAWRENCE: Only if there's a
16 pauper's affidavit.

17 PROFESSOR CARLSON: Only if there's a
18 pauper's affidavit.

19 HONORABLE TOM LAWRENCE: Otherwise the bond
20 would moot the potential rent.

21 PROFESSOR CARLSON: Okay. I'm sorry. I
22 misspoke. So if you are a non-indigent coming out of JP
23 currently you must put up the amount of the judgment,
24 attorneys fees, and rent.

25 HONORABLE TOM LAWRENCE: Rent for the

1 pendency of the appeal.

2 PROFESSOR CARLSON: For the pendency of the
3 appeal. If you're an indigent currently under the JP
4 rules, you can go in and prove up your indigency, in which
5 case you're required to post rent as it becomes due, but
6 you're excused from putting up the appeal bond.

7 The problem with that scheme is several
8 things. Our Supreme Court in construing the open courts
9 provision has held in Dillingham vs. Putnam and several
10 other related decisions that the open courts guarantee in
11 the Texas Constitution prohibits a requirement that a
12 party secure a judgment through a bond as a precondition
13 to appeal. The open courts provision, as you may know, is
14 a state constitutional guarantee. It is not part of our
15 Federal Constitution, and we have to look to our state
16 body of law to try and see how -- what the interpretation
17 should be on construing the rights. The jurisprudence in
18 this area is nowhere near developed, as you might guess,
19 as it would for a Federal constitutional guarantee. Not
20 all states use the open courts provision. We're one of 39
21 that do.

22 It emanates from the Magna Charta, and I
23 tried to track some of the history just to get an idea of
24 what are the restrictions potentialities of going forward
25 with a required supersedeas. It was part of the Magna

1 Charta at a time when the king's court required judges to
2 buy their judgeships, and the judges apparently would turn
3 around and require that you pay large filing fees and you
4 pay large sums of money to get any writ issued, including
5 something like a writ of possession for a tenant and in
6 other areas, and it's against that background that there
7 was to be a guaranteed access to the courts for all
8 people, and that guarantee has been construed by our
9 Supreme Court and other states that have it to allow
10 guaranteed access not only to a trial court, but you have
11 a guaranteed right to access an appellate court as well.

12 That is not to say that you get a free ride.
13 You do, however, under Dillingham vs. Putnam have the
14 right to proceed on appeal without having to post a
15 supersedeas bond to secure a money judgment with the
16 downside risk that if you don't put that up, if you don't
17 post a bond, you still get to proceed with the appeal.
18 Your right to appeal is protected by putting up a very
19 diminuous appeal bond to cover costs. But you still get
20 the right to appeal, but the downside risk is your
21 judgment, of course, might be superseded. It might be
22 enforced, and you may find that if that happens, and, for
23 example, in an FE&D case, the issues on possession,
24 according to intermediate courts, are mooted.

25 So as a tenant going now, currently, from

1 county court to court of appeals, you've got to put up an
2 appeal bond -- well, actually we don't even do that
3 anymore. You have to put up a supersedeas bond required
4 under the Property Code if you want to suspend enforcement
5 of an FE&D judgment against a tenant. If the tenant does
6 not do that, they proceed on appeal, but the landlord can
7 go get a writ of possession, moots the possession issue,
8 and only leaves the issue of money and any other claims
9 that are nonpossession claims.

10 At the JP court right now we are requiring
11 under our rules, which are suspect, or certainly
12 implicated, by the holdings in the open courts guarantee,
13 we are requiring a tenant who is not an indigent to post
14 in effect a supersedeas bond, but we call it an appeal
15 bond, and it's required. You know, the big difference
16 between an appeal bond and a supersedeas bond is the
17 appeal bond must be filed before you get access to the
18 court. That is in my view and our view of the committee,
19 our subcommittee, that is not proper. We are concerned
20 about the structure of the way a tenant proceeds from JP
21 court to county court on that issue.

22 Having said that, there is nothing that
23 allows an indigent to get a pass on a supersedeas bond.
24 An indigent or a nonindigent's right to appeal is
25 protected under our current scheme from county court to

1 courts of appeals because once you perfect the appeal you
2 go forward, regardless of whether the supersedeas has been
3 filed. You get your right to go forward on the court.
4 What you lose, however, is the right to suspend
5 enforcement of the judgment; and you risk, as I said
6 earlier, that the landlord will moot that issue. Now,
7 that does not moot the tenant's claims, independent claims
8 that the tenant might have for wrongful eviction or other
9 matters.

10 You know, like I was telling you before, res
11 judicata does not operate the same in this area of the law
12 because these proceedings are designed only to adjudicate
13 possession and now writs, if the landlord chooses to add
14 that on. So all other issues are still on the table, so
15 to speak, and the tenant may bring those claims
16 independently.

17 What our subcommittee was faced with from
18 the State Bar Court Rules Committee, their particular
19 concern that was expressed to us is that currently a
20 pauper can proceed from JP court to county court by filing
21 a pauper's affidavit and then they're required within five
22 days to put up one rental period's rent guaranteeing in
23 some cases because of those two time periods, ten
24 potential days of free rent; and the State Bar committee
25 was of the mind that we should condition perfection of an

1 appeal in an FE&D case upon the indigent paying rent up
2 front, rent -- one rental period's rent into the registry
3 of the justice court; and that failing to do so, a writ of
4 possession would issue.

5 That has some concerns for the subcommittee
6 for the issues we just discussed under the open courts
7 rule. Can you require someone -- or how much can you
8 require someone up front to bond a potential judgment or
9 obligation and if they don't do that, deny them access to
10 the court. That's not to say, however, that a tenant is
11 free and clear from the requirement of paying the rent as
12 the appeal or the FE&D case goes forward. There is no
13 constitutional right to live free while you proceed in an
14 FE&D case, but the subcommittee was mindful of the
15 concerns that were expressed by the State Bar committee
16 and the concerns a landlord would have in general of their
17 right to be paid rent while an appeal is being taken.

18 We looked at the State Bar Rules Committee
19 recommendation, and we looked as well at all of the FE&D
20 rules. Our committee is very fortunate this year to have
21 Judge Lawrence on it, who has been a JP, I believe, for 20
22 years? 19 years?

23 HONORABLE TOM LAWRENCE: 19 years.

24 PROFESSOR CARLSON: 19 years. So he brings
25 a wealth of practical experience to our committee, which

1 many of our committee members, we don't spend our time
2 doing forcible entry and detainer, yet this is such an
3 important area of the law for the people who are affected,
4 and Judge Lawrence expressed last time and I think -- what
5 percentage of the docket?

6 HONORABLE TOM LAWRENCE: It's substantial.
7 About 118,000 forcibles a year filed in Texas, so it's --
8 I mean, the percentage varies from court to court, but
9 it's pretty substantial timewise.

10 PROFESSOR CARLSON: And there's a bigger
11 issue that the State Bar Rules Committee and other
12 committees have struggled with and, quite frankly, we
13 struggled with as a subcommittee; and that is this is
14 supposed to be a simple, expeditious remedy that a tenant
15 could figure out how to do on their own per se; and, quite
16 frankly, before we even started, these rules were very,
17 very -- and they remain -- fairly complex. It's difficult
18 when you've got three potential areas of rules applying
19 and then you have legislative statutes to make it
20 simplistic.

21 So our -- we have many recommendations, but
22 our main recommendation on the problems with what the
23 tenant should be required to secure insofar as appealing
24 from JP court to county court is our subcommittee was of
25 the mind that we should have parallel provisions, that the

1 same type of requirements that exist for superseding a
2 judgment from the county court to the court of appeals
3 should exist at the JP court to the trial de novo through
4 the county court; and that provision, the county court
5 provisions for supersedeas, as I said before, are driven
6 by the Texas Property Code. The Legislature has provided
7 that, so we would be providing a parallel scheme for
8 superseding the judgment.

9 The tenant would not be under an obligation
10 to post a supersedeas in order to take the de novo appeal;
11 but they would risk, if they failed to do that to secure
12 any money judgment, mooting the issues of possession, as
13 we discussed earlier. The tenant would be required under
14 our subcommittee proposal to post an appeal bond that
15 covers the costs of court, which are fairly minimal.
16 Judge Lawrence I believe said that's normally under a
17 hundred dollars.

18 HONORABLE TOM LAWRENCE: Yeah. \$67.

19 PROFESSOR CARLSON: \$67. So Constitution,
20 that is permissible to require a party to secure the cost
21 as a precondition at the lower level to go on, but we
22 would leave supersedeas as an option for the tenant. We
23 also would require that the tenant pay rent into the
24 registry of the county court as it becomes due and that
25 the tenant risks -- if they fail to pay the rent or they

1 fail to post supersedeas to secure a judgment, they risk
2 the landlord being able to come in and obtain the writ of
3 possession while that de novo appeal is proceeding and
4 mooting that issue potentially.

5 As I discussed on -- after Bates stamped
6 page 7, it's an unnumbered page, says "7a" at the top,
7 implicit in this recommendation requiring the tenant to
8 supersede a judgment out of the trial court or the JP
9 court to the county court would be the abandonment of the
10 notion that perfection of a de novo appeal to the county
11 court operates to vacate the lower court's judgment. This
12 is a very strange area of law.

13 Footnote 1 talks about this line of cases
14 that say that once you take a de novo appeal from JP court
15 to county court, that JP court judgment is vacated or
16 annulled, so much to the extent, if you look at some of
17 the footnoted cases, if one party perfects the appeal,
18 perfects an appeal to the county court in a multiple party
19 case, that then vests jurisdiction in the county court and
20 the other parties to the underlying judgment cannot have
21 it enforced against them even though they did not appeal
22 to the county court, which seems very odd to me; and that
23 whole line of cases is strange.

24 I understand intellectually why you might
25 want to say, well, on a de novo appeal you vacate and the

1 other judgments are no fact, but for purposes of
2 enforcement that leaves things really wide open. If the
3 Court wants to continue with that approach then our
4 subcommittee original proposal would not be a logical
5 solution. If we are going to adhere to that concept that
6 a de novo appeal from JP court to county court annuls the
7 lower court judgment, there is nothing to supersede, nor
8 can we require an appeal bond to secure that judgment. So
9 if we went under the existing law as it now stands, the
10 solution might be to just say, well, it's a simple
11 expeditious proceeding. You go from JP court to county
12 court. That JP court judgment is vacated and annulled;
13 the tenant has got to put up rent as it becomes due.
14 That's a very easy solution. It just leaves the landlord
15 without any security for the first judgment, and maybe
16 that's okay. Maybe that's the way that we want to go. So
17 you did have a money judgment for back rent, but it's gone
18 now because we have a de novo appeal, so you need to go
19 get another one, and we will require the tenant to put up
20 rent as it becomes due.

21 A third option we didn't really explore but does come to
22 mind is to what extent can you require a person to
23 up-front money, and what I was thinking about in that
24 regard was our interim writs of garnishment, attachment,
25 and sequestration, that kind of idea that we do have

1 constitutionally permissible bases in which to require a
2 party to bond things when we think that there is a
3 potentiality for the defendant making themselves
4 judgment-proof, removing the property or the like. You
5 know, it could be that something like that could develop,
6 but to me that seems to be a legislative function and not
7 necessarily a function of this committee.

8 So I guess I would say at this point,
9 Mr. Chairman, we would kind of just like to hear the
10 conceptual feedback from the committee, the full
11 committee, on these issues, if there's a leaning one way
12 or the other; or the alternative would be to march through
13 our concrete proposals and deal with those first one at a
14 time.

15 CHAIRMAN BABCOCK: Anybody have any global
16 thoughts about this? Yeah, Steve.

17 MR. YELENOSKY: Well, I used to represent
18 tenants in Legal Services for some years, but it's been
19 many years since then, and the rules may have changed
20 since then, and my memory certainly has faded, but my
21 recollection was -- and this may still be true and Judge
22 Lawrence can certainly say. The time period for a
23 landlord to get into court to try an eviction case is what
24 now? I mean, if a landlord files a forcible, they get a
25 hearing in how long?

1 HONORABLE TOM LAWRENCE: It's supposed to be
2 six to ten days after it's served, so, you know, add some
3 service time to that, so you're looking at two weeks at
4 least.

5 MR. YELENOSKY: Right. Right. And if the
6 tenant loses at that hearing and doesn't do anything, the
7 writ of possession issues in, what, five days?

8 HONORABLE TOM LAWRENCE: After five days.

9 MR. YELENOSKY: Okay. So you have a total
10 of potentially eleven days, and the way I would look at
11 this is, I understand -- first of all, on the end of the
12 supersedeas being perhaps unconstitutional when required
13 of a person to appeal, that's one issue; and I think that
14 does need to be addressed; but on the indigent side of
15 things, you have somebody who -- now, granted, a landlord
16 is supposed to send notice of termination and there are
17 rules about that; but if a landlord files a forcible and
18 somebody with five days notice of trial doesn't know,
19 doesn't get their act together to demand or to assert a
20 defense based on prior notice, they may not have had any
21 notice. In a matter of six days they could be in court
22 with an order from the court saying, "You're out of your
23 house and if you want to stay, you owe three months prior
24 rent."

25 Now, to put that in perspective for those of

1 us of higher income, let's say you got a notice to be in
2 court next week in six days and you can't get a lawyer for
3 whatever reason and you're not a lawyer and you get a
4 judgment against you saying, "You're out of your house
5 unless you put \$12,000 up in the next five days. You can
6 appeal, and that's going to cost you \$700, but it's 12,000
7 to stay in." If you win your appeal later, you may get
8 possession back. I think that's a value judgment as to
9 whether we want to put people in that position or not.
10 The current rules don't put people in that position, and I
11 think it would be a major change to do that, and my
12 understanding of what is proposed would do that.

13 HONORABLE TOM LAWRENCE: Well, I don't know
14 about the \$12,000. I think that would be very unusual.
15 The typical appeal bond is probably between two and three
16 thousand dollars.

17 HON. F. SCOTT McCOWN: Well, no, he was
18 trying to show proportionality.

19 MR. YELENOSKY: Proportion for an individual
20 whose income by definition --

21 HONORABLE TOM LAWRENCE: Oh, okay. I'm
22 sorry. I misunderstood.

23 MR. YELENOSKY: -- would have to be indigent
24 in order for this to apply. I'm just trying to pick some
25 figure that we can grasp, because the real figures I don't

1 think any of us fathom what the amount of money -- \$2,000
2 to somebody whose income in a year is \$12,000 might as
3 well be a million.

4 HONORABLE TOM LAWRENCE: Well, the appeal
5 bond, though, could be minimal. It could be that the
6 plaintiff is not asking for back rent, just asking for
7 possession. It may be a non-rent breach of the lease, in
8 which case the appeal bond may be \$200. You're going to
9 have -- this should not be a total surprise to a tenant
10 because, presumably if it's a rent breach then the tenant
11 will have known that he didn't pay rent. There's got to
12 be a notice to vacate and a three-day wait after that to
13 filing a suit. There's a service time and then there's
14 the time to actually get it to court, which is supposed to
15 be six to ten days, so you're looking at a little more
16 time maybe than you think in order for the tenant to try
17 to hire a lawyer if he wants to.

18 MR. YELENOSKY: Well, that assumes -- well,
19 first of all, you're talking about the appeal bond being
20 low and I am not as concerned about the appeal bond as the
21 proposed supersedeas, because the proposed supersedeas
22 would be a function of the alleged back rent owed, and
23 there may be defenses to the alleged back rent owed that
24 aren't asserted because you've got six days to get to
25 trial, you aren't aware of your rights and educated well

1 enough to determine them in that amount of days and get a
2 lawyer. You may even have -- you may even have an
3 argument based on the Fair Housing Act. You're not going
4 to be able to get that together in six days.

5 Now, again, then you get to the question of
6 whether the amount of money to remain in possession should
7 be that alleged back amount of rent or if instead a person
8 should just be required to pay current rent pending
9 appeal, which is the current state of the law.

10 HONORABLE TOM LAWRENCE: Well, at the time
11 the supersedeas is set it's not going to be based on
12 what's alleged in the petition. It will be based on a
13 trial, the judgment rendered by the court after a trial,
14 after an evidentiary hearing and a full opportunity to
15 present defenses, but you're correct that the trial court
16 says that the judgment is for the plaintiff for
17 possession, \$3,000 back rent, then you base the
18 supersedeas on the amount of the judgment, and that's
19 correct, but it's not based on allegations. It would be
20 after trial and a full hearing.

21 MR. YELENOSKY: Well, and I guess my
22 argument is it's a trial and it's a full hearing six days
23 from when the tenant may first know. Now, you're right,
24 they're supposed to send notices and all that; but
25 assuming poor or no defense by the tenant, it could be six

1 days from the time that the tenant knows the landlord is
2 alleging this 'til they get in court; and proof in a
3 court, of course, depends on how well the allegations of
4 the landlord are defended.

5 HON. F. SCOTT McCOWN: Could I ask another
6 question on this back rent? Because what is the present
7 substantive property law about withholding rent? For
8 example, if I am a tenant and the plumbing completely
9 backs up and I'm living in sewage and I call my landlord
10 and the landlord does nothing and so I take my meager
11 resources to do what the landlord's legally obligated to
12 do, which is take care of the sewage problem, I now can't
13 pay my rent; but, of course, the landlord breached first;
14 and the landlord files an FED alleging a rent breach to
15 get me out.

16 If I lose the FED, for whatever reason, then
17 I'm going to lose possession unless I can pay the back
18 rent, but I can't pay the back rent because all the money
19 went to fix the sewage problem. Does the substantive law
20 allow the withholding of rent if there's been a --

21 HONORABLE TOM LAWRENCE: That's governed by
22 Chapter 92 of the Property Code, which is the "Landlord's
23 Duty to Repair"; and if it is a violation that is covered
24 by the Property Code, which is something that affects the
25 material health and safety of an ordinary tenant, and

1 specifically the situation you address is actually
2 specifically addressed and it would, the tenant has to
3 give the landlord notice of the problem and request to
4 repair; and if he doesn't, the landlord actually can
5 repair it himself and deduct that from the rent. So there
6 is some --

7 HONORABLE SARAH DUNCAN: You mean tenant.

8 HONORABLE TOM LAWRENCE: The tenant can.
9 I'm sorry.

10 HON. F. SCOTT McCOWN: Okay. So I guess
11 this is kind of a different take on the problem Steve's
12 raised, which is, is I lose and I'm ordered then to
13 vacate. If I want to take an appeal, I've got to come up
14 with the back rent, but my money went to repair the
15 problem, and I can't come up with the back rent, and so I
16 lose possession.

17 CHAIRMAN BABCOCK: Frank Gilstrap.

18 MR. GILSTRAP: Before we go much further
19 down that road, I'd kind of like to maybe get a fix on
20 where we're going with this discussion. Certainly the
21 whole law of eviction is something that could be examined
22 in depth. It involves the rights of little people,
23 including some little landlords, and you could easily go
24 in and blow the whole thing up and rewrite a better law,
25 but as Elaine says, this is an ancient area of the law.

1 Some of this stuff has developed over years. Many people
2 know how to do it already, and any change you make is
3 going to make a real change in a huge number of lawsuits
4 in JP court.

5 I think the approach the committee took was
6 not to try to rewrite the law, but basically to take the
7 existing law, including the existing language, and go
8 through and make some needed changes, such as the
9 requirement involving an appeal bond which apparently is
10 mandated by the Constitution. What are we going to do
11 with this? Are we going to first of all look at the old
12 review? Are we going to talk about the ins and outs? If
13 so, which ins and outs? My concern is we could be here on
14 this as long as we were on recusal. It's that complex.

15 CHAIRMAN BABCOCK: Ouch. We don't want to
16 do that. Well, that's a great point, and, frankly,
17 Stephen, I was going to ask you this question. Do you
18 agree with the subcommittee that the existing law with
19 respect to appeals from JP court to the county court de
20 novo needs to be fixed?

21 MR. YELENOSKY: Well, only with respect to
22 nonindigent appellants because that's the only thing
23 that's constitutionally compelled. Isn't that right,
24 Elaine?

25 PROFESSOR CARLSON: No -- No litigant can be

1 required to bond a judgment by supersedeas to appeal.

2 MR. YELENOSKY: Right, but I mean the only
3 change that is constitutionally compelled from the current
4 rules is one that would release -- because nonindigents
5 right now are required essentially to post a supersedeas,
6 would be required to separate out the requirement of an
7 appellate bond from the requirement of a supersedeas bond.
8 That's constitutionally compelled because the current
9 rules define the appellant's bond essentially to be a
10 supersedeas bond.

11 PROFESSOR CARLSON: Right.

12 MR. YELENOSKY: So the only constitutionally
13 compelled change is one that fixes what an appellant's
14 bond should be in amount and uncouples that from the back
15 rent and then says, "Well, if you're not indigent and you
16 want to retain possession, you have a choice of
17 supersedeas," as opposed to being compelled to have that
18 in your appellant's bond.

19 CHAIRMAN BABCOCK: But you agree that no
20 matter what the scope is, something needs to be fixed?

21 MR. YELENOSKY: Well, but I think it's very
22 important to say that part, because I understood -- I
23 agreed with Frank up to the point where maybe I
24 misunderstood you. At the end I thought you were saying
25 that everything proposed here is not substantive, because

1 to the extent that we're talking about a supersedeas that
2 would have to be posted by indigents, that's very
3 substantive and that does exactly what you were suggesting
4 earlier, which is overturns a whole body of law and
5 perhaps the basis, one of the bases, for supporting a very
6 rapid entry into the JP court.

7 So I would say if people agree with Frank
8 then we focus on the one constitutionally compelled change
9 here, which can be done without affecting the current
10 right of indigents to appeal merely by paying current
11 rent.

12 PROFESSOR CARLSON: Steve, you're correct.
13 Those are two distinct issues and then there's a myriad of
14 other problematic issues that exist as well, such as
15 there's case law right now saying Rule 245 applies when
16 you go to the county court, goes both ways.

17 MR. YELENOSKY: Right.

18 PROFESSOR CARLSON: And the setting of trial
19 -- these are supposed to be expedited proceedings and
20 there are intermediate court decisions saying "We need to
21 give 45 days notice of a trial." That's not very
22 expedited. And there's other cases saying, "Well, that's
23 modified to the extent it's feasible, and it's very
24 unclear." 7216. But there are other problems, and you're
25 right, those are the two central issues.

1 MR. YELENOSKY: And those are other problems
2 that yet you may very well be right need to be fixed
3 constitutionally, and we can focus on those. I think if
4 we do get to the issue for supersedeas for indigents we
5 are not only getting into the debate here, but as I told
6 Judge Lawrence before, quite frankly, if that were to be
7 changed by rule I think you would see tenant groups going
8 to the Legislature saying "Change one of two things.
9 Either make it so that when we're indigent we don't have
10 to pay a supersedeas that we can't pay to continue
11 possession, or rewrite the JP rules so that landlords
12 can't get in in six days and have a hearing before we're
13 prepared to have it heard," because the legislative
14 support for the JP system may be in part based on the
15 assumption that you get in quickly but the person is
16 not -- is held harmless if they decide they want to appeal
17 and take it to county court.

18 PROFESSOR CARLSON: Steve, currently to
19 appeal from county court to the court of appeals an
20 indigent has to post supersedeas.

21 MR. YELENOSKY: And I think that is a
22 different situation precisely for the reason I just said.
23 You can get into JP court so quickly. Rarely the tenant,
24 given the population of legal aid lawyers, have one. If
25 they are going to raise it to the level of county court,

1 go through a trial there, then I think it is different
2 when you go from the court of appeals -- or from the
3 county court to the court of appeals.

4 CHAIRMAN BABCOCK: Carl, do you want to
5 yield to Sarah?

6 HONORABLE SARAH DUNCAN: No, go ahead.

7 CHAIRMAN BABCOCK: Okay. Carl first.

8 MR. HAMILTON: I missed the last meeting,
9 and this may have been stated, but the way this all came
10 up was the Justice of the Peace Association came to our
11 committee and through a subcommittee we learned that there
12 was a lot of abuse of the rules by the tenants in that
13 they all had figured out how to manipulate the system so
14 that they cannot pay rent for at least ten days and
15 sometimes up to three months before they actually get
16 evicted, so this was the problem that we set about to fix.

17 I guess I agree with Elaine that certainly
18 the de novo trial would eliminate the necessity for
19 anything. So I think that really does need to be fixed,
20 but once we fix that, it seems to me that the fairest way
21 to do it is to have the parallel systems of an appeal,
22 which doesn't require anything except an appeal bond, and
23 then a supersedeas procedure whereby they at least have to
24 pay the rent in order to maintain possession of the
25 property. Now, the supersedeas bond to protect against a

1 money judgment I think as a practical matter -- you may
2 know more about this -- is that there are not many
3 landlords that really care about getting the money
4 judgment for the back rent because if they can't pay the
5 current rent they are not going to pay the back rent
6 either.

7 So it's mostly a matter of possession, and
8 most of the cases are forcible detainers without
9 necessarily suing for back rent, so that a procedure that
10 in unusual circumstances where you had a back rent
11 situation, the tenant is just going to have to come up
12 with either a pauper's affidavit or a bond to supersede
13 it. I don't see anything wrong with that. It may require
14 a little work to rewrite some of this, but I think that's
15 the way we ought to go.

16 CHAIRMAN BABCOCK: Justice Duncan, then
17 Steve.

18 HONORABLE SARAH DUNCAN: I may be too
19 theoretical about this and not practical. It's my nature.

20 HON. F. SCOTT McCOWN: Judicially noted.

21 CHAIRMAN BABCOCK: That's not true.

22 HONORABLE SARAH DUNCAN: But it does seem to
23 me -- and I think it's true historically -- that the
24 reason the law vacates a JP judgment upon appeal to the
25 county court is because the JP court is not a court of

1 record, and we're not willing to give a presumption of
2 correctness to a judgment emanating from a court that is
3 not of record.

4 I have long been concerned with the
5 Dillingham vs. Putnam problem in these rules, but I also
6 have a great concern with giving a presumption of
7 correctness to only one type of JP court judgment.

8 PROFESSOR CARLSON: And if I could just
9 follow up on that, Sarah, the case law is to the extent,
10 for example, that if a tenant appeals to the county court
11 and the JP court judgment is vacated and the tenant does
12 not proceed expeditiously and the FED is dismissed for
13 want of prosecution by the county court, you have no
14 judgment. There is no judgment to rebut. So it does --
15 the case law, you're right, currently is very clear that
16 there's a vacation, an annulment of the JP judgment, and
17 for the reasons you stated; but that may be the reason,
18 but it does have problems in putting forth the correct
19 procedures.

20 CHAIRMAN BABCOCK: Stephen and then Judge
21 McCown.

22 MR. YELENOSKY: Carl Hamilton and I also
23 spoke before this, and I can give anecdotal information
24 from the tenant's perspective and Carl and others can give
25 them from a landlord's perspective and the JP can give

1 probably both, but the point there is that when we start
2 talking about there's a problem because the landlord's
3 can't do this or that, we're really talking legislatively.
4 Now, whether or not this rule was written with in mind
5 some legislative end that we want to make it this way or
6 that way for landlords or tenants, to change it now
7 because we see a problem for landlords clearly is making a
8 kind of legislative decision.

9 Now, I don't know, but I think we try to
10 stay away from that. We talk all the time about how this
11 doesn't work because the plaintiff, the defendant, who
12 might be on one side or another in a particular situation,
13 is unconstitutionally disadvantaged or the rules aren't
14 fair between the two, but to say that we need to change a
15 rule because landlords are having to wait too long to get
16 possession -- which may or may not be true. I know there
17 are small landlords, but to have that debate here, really,
18 to me is a legislative debate, and it would require us to
19 ask whether clearly changing that would be more
20 advantageous to landlords, and clearly some people think
21 moving to be more advantageous to landlords would be fair,
22 but then we have to have a debate about whether the
23 current system is fair when you compare it to other
24 forcible entry and detainer systems around the country.

25 CHAIRMAN BABCOCK: Judge McCown.

1 HON. F. SCOTT McCOWN: Well, I mean, I agree
2 with Frank in what he -- in his approach, which is we need
3 to fix any procedural problems but not change the law, but
4 my understanding is that requiring the back rent to
5 supersede is a change, that that's not what we're doing
6 now, and that's what's being proposed.

7 MR. YELENOSKY: For indigents.

8 HON. F. SCOTT McCOWN: For indigents, and I
9 have a real problem with that. You know, Carl just said
10 these suits aren't about -- usually about back rent
11 because the landlord doesn't care; but if you change the
12 procedural rule, they would quickly become about back rent
13 because the landlord would want to set a supersedeas
14 amount so high that the tenant couldn't meet it and the
15 landlord would get possession; and I don't want to sign
16 off onto the philosophy that Steve just said, which is
17 that we shouldn't make legislative decisions through these
18 rules because sometimes I think we should and in the
19 future may want to; but if we're going to look at policy,
20 we ought to look at it in a systematic, sophisticated way.
21 We should go out and study the relationship between
22 tenants and landlords and who's getting ripped off
23 economically or who needs what.

24 We shouldn't make it based on anecdotal
25 evidence, and my guess is that we're better off in a

1 system overall where landlords get possession a little
2 more slowly than in a system where tenants are booted a
3 little more quickly. That would be my guess about what we
4 would find if we studied it. So, I mean, I don't know
5 where that leads us, but I agree with Frank we ought to
6 just fix the procedural parts and shouldn't make
7 substantive changes.

8 CHAIRMAN BABCOCK: Judge Lawrence.

9 HONORABLE TOM LAWRENCE: Well, the
10 subcommittee probably spent more time on this issue than
11 any other issue. We had a lot of discussion. I spent a
12 lot of time talking to plaintiff's lawyers and defense --
13 indigent defense Bar trying to come up with something. We
14 looked at the existing case law, the statutes that govern
15 appeals from other ways, and this is what we felt at the
16 time was the best way to do it.

17 Now, is there another way? Yes, obviously,
18 but the issue of whether or not you give an indigent --
19 allow an affidavit of indigence to suffice for the
20 supersedeas as well as the appeal bond itself is just one
21 issue of a lot of things here, most of which does not have
22 anything to do with that. We've got a lot of procedural
23 issues that don't involve that particular thing that I
24 think we can talk about and maybe get some agreement on.
25 And this one we certainly need to talk about, but it's

1 only one part of a lot of changes.

2 CHAIRMAN BABCOCK: Yeah, Carl.

3 MR. HAMILTON: Can we fix the trial de novo
4 problem by just saying that it's a trial de novo in the
5 sense that we're going to hear everything again because,
6 as Sarah says, it's not a court of record, but that the
7 judgment below is not void? Can we do that by rule?

8 HONORABLE TOM LAWRENCE: We have in the
9 proposed changes a fix to that and a lot of other problems
10 we haven't even gotten into. I think the proposed rules
11 dovetail together. The rules can be written in a way
12 either to solve the problem raised by the indigent appeal
13 on supersedeas, one way or the other, and not change a lot
14 of the other things, but that issue is addressed in
15 actually Rule 748a in the proposal.

16 This was not the only issue. We looked at
17 all of the problems. We have got a lot of problems with
18 the rules, and we looked at all of them to try to figure
19 out how best to handle them at the JP court level through
20 the appeal to county court and then the trial at the
21 county court. I mean, this is a pretty substantive change
22 in the procedural rules that we think is going to make
23 everything run a lot smoother.

24 I guess I'd rather just start with Rule 748,
25 which is where we left off last time, and work through it;

1 and when we get to Rule 750, which is the supersedeas, we
2 can talk about that or just skip over it and save
3 that 'til later; but I think you'll see as we get into it
4 how everything kind of fits together.

5 CHAIRMAN BABCOCK: Okay. Yeah, I think the
6 line between substance and procedure is often a very murky
7 and fuzzy one, but my sense is that our charge is to not
8 cross that line into substance as a general proposition
9 but rather to stick with the administration of justice and
10 procedure; and certainly if we spot in a rule that there
11 is a problem with the constitutionality of the rule that
12 we should fix it without regard to much of anything else;
13 but having said all that, the rules are what they are.
14 They are Rules of Procedure, and we are charged by the
15 Court with studying and recommending to the Court what
16 changes to the Rules of Procedure there should be.

17 I agree with Steve, however, and Frank that
18 we don't need to and are ill-equipped to start getting
19 into legislative-type activity where we're choosing one
20 interest group, the tenants, over another interest group,
21 the landlords. So if that is a fair summary of where we
22 are in terms of the substance versus procedure, I think it
23 would be appropriate now to go to Rule 748a.

24 HONORABLE TOM LAWRENCE: 748.

25 CHAIRMAN BABCOCK: 748, and start talking

1 about it. Anyone disagree with that?

2 MR. CHAPMAN: I just have a question.

3 CHAIRMAN BABCOCK: You don't disagree,
4 though?

5 MR. CHAPMAN: Don't disagree, though.

6 CHAIRMAN BABCOCK: Then you may speak.

7 MR. CHAPMAN: Thank you. I guess it's a
8 point of order. Elaine, is the bottom line that the
9 subcommittee has recommended the parallel procedure? Is
10 that what is --

11 PROFESSOR CARLSON: Yes.

12 MR. CHAPMAN: -- implicit in these proposed
13 changes?

14 PROFESSOR CARLSON: Yes, and we really did
15 not feel like we were in the legislative encroachment. In
16 fact, the procedure that we're paralleling are the
17 legislative procedures from county court to court of
18 appeals. But Steve makes a valid argument that there may
19 or may not be reason to do that. That's something that I
20 think is a procedural issue.

21 CHAIRMAN BABCOCK: Okay. With that noted,
22 let's go forward.

23 HONORABLE TOM LAWRENCE: Okay. If you look
24 on the Bates stamped version, page 8 through page 14 is an
25 index of the rule changes that talks about what was

1 changed, what was deleted. It sort of helps you follow
2 the discussion, and some cases we took portions in one
3 rule and put into a different rule. Some cases we
4 amended, changed the substance of the rule, but for the
5 purposes of this we're going to start on page 22.

6 Everything that is underlined represents an addition.

7 Everything that is struck through represents a deletion.

8 There are notes and comments. If the notes
9 and comments have been underlined then the proposal is
10 that that actually be put into the rule as a comment.
11 Some cases I've got a comment for the committee or comment
12 to the committee. That's not to go into the rule. That's
13 just to try to help understand what we have done and why.

14 Rule 748 as it currently exists is fairly
15 small. It talks about what the judgment is, and there's
16 not much to it in the current rule, but in order to make
17 the process work to figure out how much rent is to be paid
18 to the registry of the court during an appeal, figure out
19 how to set the supersedeas, to figure out what to set the
20 appeal bond at, we feel like we need to expand somewhat
21 Rule 748; and what we're going to do or what we propose to
22 do is we're specifying what the judgment may include as
23 far as the judgment for the plaintiff, what can be awarded
24 to the plaintiff or what can be awarded to the defendant.
25 An overview is that that would have to be reduced to a

1 finding of fact and put in a written judgment; and that
2 written judgment would specify how much rent is awarded,
3 the date through which the rent is awarded; and that
4 becomes important to try to figure out how much rent and
5 when rent should be paid into the registry of the court.

6 Currently there is a requirement that if
7 there is an affidavit of indigence and appeal from that
8 that says rent be paid into the registry. Well, the
9 difficulty is that the judgment may include rent through a
10 certain date, and that's not currently reflected in a
11 judgment, so we feel it's important to put the date on
12 which the rent is rendered or on which the rent is granted
13 so it's obvious that you're not going to charge the
14 defendant twice, in other words. You're not going to
15 assess a judgment for rent through the end of the month of
16 September and then require rent be paid to the registry of
17 the court within five days after the appeal and,
18 therefore, he has to pay it twice. So that's why we feel
19 like we need to specify on the judgment what rent is
20 awarded and when the rent is through and also the date the
21 rent is due because that becomes important in county court
22 when you try to figure out, well, when is the rent
23 supposed to be paid into the registry of the court? Well,
24 it should be paid when due, and that needs to all be based
25 on the judgment that's originally rendered by the trial

1 court, the JP court.

2 Now, I don't know if you want to go through
3 this line by line. In the first paragraph we're making it
4 clear that a justice may give judgment for -- obviously
5 for the possession -- we're not changing that -- but also
6 for back rent, contractual late charges, and attorneys
7 fees, if sought and established by proof, provided that
8 it's within the jurisdiction of court. Our 5,000-dollar
9 jurisdictional limit includes attorneys fees, so it's
10 everything other than court costs.

11 Now, if a defendant prevails then the
12 defendant may be awarded possession obviously, attorneys
13 fees as authorized and established by proof and provided
14 it's within the jurisdiction of the court. If the
15 judgment is for possession, the judgment shall issue a
16 writ of possession for the plaintiff, and we're not
17 changing the five days.

18 When we get into subparagraph (a), we're
19 talking about the -- that the judgment itself must be in
20 writing in a separate document, contain the full names of
21 the parties as per the pleadings, state for and against
22 whom the judgment is rendered. The judgment forms now,
23 actually, you don't actually have to have a judgment form
24 now. You can write it in the docket book, and that's
25 permissible; and then, of course, if it's appealed, you

1 make a copy of that docket book and send it up. We're
2 trying to refine this so it's clear exactly what the
3 judgment is, because that's going to be more important.

4 CHAIRMAN BABCOCK: Can I stop you for two
5 seconds? Is the jurisdictional limits of the JP courts
6 statewide, uniform statewide? In other words there are no
7 counties where the JP court has a larger jurisdictional
8 limit?

9 HONORABLE TOM LAWRENCE: There used to be a
10 distinction, but not anymore. It's 5,000 for forcibles.
11 There is no jurisdictional limit for deed restrictions,
12 but for forcibles it's 5,000 statewide.

13 CHAIRMAN BABCOCK: Thanks.

14 HONORABLE TOM LAWRENCE: And everything else
15 is 5,000.

16 "(b), a forcible entry and detainer judgment
17 shall contain findings of fact." And then we specify --
18 and this becomes important for the purposes of determining
19 the supersedeas and for determining -- and we're going to
20 have a supersedeas, presumably, if the defendant is not
21 indigent. That's not probably something that's going to
22 be that controversial I would assume, so whether or not
23 the indigent defendant is going to be relieved of the
24 supersedeas, then if there's going to be a supersedeas to
25 be posted to secure the judgment then you would need the

1 information in (b) to determine that as well as for the
2 county court to rely on. We're trying to determine how
3 much rent is to be paid into the registry and when that is
4 due.

5 Now, (c), not all cases of forcible detainer
6 are going to be under rental agreement, either written
7 lease agreement or oral rental agreement. You have a lot
8 of cases that are because there was an original -- maybe
9 there's been a mortgage foreclosure and there's been a
10 holdover after that. There's been a termination of
11 executory contract. So there may not be an independent
12 obligation to pay rent. Well, you still have an interest
13 by the landlord that he's having to pay the mortgage or
14 having to expend funds that his interests need to be
15 protected just as if there was an agreement to pay rent,
16 so there's a determination in these cases that you
17 determine the fair rental market value and assess that,
18 and that will be the amount to be paid into the registry
19 of the court during the pendency of the appeal.

20 The notes and -- I'm sorry, yeah, the notes
21 and comments at the bottom were clarifying there -- in
22 essence, we're clarifying exactly what the judgment can be
23 for, as far as a judgment for the plaintiff or a judgment
24 for the defendant. We're explaining that recovery under
25 any other grounds than specified is not to be allowed,

1 because sometimes people want to come in and they file a
2 petition and they want damages for holes in the sheetrock
3 or they want some other ground of recovery, and we're
4 making that clear that's not to be included in here.

5 There actually are -- and also that there is no -- I'm
6 sure we put in here not that there was a counterclaim.

7 MR. CHAPMAN: Yeah, it's there.

8 HONORABLE TOM LAWRENCE: In the comment
9 there's no counterclaim. There's actually some case law
10 about that in a county court case that the court ruled
11 that really it's not appropriate to have a counterclaim
12 and we're specifying that because sometimes defendants
13 want to file a counterclaim; and if you get into
14 counterclaims or other matters of recovery then you
15 lengthen the process, and it's designed to be a rapid
16 process.

17 They're actually in -- if you look at the
18 standard Texas Apartment Association lease agreement,
19 which is probably used in a substantial percentage of
20 nonpayment rent cases -- most of the large landlords use
21 it -- there actually are 18 different paragraphs in the
22 Property Code where a tenant can independently sue a
23 landlord. There are 13 different provisions in the
24 Property Code where a landlord can sue a tenant. Just
25 because we limit the grounds of recovering a forcible does

1 not preclude them from filing it. They can always file a
2 separate lawsuit for these other independent grounds, but
3 I think the focus has always been to limit the grounds of
4 recovery to just those things set forth.

5 MR. YELENOSKY: Can I ask a question?

6 CHAIRMAN BABCOCK: Yeah, Steve.

7 MR. YELENOSKY: Some of those grounds --
8 just to point out because this later will become relevant
9 to the other issue if we talk about it, some of the
10 grounds the tenant can bring actually relate to the issue
11 of possession, that a tenant could bring in another
12 lawsuit.

13 HONORABLE TOM LAWRENCE: Doesn't mean that
14 they can't use that as a defense in the forcible. It just
15 means that an independent ground to try to get monetary
16 damages would not be appropriate in this particular
17 action. They can certainly sue for monetary damages in a
18 separate lawsuit. Whatever defense comes up, obviously,
19 they could use.

20 CHAIRMAN BABCOCK: Ralph.

21 MR. DUGGINS: How does that deal with
22 Scott's situation? I mean --

23 HONORABLE TOM LAWRENCE: Where the sewage
24 was in the apartment?

25 MR. DUGGINS: Where the tenant has been

1 forced to expend the money that he or she would otherwise
2 have spent for rent.

3 HONORABLE TOM LAWRENCE: Well, the tenant
4 would give testimony in court that they gave the notice
5 and the landlord refused to do it; therefore, they
6 repaired it themselves, deducted it from the rent; and
7 that would be a defense to the nonpayment of rent, at
8 least for those repairs during that period of time; and if
9 the landlord sued for the full amount of the rent and
10 didn't give them credit, then that should be a judgment
11 for tenant for possession. That would be a valid defense.

12 MR. CHAPMAN: Well, as a practical matter,
13 you've got in many instances a tenant who is pro se, has
14 scribbled out on a piece of paper that "I didn't pay rent
15 because the plumbing didn't work and I had to pay for it
16 myself. I spent \$67." Under these changes and this
17 comment, will the JP court judge throw out that, what
18 could be considered a counterclaim, and say, "I am not
19 going to hear it. It's not appropriate"?

20 HONORABLE TOM LAWRENCE: Well, it would not
21 be heard as a counterclaim now, nor would it be heard
22 under the proposed revisions. There is not a counterclaim
23 per se in a forcible detainer action.

24 Now, the Legislature in Chapter 22 of the
25 Property Code has set forth very specific guidelines on

1 when the defendant can repair stuff, when the defendant
2 cannot pay the rent for some reason, and that's not going
3 to change. Nothing in the rules that we're proposing
4 today is going to affect what the Legislature has done as
5 far as defenses to an eviction in the Property Code.

6 HON. F. SCOTT McCOWN: Could I make a
7 proposal? Since you're proposing to have an official
8 comment, where it says "The rule also" -- "The rules also
9 allow a defendant who prevails to recover any costs and
10 attorney fees to which they are entitled, but a defendant
11 may not file a counterclaim," could I propose that after
12 "counterclaim" you put a comma and say something like --
13 these may not be the words you want to use, but say
14 something like "though the facts supporting a counterclaim
15 may support an affirmative defense if they relate to
16 possession"?

17 HONORABLE TOM LAWRENCE: Okay. I don't --
18 that would be fine with me.

19 HON. F. SCOTT McCOWN: I just think if we're
20 going to have an official comment saying to people there
21 can't be counterclaims, we can clarify in that same
22 official comment that there might be an affirmative
23 defense if it relates to possession, that those facts
24 might support that affirmative defense.

25 HONORABLE TOM LAWRENCE: That's fine.

1 HONORABLE HARVEY BROWN: Let's break it down
2 to two sentences, though.

3 HON. F. SCOTT McCOWN: All right.

4 HONORABLE TOM LAWRENCE: Okay. Well, I
5 understand what he wants to do. I can work on that.

6 CHAIRMAN BABCOCK: Anybody opposed to that,
7 to that friendly amendment? Any comment? Okay.

8 HONORABLE TOM LAWRENCE: In the handout, the
9 small handout you have, 748a is the second page of that,
10 and probably we really need to have that as 748(d) and not
11 have an a.

12 CHAIRMAN BABCOCK: What you're proposing is
13 taking Rule 748 and adding a new subsection, (d) --

14 HONORABLE TOM LAWRENCE: Yeah.

15 CHAIRMAN BABCOCK: -- and moving the
16 language that you have in your proposed Rule 748 small a.

17 HONORABLE TOM LAWRENCE: Yeah.

18 CHAIRMAN BABCOCK: Right, without
19 parentheses?

20 HONORABLE TOM LAWRENCE: I think it makes
21 more sense to put everything relating to the judgment in
22 one rule instead of having an a.

23 CHAIRMAN BABCOCK: Anybody disagree with
24 that? It makes sense to me.

25 HONORABLE TOM LAWRENCE: Here's where we get

1 into a particular troublesome problem, which is --

2 CHAIRMAN BABCOCK: Just so we identify for
3 the record, this is a handout for forcible entry and
4 detainer agenda items which was handed out today, and on
5 the second page of this handout there is a proposed rule
6 748 small a, "Judgment of the justice court upon appeal,"
7 and we now have proposed taking that language and moving
8 it to create a new subsection, small (d), to Rule 748,
9 which is on Bates page 22 and 23 of the June handout,
10 correct?

11 HONORABLE TOM LAWRENCE: Yes.

12 HONORABLE HARVEY BROWN: Before we do that,
13 can I ask a quick question?

14 CHAIRMAN BABCOCK: Yeah, Judge Brown.

15 HONORABLE HARVEY BROWN: On the attorneys
16 fees issue for the tenant, do they have to file something
17 requesting that? In other words, do they have to have a
18 prayer or can they just -- can their answer that says, you
19 know, "I don't think I owe the money" be enough that they
20 can get attorneys fees?

21 HONORABLE TOM LAWRENCE: There are two ways
22 that a tenant can get attorneys fees. One way is if there
23 is a written lease agreement that says the prevailing
24 party is entitled to attorneys fees. So they wouldn't
25 have to do anything.

1 HONORABLE HARVEY BROWN: They don't have to
2 put it in their pleading, in other words.

3 HONORABLE TOM LAWRENCE: No, and the other
4 way that they can get attorneys fees is Property Code,
5 Section 24.006, and that says that if the landlord has a
6 specific pleading for attorneys fees separate and apart
7 from the lease agreement and the tenant wins, the tenant
8 can get attorneys fees. So the tenant does not have to do
9 anything to get attorneys fees if they prevail so long as
10 one of these two scenarios is in effect.

11 HONORABLE HARVEY BROWN: Thank you. Sorry.

12 HONORABLE TOM LAWRENCE: Now, 748(d) is
13 designed as much as possible to try to solve a problem
14 that has existed for a number of years, and it affects the
15 appeal and the status of a judgment of the JP court if
16 it's appealed to county court, as Elaine got into.

17 If you -- under our current rule it talks
18 about a judgment being perfected when you post the appeal
19 bond and then some case law says that if the judgment is
20 perfected then the judgment in justice court is annulled
21 or vacated or --

22 MR. EDWARDS: You're talking about the
23 appeal being perfected, not the judgment.

24 HONORABLE TOM LAWRENCE: The appeal being
25 perfected, and from JP to county court. There is another

1 hurdle, though, and that's Rule 143a, which is that the
2 county clerk -- it says that a filing fee be paid, and
3 that's in the rules. So if the filing fee is not paid
4 then the county court never has jurisdiction, so the
5 judgment that is perfected from the JP court is sort of in
6 limbo until the judgment -- until the court costs are paid
7 in county court, and then when the county court judge
8 invokes jurisdiction and takes jurisdiction, at that point
9 the judgment in JP court is a nullity or is vacated.

10 Now, if the judgment at county court, if the
11 case at county court, if they decide to dismiss that case
12 for want of prosecution or some other reason then it's all
13 over and the plaintiff no longer has to have a judgment.
14 The plaintiff has to go back to JP court and start over
15 again and file a new lawsuit because the judgment was
16 originally vacated in the JP court, and there are a lot of
17 things that affect that. There is quite a bit of case law
18 that talks about it. The case law is confusing, sometimes
19 contradictory; but we're trying to fix that problem here;
20 and what we propose, "If the judgment of the justice court
21 is not appealed then it remains in force and the
22 prevailing party may enforce their rights under the
23 judgment of the justice court." That's the easiest
24 scenario, no appeal. Judgment is final, and it goes into
25 effect.

1 If the appeal of the judgment of the justice
2 court is perfected, but the county court's jurisdiction is
3 not invoked then the judgment of the justice court remains
4 in force, and the prevailing party may enforce their
5 rights under the judgment of the justice court. So if the
6 appeal bond is posted and everything looks right from the
7 JP level and they send it up to the county court, the
8 county court doesn't take jurisdiction, then that means
9 that the justice court -- it's clear, even though there's
10 case law that sort of says that, it's now clear that that
11 original judgment is in effect and may be enforced.

12 CHAIRMAN BABCOCK: How would that happen
13 that the county court doesn't take jurisdiction?

14 HONORABLE TOM LAWRENCE: They don't pay the
15 court costs. They don't pay the court costs at the county
16 court, right, Andy?

17 MR. HARWELL: That's right.

18 MR. YELENOSKY: Or file an affidavit.

19 HONORABLE TOM LAWRENCE: Or file --

20 CHAIRMAN BABCOCK: Sarah's amused by this.
21 Sarah's amused by this.

22 HONORABLE SARAH DUNCAN: Well, I'm a little
23 frustrated. We have -- it's now getting close to a decade
24 of Supreme Court case law on not paying filing fees
25 exactly when they're due, and we're going to create a

1 whole different set of rules for these kinds of cases, and
2 I'm frustrated.

3 HONORABLE TOM LAWRENCE: I don't know that
4 we're creating a new set of rules. I think we're trying
5 to refine what is really existing case law for the most
6 part.

7 HONORABLE SARAH DUNCAN: That's not my
8 understanding of what the Supreme Court says, and if
9 Dorsaneo were here he could tell us exactly the cases, or
10 maybe Pam can or Elaine, but the Supreme Court has been
11 quite liberal on not paying the filing fee precisely when
12 it's due and there being conditional jurisdiction until
13 that fee is paid.

14 HONORABLE TOM LAWRENCE: On all of the cases
15 that I've read -- and I have got a number of them here
16 that deal with appeals from the justice court to county
17 court, both forcibles and nonforcibles -- if the
18 jurisdiction is not invoked, and nonpayment of the filing
19 fee is one of those, we are not talking about paying it
20 late. We're talking about it not being paid, period.
21 They have always kicked them back and not invoked
22 jurisdiction and said that the judgment of the JP court
23 should be enforced. I mean, I don't think I'm changing
24 anything.

25 CHAIRMAN BABCOCK: Yeah, Andy, how does that

1 work?

2 MR. HARWELL: Well, whenever the case is
3 appealed they have to pay the filing fee before the county
4 court will come in. Now, the pauper affidavit, if the
5 pauper affidavit is filed then our county court judge --
6 we have two county court-at-law judges. They say that the
7 pauper's affidavit has to be approved at the county court
8 level. In other words, it doesn't -- it's not approved
9 automatically, but the court costs still have to be paid
10 up front.

11 CHAIRMAN BABCOCK: Okay. Let's say that on
12 the day that they're due they're not paid. What happens
13 then? I mean, does the county court say, "Okay, fini,
14 it's over. See you."

15 MR. HARWELL: That's correct.

16 HONORABLE TOM LAWRENCE: They send it back
17 to the JP court.

18 CHAIRMAN BABCOCK: Send it back to the JP
19 court. Well, what if there's a motion, petition, or
20 something to say, "Okay, I missed the date, sorry, but now
21 it's five or ten days later. Here's the filing fee. Now
22 will you take my case"? What happens then?

23 MR. HARWELL: It's up to the judge. I mean,
24 the judge will have to order --

25 HON. F. SCOTT McCOWN: But can I ask a more

1 fundamental question, because --

2 CHAIRMAN BABCOCK: Okay.

3 HON. F. SCOTT McCOWN: In our county I don't
4 think the clerk would let you get your paperwork across
5 the threshold. They would not take it without a check or
6 an affidavit of indigency.

7 MR. HARWELL: That's correct.

8 HON. F. SCOTT McCOWN: Would you-all do
9 that, Bonnie?

10 MS. WOLBRUECK: As far as the filing of the
11 case, we would accept the filing.

12 HON. F. SCOTT McCOWN: You would?

13 MS. WOLBRUECK: No issuance or anything on
14 the document.

15 HON. F. SCOTT McCOWN: I don't think our
16 clerk would.

17 HONORABLE TOM LAWRENCE: But the way it
18 works, if you send the JP -- if they post the appeal bond,
19 the JP sends it up to county court, and under Rule 143a --
20 correct me if I'm wrong -- they have got 20 days to pay.

21 MR. EDWARDS: Well, what 143a says is, "If
22 the appellant fails to pay the costs on appeal from the
23 judgment of the justice of the peace or small claims court
24 within 20 days after being notified to do so by the county
25 clerk, the appeal shall be deemed not perfected and the

1 county clerk shall return all papers in said cause to the
2 justice of the peace having original jurisdiction, and the
3 justice of the peace shall proceed as though no appeal had
4 been attempted."

5 HONORABLE SARAH DUNCAN: Isn't that -- if
6 I'm hearing you correctly, Bill, that's the justice court
7 fees and costs.

8 HON. F. SCOTT McCOWN: No, that's the county
9 court.

10 MR. EDWARDS: That's county court.

11 HONORABLE SARAH DUNCAN: That's the filing
12 fee for your appeal.

13 MR. EDWARDS: It says "costs on appeal to
14 the county court," Rule 143a, "costs on appeal."

15 HONORABLE TOM LAWRENCE: We're going to fix
16 this problem with the costs on appeal a little bit later.
17 We're going to get to that. I'm just trying to --

18 MR. EDWARDS: But that's what it says now.

19 HONORABLE TOM LAWRENCE: Yeah. We're going
20 to fix this problem in a second, but I'm trying to go
21 through the status of the judgment, which is at this point
22 not different than existing case law, but I'm trying to
23 clarify it because the case law is sort of all over the
24 place a little bit. I think it is going to make it easier
25 to understand.

1 CHAIRMAN BABCOCK: Well, let's satisfy
2 Sarah's problem, though, with this. Is there case law,
3 Sarah, that you think under this Rule 143a says, "Okay, it
4 says 20 days, but we're kind of liberal guys, and we'll
5 let you do it in 30"?

6 HONORABLE SARAH DUNCAN: I am not talking
7 about 143a, and I am not talking about FED case law. I'm
8 just talking about --

9 CHAIRMAN BABCOCK: Just generally.

10 HONORABLE SARAH DUNCAN: I'm talking about
11 appeals from district courts to courts of appeals, and it
12 is the notice of appeal that invokes the jurisdiction of
13 the court of appeals, not the paying of the fee, and I am
14 not in favor of creating a different rule.

15 CHAIRMAN BABCOCK: Do you think a different
16 rule exists now, from --

17 HONORABLE SARAH DUNCAN: 143a --

18 CHAIRMAN BABCOCK: From JP to county court.

19 HONORABLE SARAH DUNCAN: And I don't know if
20 it's interpreted as it's written, but there appears to be
21 a 20-day --

22 HONORABLE TOM LAWRENCE: There's a different
23 rule for JP. There is.

24 CHAIRMAN BABCOCK: Okay. But what Judge
25 Lawrence is saying is there is a different rule, and so

1 jurisdiction is not invoked if within 20 days of getting
2 notified you don't pay your fee.

3 HON. F. SCOTT McCOWN: Well, is it accurate
4 to say jurisdiction is not invoked, or is it more accurate
5 to say jurisdiction is not retained? You get -- the case
6 goes up. It gets filed. You get notice of what's owed.
7 You've got 20 days to pay it. If you don't pay it in 20
8 days then it goes back to the JP and they act as if no
9 appeal were perfected.

10 CHAIRMAN BABCOCK: So if you said
11 "jurisdiction is not invoked or retained," not invoked
12 would be in those counties that where like you say --

13 HON. F. SCOTT McCOWN: Well, but I'm not
14 sure that's -- I was thinking of a case in the district
15 court. It seems like this is its own procedure that
16 you're going up from the JP to the county. They have a
17 specific rule about it.

18 CHAIRMAN BABCOCK: As Bonnie says, that they
19 will take it --

20 HON. F. SCOTT McCOWN: Yeah.

21 CHAIRMAN BABCOCK: -- but they will hold it
22 until the fees get paid, and, Andy, what do you do?

23 MR. HARWELL: We have a notice of appeal,
24 and I guess that's the 20-day period where the parties are
25 notified, and if the fees are not paid then it goes back

1 to JP court.

2 CHAIRMAN BABCOCK: Would this be fixed if it
3 said "is not retained," Judge McCown?

4 HON. F. SCOTT McCOWN: Well, I'm --

5 MR. YELENOSKY: I have a different
6 suggestion.

7 CHAIRMAN BABCOCK: Yeah, Steve.

8 MR. YELENOSKY: 143a is a different rule,
9 but it's just a different rule. There's nothing that
10 would prevent us from proposing a change to Rule 143a.

11 HONORABLE TOM LAWRENCE: We have a change to
12 143a in this. I

13 MR. YELENOSKY: Okay. And I haven't seen
14 that or looked ahead to it; but if what we're talking
15 about now is governed by the existing 143a, maybe this
16 would affect people in a way I don't want them to be
17 affected; but with respect to indigents, it always had
18 seemed to me silly that you had to file an affidavit of
19 inability in the JP court and then turn around and file
20 one in the county court in the very same action. So I
21 don't know why we need the two-step process.

22 CHAIRMAN BABCOCK: You might have come into
23 some money in the interim.

24 MR. YELENOSKY: Well, that's right, but
25 perhaps -- that's true, but 20 days?

1 HONORABLE TOM LAWRENCE: If the affidavit of
2 indigence or pauper's affidavit is granted in the JP court
3 for an appeal to county court, you don't have to file a
4 new one in county court.

5 MR. YELENOSKY: Well, it used to be, I
6 think, that you did.

7 MR. HARWELL: Our two county courts-at-law
8 require that it be refiled.

9 MR. YELENOSKY: See.

10 MR. HARWELL: They said because the judge's
11 ruling at the JP level doesn't necessarily mean that that
12 ruling will be upheld at the county court level.

13 HONORABLE TOM LAWRENCE: I think our changes
14 to Rule 749 is going to correct that problem.

15 PROFESSOR CARLSON: But I guess the big
16 picture, though, is it the sense of the committee that you
17 don't want to have perfection of an appeal by filing fees?
18 Sarah's saying like --

19 HON. F. SCOTT McCOWN: No.

20 PROFESSOR CARLSON: -- by notice of appeal.

21 HON. F. SCOTT McCOWN: I don't see any
22 reason to change it. We're talking about if they don't
23 pay the fee, they get 20 days. 20 days after notice if
24 they don't pay the fee then it's dismissed.

25 HONORABLE SARAH DUNCAN: Not under this

1 rule. I think that the proposed rule is that you perfect
2 by paying the fee.

3 MR. CHAPMAN: Yeah. That needs to be
4 changed, so it dovetails with the existing rule.

5 HONORABLE TOM LAWRENCE: That is the
6 existing rule. You have to pay the filing fee for the
7 county court to accept jurisdiction on the case. That's
8 the existing. That's not only the existing rule, there's
9 a lot of case law that says that.

10 CHAIRMAN BABCOCK: Well, this sentence says,
11 "If the appeal of the judgment in the justice court is
12 perfected, but the county court's jurisdiction is not
13 invoked" then et cetera, et cetera. So if you envision
14 the situation in the second sentence where the appeal is
15 perfected, but it's really not perfected because they
16 haven't paid the costs in 20 days --

17 HONORABLE SARAH DUNCAN: I would never --

18 CHAIRMAN BABCOCK: Sarah's got a problem
19 with that.

20 HONORABLE SARAH DUNCAN: -- try to predict
21 what the Supreme Court would do, but my hunch is that the
22 Supreme Court hasn't had to deal with an appeal from the
23 justice to county court and get this issue resolved,
24 because the Court's been pretty consistent in other areas
25 where people are trying to pay -- to tie paying the filing

1 fee to perfection of an appeal.

2 JUSTICE HECHT: This is a weird thing,
3 though. Because the appeal is really a de novo
4 proceeding, about to be a de novo proceeding, and
5 ordinarily -- I, frankly, don't know what the law is, but
6 I suppose you could go down to district court and file a
7 petition. You've not invoked the trial court's
8 jurisdiction unless you pay the fee.

9 CHAIRMAN BABCOCK: Or file an affidavit of
10 indigence.

11 JUSTICE HECHT: I don't know if that's the
12 law or not.

13 MR. EDWARDS: They won't take the fee in
14 district court.

15 HON. F. SCOTT McCOWN: Yeah. The clerk
16 wouldn't -- that's what I was saying. The clerk wouldn't
17 take it.

18 JUSTICE HECHT: Now, it's different -- I
19 know it's different in our shop. If they tender papers
20 without paying the fee, we just take them and write them a
21 letter and say, "Pay the fee," and then send them back if
22 they won't. I don't know how the court of appeals works.

23 HONORABLE SARAH DUNCAN: Bonnie?

24 MS. WOLBRUECK: Well, there is many
25 different bases for that throughout the state as far as

1 how clerks deal with the issue of not accepting filing
2 fees for pleadings, but I think that there is in the rules
3 and the like and through some case law that if whenever a
4 document is tendered to the clerk, it is deemed filed. So
5 that tendering actually files that document. So there is
6 a rule that says that the clerk needs to file but does not
7 have to issue, so most clerks will file the document,
8 although the check is not included in with it, but then
9 rule --

10 JUSTICE HECHT: Bonnie, does that apply to
11 the original petition?

12 MS. WOLBRUECK: Yes, the original petition.
13 And so then, you know, the recourse for the clerk is
14 really Rule 143, which allows rule for costs, and the
15 clerk then goes and says, "Okay, you haven't paid the
16 filing fees. I'm filing a motion to rule for costs," and
17 that's done a great deal in the state.

18 CHAIRMAN BABCOCK: Judge Brown.

19 HONORABLE HARVEY BROWN: Do we have to use
20 legal terms like "perfected" and "invoked"? Can't we just
21 say, "If a notice of appeal is filed but the filing fee is
22 not paid and an affidavit is not filed"? For one thing,
23 it will make it easier to read for the tenant, but,
24 secondly, it seems like we don't have to decide this legal
25 issue. We can draft it in more practical terms.

1 HON. F. SCOTT McCOWN: I agree.

2 HONORABLE SARAH DUNCAN: The procedure that
3 Bonnie is talking about, there is notice to the person
4 filing the original petition that you haven't paid the
5 fee, and there is an opportunity to cure that deficiency.

6 MR. EDWARDS: There is one under 143a, too,
7 because they don't kick it back until 20 days after
8 notice.

9 HONORABLE SARAH DUNCAN: Right.

10 CHAIRMAN BABCOCK: The second sentence is
11 trying to get at the situation where, however it's done in
12 whatever county it's done in, the proceedings do not go
13 forward in county court, and in that event then the JP
14 judgment remains in force --

15 HONORABLE TOM LAWRENCE: Maybe it will make
16 it easier --

17 CHAIRMAN BABCOCK: -- unless I'm missing
18 something.

19 HONORABLE TOM LAWRENCE: I hate to get
20 ahead, but the new Rule 749(d) -- I'm sorry. The proposed
21 Rule 749(d) is going to require the filing fee to be paid
22 to the JP court at the time of the motion of appeal bond
23 or notice of appeal from a plaintiff, so I don't think
24 we're going to have this problem anymore. So 748 makes
25 more sense, I think, if you understand that if 749(d) is

1 adopted then you're not going to have 143a where there's
2 going to be the separate notice and the 20 days.

3 The appeal is truly going to be perfected at
4 the time you post your appeal bond and pay the court costs
5 or you do your affidavit of indigence, which means you
6 don't have to do either one. It's going to be clear at
7 the end of it that there's no filing fee and no appeal
8 bond to be posted or the plaintiff gives his notice of
9 appeal and pays the filing fee, so we're not going to have
10 this conundrum anymore under the new proposed 749(d).

11 HONORABLE SARAH DUNCAN: I think that's
12 exactly what some people are objecting to, is that you --
13 under 749(d) there is no perfection until the filing fee
14 is paid.

15 HONORABLE TOM LAWRENCE: That's correct,
16 and --

17 HON. F. SCOTT McCOWN: And what's the
18 problem with that?

19 HONORABLE TOM LAWRENCE: That's the existing
20 law.

21 HON. F. SCOTT McCOWN: Yeah. What's the
22 problem with that?

23 HONORABLE SARAH DUNCAN: Under 143a, that's
24 not --

25 HON. F. SCOTT McCOWN: No, what's the

1 problem with the proposed rule?

2 HONORABLE SARAH DUNCAN: That's not --
3 that's not -- doesn't appear to be the --

4 HON. F. SCOTT McCOWN: Well, what's the
5 problem with the proposed rule? Why should a person be
6 able to walk in in a de novo proceeding and file without
7 paying the fee? You either pay the fee or you have the
8 affidavit of indigency. You're at the clerk's counter,
9 and you're there with your papers, and the clerk says,
10 "Either you write me a check for this much or here's an
11 affidavit of indigency." Why should you be able to force
12 the clerk to take it without doing that?

13 MR. YELENOSKY: That's on the amount of
14 days.

15 HONORABLE SARAH DUNCAN: I think exactly the
16 same reason that clerks now take original petitions and
17 notices of appeals from district courts to courts of
18 appeals.

19 HON. F. SCOTT McCOWN: And what's that
20 reason?

21 HONORABLE SARAH DUNCAN: That we want to
22 give people a fair opportunity to comply with their
23 responsibilities; and if I mail in a notice of appeal and
24 not a check, I think it's fair to say, "Sarah, you've only
25 done part of what you need to do. Now you need to pay the

1 fee, and if you don't pay the fee within X number of days,
2 your appeal is going to be dismissed," just like we do on
3 original petition, apparently from what Bonnie says, and
4 as we do on appeal from district court to the court of
5 appeals.

6 CHAIRMAN BABCOCK: Steve.

7 MR. YELENOSKY: Well, there's nothing wrong
8 with that, I think, Judge McCown, if you lengthen the
9 number of days to do it, because right now you've got five
10 days, I guess, to file your notice of appeal, whatever,
11 and then you get time from the county court to notify you
12 you have to pay, and there's a period of time in there.
13 If you lengthen the period of time to do this just one
14 thing, that might allow people the opportunity to get the
15 money together. That's really the only issue from my
16 perspective, but landlords aren't going to want to do that
17 because they want a short period of time for appeal of
18 five days, so that if a tenant does nothing, on the sixth
19 day they can get possession. So it's mediating between
20 landlords getting possession quickly when tenants do
21 nothing on appeal and giving tenants enough time to get
22 money together if they're going to have to pay.

23 CHAIRMAN BABCOCK: Carlyle.

24 MR. CHAPMAN: My problem with all of this,
25 moving away from the notion that is embodied in 143a that

1 after 20 days -- or 20 days after notice is that this
2 implies a bunch of "got you's." We are talking about a
3 process where most people, the majority of the cases,
4 people are pro se. Many times they're struggling just to
5 try to understand what the process is, and what 143a
6 presumes is that if someone files but doesn't pay or
7 understand that a check needs to be paid, they've already
8 paid something, or if they were a plaintiff in the JP
9 court, they may assume that that's all that's necessary
10 and it's just papers that need to be filed.

11 We shouldn't, I don't think, then take out
12 those notice provisions that provide people reasonable
13 access and an opportunity to be heard. I mean, I just
14 think that this kind of eliminates -- it makes it more
15 arbitrary and less fair, and I think that we ought to
16 leave those provisions unchanged with regard to provisions
17 that give notice.

18 CHAIRMAN BABCOCK: Judge Lawrence.

19 HONORABLE TOM LAWRENCE: The proposed
20 749(b), which defines what it is to perfect an appeal that
21 we haven't got to yet, that's going to require that this
22 filing fee be paid at the time you perfect the appeal.

23 MR. CHAPMAN: I have a problem with that,
24 too, and I think that you're just increasing the amount of
25 money that the person has to come up with at a specific

1 time. I mean, they're just -- I think that that's -- that
2 permits --

3 HONORABLE TOM LAWRENCE: Well, the decision
4 as to whether or not a filing fee is charged was made, and
5 currently there is a filing fee required. So if that's a
6 recommendation to change that, to have no filing fee by
7 anybody if there's an appeal, then I guess that can be a
8 recommendation.

9 MR. CHAPMAN: Well, I haven't implied that,
10 and that's not what I'm suggesting.

11 HONORABLE TOM LAWRENCE: Okay. But if there
12 is going to be a requirement that a filing fee be paid
13 then there are two ways to do it. One is that it be paid
14 up front when the appeal bond is posted or the notice of
15 appeal given to the JP within five days. Now, the five
16 days, we keep it at five days. It's always been five
17 days. I guess that could be changed if the committee and
18 the Court wanted to.

19 CHAIRMAN BABCOCK: Is that jurisdictional,
20 the five days?

21 HONORABLE TOM LAWRENCE: Well --

22 CHAIRMAN BABCOCK: What if you file it on
23 Day 7?

24 HONORABLE TOM LAWRENCE: If you file it on
25 Day 7 you've lost your right to appeal.

1 MR. YELENOSKY: Yeah, it is jurisdictional.

2 CHAIRMAN BABCOCK: Yeah, that's what I
3 thought. So the filing fee issue is kind of tricky. If
4 you don't pay your money on Day 5 and you have to pay it
5 on Day 5, you could lose your substantive rights.

6 HONORABLE TOM LAWRENCE: The problem with
7 the existing rule -- I think you've already pointed out --
8 one of the problems is that we send the papers up, we send
9 the appeal bond up, and the transcript, and that goes to
10 the county clerk. The county clerk then sends out a
11 notice -- and if I get something wrong, tell me, Andy.
12 The county clerk sends out a notice to the appellant, who
13 may be the plaintiff or the defendant at the original
14 level, saying, "You've got 20 days to file it," and a lot
15 of them don't come in. Now, maybe a lot of them don't
16 come in because they don't understand it, they don't think
17 they have to do anything, and that's probably true, but I
18 can tell you that a lot of them don't come in because the
19 tenant may appeal, and he knows that he's got a period of
20 time in which he doesn't really have to do anything
21 because you've got to give the notice, then you've got to
22 wait 20 days, then you've got to send it out. So it could
23 be almost a month in which he's not paying any rent or
24 doing anything, and he knows that if he posts the appeal
25 bond then nothing is going to happen for close to 30 days

1 after that.

2 So part of why we want to change 749(b) is
3 to speed up the appeal -- the time in which it goes from
4 the JP court to when it's heard at the county court so
5 there isn't this 30-day delay.

6 MR. CHAPMAN: And I vote --

7 HONORABLE TOM LAWRENCE: If you want to do
8 away with having to pay a filing fee at all, that's fine,
9 but the filing fee -- what's the filing fee at county
10 courts? Hundred and --

11 MR. HARWELL: 148, I believe.

12 HONORABLE SARAH DUNCAN: Wow.

13 HONORABLE TOM LAWRENCE: So it's \$148 that's
14 either going to have to be paid under the current rule 20
15 days after the notice is given, or under the proposed rule
16 that's going to have to be paid up front to perfect the
17 appeal. It makes the system work smoother to do it up
18 front to perfect the appeal. If you want to lengthen the
19 process by having to appeal within ten days or one of
20 these other things, you can do that, but understand that
21 from the landlord's standpoint, they don't want the
22 process lengthened to get the appeal done.

23 MR. CHAPMAN: Well, but from a due process
24 standpoint and access to the courts, I think we ought to
25 give notice as opposed to promote deficiency.

1 HONORABLE TOM LAWRENCE: You mean keep the
2 rule like it is and allow 20 days?

3 MR. CHAPMAN: Right.

4 MR. YELENOSKY: Well, if you tighten up the
5 procedures that you think are preventing landlords from
6 getting current rents so that the landlord is getting what
7 he or she would get from that tenant or another tenant,
8 maybe they're going to raise the rent, but at least what
9 they have been getting all along, if that concept is held,
10 then I don't see a problem with the changes; but some of
11 these changes are going far beyond that; and for a
12 landlord to say that they want to get somebody out right
13 away when they are getting current rent doesn't really --
14 isn't sympathetic to me.

15 HON. F. SCOTT McCOWN: If you took an
16 appeal, would they be getting current rent during that
17 appeal time?

18 HONORABLE TOM LAWRENCE: If the appeal is
19 perfected and the county court accepts jurisdiction and
20 there is an obligation to pay rent that would be reflected
21 in the trial court judgment, then rent would have to be
22 paid into the registry of the court during the pendency of
23 the appeal.

24 HON. F. SCOTT McCOWN: Right, but that
25 doesn't affect this 20-day period because what the

1 landlord is concerned about is not the tenant that's going
2 to stay and prosecute the appeal and pay the current rent.
3 It's the tenant that's going to walk but takes the appeal
4 so they get the 20 to 30 extra days.

5 MR. YELENOSKY: But you could tighten up --
6 I mean, whatever -- if there's a time period in there
7 where they're ending up leaving without having paid
8 current rent during the pendency of the appeal, I
9 understood that prior rule to be tightening that up by
10 setting the date when they pay and all that, and that
11 could be tightened up without holding people hostage to
12 paying within 5 days or 20 days, something above what the
13 landlord would normally get during that period, in order
14 for them to contest it.

15 HONORABLE TOM LAWRENCE: But the obligation
16 to pay rent into the registry will not occur until after
17 the county court has jurisdiction, and that's not going to
18 happen until the court costs are paid. I mean, the issue
19 is when do we want the court costs to be paid, after
20 notice and 20 days after that, or at the time that you
21 perfect the appeal, which makes everything work a lot
22 better? I mean, it makes the rules work better.

23 MR. YELENOSKY: Well, it makes it work
24 better unless you're the person who can't pay it and
25 you're not in your apartment.

1 MR. CHAPMAN: Or unless you're the person
2 who doesn't understand that you have to pay --

3 HONORABLE SARAH DUNCAN: Yeah.

4 MR. CHAPMAN: -- within five days.

5 HONORABLE TOM LAWRENCE: Well, you file an
6 affidavit of indigence.

7 MR. CHAPMAN: You may not be indigent. You
8 may just not understand.

9 HONORABLE SARAH DUNCAN: You could easily
10 not be indigent and not be --

11 MR. YELENOSKY: Not be able to pay.

12 HONORABLE SARAH DUNCAN: There's \$148, which
13 sounds awfully high to me, but there's a 148-dollar filing
14 fee.

15 CHAIRMAN BABCOCK: Judge Brown has been
16 patient.

17 HONORABLE HARVEY BROWN: It just seems to me
18 it's a little inequitable to say, "We'll let lawyers make
19 mistakes. We won't kick theirs out because they didn't
20 file a fee, but we will not let the pro se litigants go."
21 I mean, the lawyers are the ones who know the rules. We
22 give them grace. How can we not give a pro se the same
23 thing?

24 MR. CHAPMAN: I just --

25 HONORABLE TOM LAWRENCE: Well, there's not a

1 lot of grace built into the rules as they exist now. It's
2 pretty firm. I mean, it's --

3 HONORABLE HARVEY BROWN: Well, but there are
4 for lawyers. We've just heard that, for the Supreme
5 Court, for filing a petition.

6 HONORABLE TOM LAWRENCE: I'm sorry. There's
7 not a lot of grace period built into the forcible rules
8 now. I mean, it's designed to be fast and --

9 HON. F. SCOTT McCOWN: And can I point out
10 something, because this kind of goes back to Frank's
11 comment earlier, and there really isn't a way to separate
12 procedure completely from substance here because in the
13 real world lots of problems between landlords and tenants
14 could be worked out without anybody going to court if the
15 landlord or the tenant were a little more reasonable with
16 each other; and to the extent that you make it easier and
17 faster for the landlord to kick out a tenant and get
18 possession, to the extent you cut the hassle factor by
19 making the rules more efficient, the landlord loses
20 incentive to work out those minor problems with the tenant
21 and instead just goes to court.

22 And so this free 20- to 30-day ride that the
23 tenant gets that's a disadvantage to the landlord is also
24 the system's way of building in an incentive for the
25 landlord to work out those problems instead of going to

1 court. So there's just no way to separate these
2 procedural rules completely from making policy choices.

3 HONORABLE SCOTT BRISTER: Well, but speaking
4 economically, landlords are not going to just -- landlords
5 have to make a profit. They're not just going to bear
6 these costs and say, "Well, we just will make less." If
7 landlords -- there's a certain percentage of rents are not
8 paid and they're going to have people in there for 30
9 days, what are they going to do? They are going to charge
10 higher rents to all the other poor people who pay on time.

11 The cost of all deadbeats is not born,
12 economists tell us, by the capitalists that we want to
13 punish.

14 HON. F. SCOTT McCOWN: But taking that --

15 HONORABLE SCOTT BRISTER: They are born by
16 the consumers who are responsible who have to bear the
17 cost of deadbeats.

18 HON. F. SCOTT McCOWN: Taking that economic
19 analysis one step further, the market for rents forces
20 landlords to at a certain point they can't exceed what the
21 market will pay because you'll go to some other landlord,
22 and what you get here is taking some of the profit out of
23 the landlord and leaving him with a little of the profit,
24 but without doing -- without actually going out and doing
25 an empirical analysis you can't know how that rule works.

1 HONORABLE SCOTT BRISTER: I can tell you
2 they won't volunteer to bear 100 percent of the costs.

3 HON. F. SCOTT McCOWN: Right, but they do
4 volunteer to bear maybe 20 percent or 30 percent of the
5 costs and take a little less profit.

6 HONORABLE SCOTT BRISTER: The question is
7 should we shift the cost -- and to some degree you do,
8 maybe say "yes" -- but should we shift the cost from the
9 people who aren't paying to people who do? That's -- if
10 you boil --

11 HON. F. SCOTT McCOWN: No.

12 HONORABLE SCOTT BRISTER: -- it down, that's
13 what you're going to do.

14 HON. F. SCOTT McCOWN: No. Or should you
15 shift some of the costs to the landlord out of profit; and
16 this, what's being proposed, is a change. Already we
17 are -- the system puts a hassle factor in there that
18 forces a landlord to work out some amount of those
19 problems. If it's economically cheaper to work out the
20 problem than it is to evict the tenant, he'll work out the
21 problem, so you are shifting that economic analysis, too.

22 CHAIRMAN BABCOCK: To interrupt this debate
23 between Justice Keenes and Justice Friedman, to hear from
24 Judge Brown.

25 HONORABLE HARVEY BROWN: Maybe we could

1 think out of the box for just a minute. It seems like
2 maybe part of the problem is that we don't think the
3 tenant knows their rights. Maybe we could put in the
4 judgment a notice that's required that advises the tenant
5 they have five days to file their notice of appeal, and
6 maybe we give them another five days to file the filing
7 fee or something like that. Maybe that's a compromise
8 that in putting something in the judgment where they're at
9 least advised of the rights might help some of the issues
10 about they don't know, they walk in there, it's 5:00
11 o'clock p.m. the fifth day, and they didn't bring a check.

12 HONORABLE TOM LAWRENCE: Okay. Well, let me
13 -- I'm not opposed to that, but let's don't do it in a
14 judgment, because the judgment is not going to be signed
15 probably when the tenant is still there. If you want that
16 then you need to have the court hand the losing party
17 something about their -- or actually both parties, really,
18 because one party may decide they didn't get enough rent
19 and they want to appeal, I guess in theory, but that both
20 sides are given something at the time outlining their
21 rights. I think if you want it to be effective you need
22 to do it right after the trial.

23 CHAIRMAN BABCOCK: Steve, Carl, and then
24 Pam.

25 MR. YELENOSKY: Oh, on the economics, I

1 think you're right, Judge Brister, that it comes out of
2 both of them. You have a little graph, and you meet at
3 some point and some of the profit comes out of the
4 capitalist, some comes out of the consumer, in a perfect
5 market; but that -- it's not a hundred percent, but if
6 we're just talking about --

7 HON. F. SCOTT McCOWN: Well, he was taking
8 it all out of the consumer, and I'm saying some of it
9 comes out of capitalist.

10 MR. YELENOSKY: Well, in any event, what
11 we're talking about right now is the 20-day period, not
12 the landlord who is saying, "I haven't been paid rent for
13 six months," because the question there is, "Well, why did
14 you wait six months before you sought forcible entry and
15 detainer or whatever recourse you want?" That back amount
16 he's probably never going to get if the person is not --
17 is judgment-proof. The only question is, is 5 days, 20
18 days, whatever; and that I don't think is worth worrying
19 about the economics of.

20 CHAIRMAN BABCOCK: Carlyle, you still want
21 to say something?

22 MR. CHAPMAN: No.

23 CHAIRMAN BABCOCK: Pam.

24 MS. BARON: I think the problem is the
25 concept of jurisdiction and premising jurisdiction on

1 payment of the fees, because what I'm hearing is, is that
2 the jurisdiction doesn't transfer until the fee is paid;
3 and so the 20 days can slow up the process. So I'm
4 thinking maybe that shouldn't be the jurisdictional basis,
5 but if the fee isn't paid within the 20 days then the
6 appeal is dismissed and it's sent back.

7 MR. CHAPMAN: And that's exactly what 143a
8 seems to say, and I vote to keep it just as it is because
9 of, one, the appearance of fairness; two, the concepts of
10 notice; and, three, the open courts concept that is
11 implicit in this. I just don't think that we ought to be
12 making changes that affect people who are most vulnerable
13 to the change without having the ability to respond to it.
14 I think this is the wrong way to go.

15 CHAIRMAN BABCOCK: Okay. Judge Lawrence,
16 and then we'll take a break, which we're desperately in
17 need of.

18 HONORABLE TOM LAWRENCE: If you say that the
19 -- if you want to argue that the county court would accept
20 jurisdiction when the appeal bond and the transcript is
21 sent up and that if they later do not -- if I understand
22 what you're saying, and later the filing fee is not paid
23 so they dismiss the appeal and send it back to JP court,
24 the problem with that is that under a lot of existing case
25 law if they accept jurisdiction then the JP court judgment

1 is vacated. It doesn't exist any longer.

2 PROFESSOR CARLSON: It's not revived.

3 HONORABLE TOM LAWRENCE: It's not revived.

4 I mean, it's over with, and the parties have to start over
5 again and file a new lawsuit. That's the existing law.

6 HONORABLE SARAH DUNCAN: Then that's the
7 problem, and let's fix the problem.

8 MR. CHAPMAN: I thought that there was a
9 later provision that you were proposing that dealt with
10 that.

11 CHAIRMAN BABCOCK: That's one of their
12 alternatives, but that's not the primary recommendation
13 they're making.

14 HONORABLE SARAH DUNCAN: Isn't it true --

15 HONORABLE TOM LAWRENCE: It deals -- I'm
16 sorry.

17 HONORABLE SARAH DUNCAN: No, go ahead.

18 HONORABLE TOM LAWRENCE: It deals with it --
19 it deals with it if the filing fee is paid at the time the
20 appeal bond is posted. Then everything dovetails
21 together. It makes it work, and the definition of when
22 the appeal is perfected as defined in a later rule, it all
23 fits together if we do it that way. If we keep it the
24 existing way, then we'll have to make some later changes,
25 which can be done.

1 PROFESSOR CARLSON: And the rules could be
2 written to incorporate Pam's suggestion, but we have to be
3 mindful that that goes contrary to our existing case law
4 and just assume that case law would be corrected or
5 changed by the rule.

6 HONORABLE TOM LAWRENCE: About 160 years of
7 existing case law.

8 HONORABLE SARAH DUNCAN: That's no problem.

9 CHAIRMAN BABCOCK: We'll be in recess for
10 ten minutes.

11 (Recess from 10:59 a.m. to 11:20 a.m.)

12 MR. GRIESEL: I think we have Justice
13 McClure on the phone, just in general.

14 CHAIRMAN BABCOCK: We have her on the phone
15 in general?

16 MR. GRIESEL: Well --

17 CHAIRMAN BABCOCK: Or does she want to break
18 into this and do her deal?

19 MR. GRIESEL: Let me make sure she's still
20 on there.

21 MR. YELENOSKY: Well, I think we must have a
22 solution now because I've established that Justice Duncan
23 is taking a position even to the left of mine, so Judge
24 Lawrence will have to accept my position on this.

25 CHAIRMAN BABCOCK: All right. We're joined

1 by Justice McClure from El Paso, from what I understand.

2 HON. ANN McCLURE: Good morning.

3 CHAIRMAN BABCOCK: Good morning. Justice
4 McClure, is your time limited so that you want us to jump
5 to your issue now or are you just dying to hear about FED?

6 HONORABLE ANN McCLURE: Well, my position is
7 just this, Chip. First of all, I apologize that my
8 physical disability at the moment prevents me from
9 traveling, but my mental faculties are not impaired, so I
10 at least wanted to be able to listen in on the
11 discussions, and you can take up my proposals at any time
12 during the day that's convenient to you.

13 CHAIRMAN BABCOCK: Okay. Well, if you're
14 with us for the duration, you may regret that, but --

15 HON. F. SCOTT McCOWN: Your mental faculties
16 may be impaired by the end of the day.

17 HONORABLE ANN McCLURE: That may well be.

18 CHAIRMAN BABCOCK: But since we're right in
19 the middle of Rule 748, which deals with the judgment and
20 writ on forcible entry and detainers, if it's all right
21 with you we will continue with that discussion.

22 HONORABLE ANN McCLURE: That's fine with me.

23 CHAIRMAN BABCOCK: And we'll fit you in this
24 afternoon for sure on your issue. There was a suggestion
25 made, Judge Lawrence and Elaine Carlson, by Judge

1 Patterson that it might be fairer to you that if we
2 allowed you to kind of get through the whole scheme before
3 attacking you violently as we have been for the last hour
4 and a half, but that's up to you guys. So --

5 MR. EDWARDS: Can I ask one question to kind
6 of put this thing in perspective?

7 CHAIRMAN BABCOCK: Sure.

8 MR. EDWARDS: How many of these cases out of
9 justice court on an annual basis end up in the county
10 court?

11 HONORABLE TOM LAWRENCE: It would be a
12 relatively small percentage. I couldn't tell you. Oh,
13 let's see...

14 CHAIRMAN BABCOCK: How many did we say were
15 filed in justice court? A hundred --

16 HONORABLE TOM LAWRENCE: 118,000.

17 CHAIRMAN BABCOCK: 118,000 a year.

18 HONORABLE TOM LAWRENCE: Let's see if I have
19 -- actually, I do have that number. It's one percent.
20 Out of -- roughly, out of 118,577 in the last fiscal year
21 1,295 were appealed.

22 HON. F. SCOTT McCOWN: In the whole state?

23 HONORABLE TOM LAWRENCE: Yeah.

24 PROFESSOR CARLSON: To the county court.

25 HONORABLE TOM LAWRENCE: To the county

1 court.

2 PROFESSOR CARLSON: I've seen fewer to the
3 court of appeals.

4 JUSTICE HECHT: So we're not talking about a
5 lot of money.

6 MR. EDWARDS: I just wanted to get a feel
7 for it, and the reason I brought it up was I have been in
8 the apartment business for over 30 years and never had one
9 of these things go to county court.

10 MR. YELENOSKY: Well, how is it that the
11 landlords are so up in arms about this?

12 MR. EDWARDS: I have no idea.

13 HON. F. SCOTT McCOWN: They're probably not
14 as good a landlord as Bill. They probably have a lot more
15 appeals.

16 HONORABLE TOM LAWRENCE: These proposed
17 rules are not landlord-driven. I mean, the committee did
18 not look at this because the landlords have been writing
19 letters. The committee looked at it because, one, the
20 Court Rules Committee asked us to look at some things, so
21 we looked at that; and then Elaine brought up the
22 Dillingham case, which forced us to have to look at the
23 whole appeal process; and you can't just fix one rule
24 because these things all go together. So you've got to
25 fix everything at the same time, and that's why it's kind

1 of a massive undertaking, because you can't just go and
2 fix Rule 749(a) and be done with it because everything
3 else is affected by that.

4 So it's not landlord-driven. It's more
5 driven by the fact to make the rules make sense and to
6 fit, which now the rules are confusing, as in existence
7 now. They just don't work particularly well. We're
8 trying to make it work and make more sense and comply with
9 Dillingham.

10 CHAIRMAN BABCOCK: Would you like to take up
11 the suggestion that Judge Patterson --

12 HONORABLE TOM LAWRENCE: I'd love to. Yes.

13 CHAIRMAN BABCOCK: Okay.

14 HONORABLE TOM LAWRENCE: Okay. 748, as
15 we've been discussing, talks about the judgment itself.
16 It talks about what's going to have to be in the judgment,
17 what the judgment can be rendered for, and then what we
18 have been discussing for the last 30 minutes or so is the
19 status of the judgment, which is very confusing now.

20 We're trying to make it make more sense,
21 conform to existing case law. We were not trying to
22 change existing case law with these rules, but make it fit
23 existing case law and also to make it fit what's going to
24 come next, which is Rule 749; and Rule 749 talks about the
25 appeal and it talks about motions for new trial. It talks

1 about setting aside judgments. We talk about what a
2 defendant must do to appeal a case and what a plaintiff
3 must do to appeal a case.

4 Then in part (d) of that we talk about
5 paying the filing fee, that it's to appeal the case and
6 perfect the appeal you must pay the fee to the JP at the
7 time that you file the appeal bond or your notice to
8 appeal, and we do that because of the problem of the time
9 delay under existing Rule 143a and to make it easier for
10 the county clerks. The county clerks are going to get
11 everything at one time. They're going to get the appeal
12 bond or the notice of appeal and they are going to get the
13 filing fee all at one time so they know that they can
14 docket it and issue a case number and they are ready to
15 go, as opposed to now having to set it aside for 20 or 30
16 days until they get the filing fee in or then not do
17 something with the filing fee.

18 So we're trying to solve problems that the
19 county clerks have. We're trying to solve a lot of
20 problems that the county court judges have and then
21 problems with the JP court. So that's in (d).

22 In (e) it talks about the form of the appeal
23 bond, and let me say that another thing that we've done
24 that's been paramount is to try to follow the TRAP rules
25 wherever possible, particularly for the form of the appeal

1 bond, the required notice of appeal, the affidavit of
2 indigence, and the supersedeas. We're trying to follow
3 the TRAP rules as much as possible. We were trying to
4 avoid creating an esoteric body of law that nobody
5 understands except those that practice in there. We're
6 trying to make it so that people who do appeals under the
7 TRAP rules would at least be somewhat comfortable and
8 familiar with what we've done here and have it make sense.
9 It's not going to be exactly the same because it can't be,
10 but it's going to be as much as possible to have some
11 consistency.

12 (F) and (g), or (g), talks about challenging
13 the sufficiency of the appeal bond. This happens all the
14 time, and there is a huge body of case law that says if
15 you post an appeal bond in JP court that even if it's not
16 perfect you're supposed to send it up, and that's on
17 forcibles and regular appeals. So if all the T's aren't
18 crossed and the I's dotted and such minor things such as
19 the appeal bond not signed, for example, are not a
20 problem. You just send it up and you fix it at county
21 court.

22 So we're trying to make it clear that if you
23 want to challenge the sufficiency of the bond you do it at
24 county court, not at the JP court level, because once they
25 perfect the appeal, that's it for the JP court, and the

1 county court handles everything on it after that.

2 749b -- or 749a is the affidavit of
3 indigence. This follows the TRAP rules as much as
4 possible, sets forth the time limits to file it.

5 CHAIRMAN BABCOCK: What do you mean "as much
6 as possible"?

7 HONORABLE TOM LAWRENCE: Well, not
8 everything works on the time rules. We tried to adopt all
9 of the language that we could, but, for example, under the
10 current pauper's affidavit you've got to file it within
11 five days. The judge has to handle it within five days,
12 and then you appeal it to county court, and the county
13 court judge has to look at it very quickly. We tried to
14 follow -- we tried to keep the time limits the same as the
15 existing pauper's affidavit, but we're changing up the
16 contents of the affidavit.

17 Currently the pauper's affidavit is pretty
18 loose. 749a, which is the current pauper's affidavit, it
19 really doesn't have any particular requirements that the
20 person asking for the affidavit of indigence or pauper's
21 affidavit has to set forth. It's really kind of
22 loosey-goosey, and the problem with having it so undefined
23 is that you have a different result depending on which
24 court you're in. If a judge doesn't have a list of
25 contents for that to be in there then what may be a

1 pauper's affidavit in one court, may not be a pauper's
2 affidavit sufficient in another court. So we're trying to
3 make the rules consistent so that you have the same result
4 whether you're in Harris County or in South Texas or
5 wherever.

6 And the contents of the affidavit of
7 indigence is in subparagraph (b), when and where filed,
8 the duty of the clerk or justice of the peace, no contest
9 filed, contest. These are all -- although the language
10 may be slightly different in a different format, this is
11 all substantially in accordance with the existing pauper's
12 affidavit rules. We're not really changing that at all.

13 The appeal from the disapproval of the
14 pauper's affidavit at justice court level to the county
15 court --

16 MR. YELENOSKY: Judge Lawrence, can I ask
17 just a question on what you just described?

18 HONORABLE TOM LAWRENCE: Yes.

19 MR. YELENOSKY: How does that, what you're
20 proposing here, differ from 145, which is the county
21 court's description of the affidavit of inability?

22 HONORABLE TOM LAWRENCE: I don't know the
23 answer to that because I used the TRAP. TRAP Rule -- is
24 it 20 --

25 MR. CHAPMAN: 20. Yeah. 20.1.

1 HONORABLE TOM LAWRENCE: I used TRAP Rule
2 20.1, which incidentally, I've talked to Fred Fuchs about
3 this, because he's the lawyer that represents Legal Aid.

4 MR. YELENOSKY: Right.

5 HONORABLE TOM LAWRENCE: He was comfortable
6 with this part.

7 MR. YELENOSKY: Okay.

8 HONORABLE TOM LAWRENCE: He didn't have any
9 problem with paralleling the --

10 MR. YELENOSKY: The TRAP rules?

11 HONORABLE TOM LAWRENCE: -- TRAP rules.

12 MR. YELENOSKY: Yeah, and I would defer to
13 Fred on that then. My only question is if it's TRAP rules
14 as opposed to the county court rules then we've got that
15 situation we were describing earlier about at least some
16 county courts requiring a new affidavit of inability in
17 the county court on your appeal. Are they different
18 enough that we're going to be judging the same appeal
19 essentially by two different standards?

20 Well, I think that the proposed rules are
21 very clear that if you -- if the affidavit of indigence is
22 granted, not only do you get a free appeal but you do not
23 have to pay the filing fee in county court. You don't
24 have to go through the process again.

25 MR. YELENOSKY: Your proposed rules.

1 HONORABLE TOM LAWRENCE: Yeah.

2 MR. YELENOSKY: Okay.

3 HONORABLE TOM LAWRENCE: Now, 145, isn't
4 that a rule -- affidavit of indigence to file the lawsuit?

5 MR. YELENOSKY: Yes. But under the current
6 rules that's perhaps what a trial court would do if it got
7 an appeal from JP court.

8 HONORABLE TOM LAWRENCE: They may. I don't
9 know. But we're -- that's not going to be an issue
10 because once the affidavit is granted in accordance with
11 this rule, then that's it. They don't have to worry about
12 the filing fee. Under the proposal.

13 MR. YELENOSKY: Right. Thank you.

14 HONORABLE TOM LAWRENCE: Okay. And
15 otherwise the procedure for handling the affidavit of
16 indigence is the same as handling the pauper's affidavit.
17 There is one exception. I like some of the language in
18 the TRAP rule that says that you've got to hold within
19 five days but the judge can extend the time period for the
20 hearing for five days. In the JP courts every time the
21 Legislature meets we have another couple of statutes that
22 require us to do something within five days. So sometimes
23 you just can't get it to the hearing within that time
24 period, so this allows us to extend it for one five-day
25 period, or presumably it's not prohibitive that someone

1 could ask for that to be extended.

2 Now, 749b talks -- defines perfecting the
3 appeal, and 748 and 749b have to match. They have to --
4 the language has to be similar in that so it all makes
5 sense. In 749b we talk about when the defendant timely
6 files the appeal bond, deposit, or security and the filing
7 fee required, or the affidavit of indigence is appealed or
8 is approved, then the appeal should be deemed perfected.
9 When the plaintiff files a notice of appeal and the filing
10 fee then the appeal will be perfected.

11 When an appeal is perfected, the JP makes
12 out a transcript of the entries, which is what's required
13 now, and sends that to the county court and then the
14 county court would docket that in accordance with how they
15 do it now. But you don't have at issue any longer about,
16 well, what's the status of the judgment, has the
17 jurisdiction been invoked, has the filing fee been paid.
18 You know right away that the jurisdiction of the county
19 court will probably be invoked because the filing fee and
20 the transcript are going up. You don't have this limbo
21 period of 20 to 30 days where you're waiting for the
22 filing fee to be paid, and what if it's not paid, and I
23 can tell you that the county courts, we get -- it's
24 confusing.

25 The current system is just, frankly,

1 confusing, because the county courts sometimes send us
2 back a procedendo and say, "Go ahead and issue the writ of
3 possession," when they've taken jurisdiction of it, and we
4 can't do it, or they tell us to go ahead and handle the
5 appeal bond or go ahead and handle the sureties on the
6 appeal. We've taken care of our stuff and do the appeal
7 bond, and when we can't do it they have to do it.

8 So there's a lot of confusion in the county
9 courts because of this issue of when the appeal is
10 perfected and when the justice court judgment is vacated
11 and when it's not.

12 CHAIRMAN BABCOCK: Sarah.

13 HONORABLE SARAH DUNCAN: Was it a conscious
14 decision to perfect an appeal with an appeal bond rather
15 than a notice of appeal, or was that --

16 HONORABLE TOM LAWRENCE: Well, the existing
17 law for -- I don't know, forever has been that you post an
18 appeal bond to appeal.

19 HONORABLE SARAH DUNCAN: That needs to be
20 the law then, appeals from district court, district court
21 appeals.

22 HONORABLE TOM LAWRENCE: That's been the law
23 in JP court both for forcibles and for regular appeals
24 forever.

25 PROFESSOR CARLSON: We didn't have any

1 significant debate on changing that.

2 HONORABLE TOM LAWRENCE: Yeah. We tried not
3 to -- we tried not to change things that have been in
4 existence for several years like the appeal bond and all
5 these other things. What we're trying to do more is to
6 make the rules fit together better and to comply with
7 Dillingham, but we really had no discussion about doing
8 away with appeal bonds or doing away with filing fees.

9 PROFESSOR CARLSON: Or perfecting through a
10 notice of appeal only, is what Judge Duncan is saying,
11 which the rule could be written that way.

12 HONORABLE TOM LAWRENCE: Does that
13 answer --

14 HONORABLE SARAH DUNCAN: Uh-huh.

15 HONORABLE TOM LAWRENCE: The latter part of
16 749b is really for the county clerk. "The county clerk
17 shall docket the case. The trial should be de novo. The
18 county clerk shall immediately notify both appellant and
19 appellee of the date of receipt of the transcript, docket
20 number of the cause, and advise the defendant that if they
21 have not filed a written answer in county court they need
22 to file it" -- or "in justice court, they need to file it
23 in county court," because currently the defendant does not
24 have to file a written answer. He can just show up for
25 trial.

1 PROFESSOR CARLSON: At JP court.

2 HONORABLE TOM LAWRENCE: At JP court. I'm
3 sorry. Excuse me. Now, here's the part that Steve will
4 not like. "The perfection of an appeal in a forcible
5 entry and detainer case does not suspend enforcement of
6 the judgment." So this is the dual track appeal. You
7 appeal the case itself, and if you want to suspend the
8 enforcement of the judgment you have the supersedeas. We
9 put this in "The Appeal Perfected" so that we're giving
10 ample notice early on before you even get to Rule 750 that
11 deals with supersedeas as to how we propose the law work.

12 "Enforcement of the judgment may proceed
13 unless the enforcement of the judgment is suspended in
14 accordance with Rule 750. If the appeal is based on a
15 judgment for possession and court costs only then the
16 tenant's failure to post a supersedeas will allow the
17 appellee to seek a writ of possession. Issuance of a writ
18 of possession will cause the appeal to be moot and allow
19 the county court in which the case is pending to dismiss
20 the appeal."

21 Now, this language that talks -- part of the
22 reason that the language in 748 exists, which talks about
23 vacating the judgment, the suspension of the judgment,
24 what the county court can rely on in the JP court
25 judgment, is to make 749 work and to make 750 work. We

1 have a note in a comment where we're making it very clear
2 what the intent is, is that you can appeal the judgment,
3 but if you want to forestall the execution of the judgment
4 then you have to post a supersedeas.

5 MR. YELENOSKY: I have a question. I'm not
6 going to argue with you right now.

7 CHAIRMAN BABCOCK: You're going to hold
8 that?

9 MR. YELENOSKY: Yeah. Can I ask just a
10 question on it? This sentence that begins right after
11 "Rule 750," period, "If the appeal is based on a judgment
12 for possession and costs only then the tenant's failure,"
13 et cetera, I don't understand that sentence even within
14 the context of --

15 HONORABLE TOM LAWRENCE: Okay.

16 MR. YELENOSKY: Why is that sentence in
17 there?

18 HONORABLE TOM LAWRENCE: Are you talking
19 about "if the appeal is based on a judgment for possession
20 and court costs only"?

21 MR. YELENOSKY: Yeah. Right.

22 HONORABLE TOM LAWRENCE: Well, it's the
23 mootness. It's a question of mootness. If you're
24 appealing only possession, some tenants want to appeal
25 possession and maybe there wasn't a judgment for back

1 rent. Some tenants don't care about the issue of
2 possession, but they don't like the judgment for rents,
3 and they want to appeal the question of rent; but if
4 you're appealing the issue of possession only and you
5 don't post a supersedeas, then it was the feeling of the
6 committee -- and Elaine can speak to this -- that perhaps
7 that's really a moot question now. If you've been evicted
8 then what's the point of further appealing the issue of
9 possession if you've been evicted because you've not
10 posted a supersedeas? Is that --

11 MR. YELENOSKY: Well, I guess maybe I'm
12 misreading it, but "if the appeal is based on a judgment
13 for possession and court costs only" I read to mean that
14 doesn't include any appeals where the court has issued a
15 judgment for possession and back rent; and so then --

16 HONORABLE TOM LAWRENCE: Yeah, that's right.

17 MR. YELENOSKY: I mean, that sentence to me
18 reads that you wouldn't be able to get a supersedeas or
19 failure to post a supersedeas wouldn't allow writ of
20 possession in any case where there's a judgment for rent.

21 HONORABLE TOM LAWRENCE: Well, what we're
22 trying to say is that if a judgment is for back rent,
23 court costs, attorneys fees, and possession and you don't
24 post a supersedeas, you may be evicted and lose
25 possession; and that issue may be mooted, but the appeal

1 would still go forward on the question of attorneys fees,
2 back rent, and whatever else was in the judgment.

3 MR. YELENOSKY: Well, it may be the way I'm
4 reading it or it may be the way it's worded, but it to me
5 seems to contradict 750 because that sentence by itself
6 seems contrary to what I understand you want to do, to
7 limit what you want to do to situations where there's not
8 judgment for back rent.

9 HONORABLE TOM LAWRENCE: As I said, we gave
10 this a lot of thought, and here's what we -- here's the
11 problem that we identified, is that, okay, you don't post
12 the supersedeas and you get evicted because you've not
13 posted supersedeas, and a writ of possession issues, and
14 that's the only thing you were appealing on. So do you
15 still go forward with the appeal on the question of
16 possession when possession is no longer a viable issue?
17 And what we're trying to say here is that the answer would
18 be, "No, it would be moot and it would be dismissed."

19 Now, maybe we need to word it differently,
20 but that was the concept that we were trying to put
21 forward.

22 MR. YELENOSKY: Well, perhaps it's after "if
23 the appeal is based on a judgment for possession and court
24 costs only," comma, and then just skip down to "issuance
25 of a writ of possession will cause the appeal to be moot,"

1 et cetera.

2 HONORABLE TOM LAWRENCE: Okay.

3 MR. YELENOSKY: Now, again, I'm just
4 speaking if we're going to go with this concept, because
5 like I said --

6 CHAIRMAN BABCOCK: Let's hold these specific
7 thoughts.

8 MR. YELENOSKY: Yeah. Okay.

9 CHAIRMAN BABCOCK: We're slipping into
10 the --

11 MR. YELENOSKY: Right.

12 CHAIRMAN BABCOCK: -- specific as opposed to
13 the overview. Just as Judge Patterson has got to give a
14 speech.

15 HONORABLE TOM LAWRENCE: Rule 749c is the
16 form of the appeal bond, and that's been changed up
17 somewhat. It was a little archaic the way it was done,
18 and we've just changed some of the wording on that so it
19 makes a little more sense.

20 Now, Rule 750 is the suspending enforcement
21 of forcible entry and detainer judgment pending appeal to
22 the county court and supersedeas. Now, as much as
23 possible we have tried to follow the TRAP rule for the
24 supersedeas. (a) talks about "The appellant who has
25 perfected an appeal shall be entitled to suspend the

1 enforcement by complying with the following procedures:
2 (1), filing with the justice court a written agreement
3 with the appellee for suspending enforcement of the
4 judgment."

5 In other words, if the tenant gets the
6 landlord to agree to it then they can file something in
7 writing saying that it would be suspended, which is in, of
8 course, the TRAP rules, and there's no need to post a
9 supersedeas. (2), filing a supersedeas; (3), a deposit;
10 or, (4), alternate security, which is all per the TRAP
11 rules.

12 Now, (b) and (c) and (d) are all pretty much
13 in accordance with the TRAP rules. (e), the effect of a
14 supersedeas is that the judgment is suspended. (f) talks
15 about the amount; and, of course, now, it becomes obvious
16 why we wanted in Rule 748 specific dollar amounts and
17 judgments, because you calculate the supersedeas. One of
18 the existing problems with the appeal bond is that
19 although there is a loose guideline in the current rule
20 for appeals, it says that you post the appeal bond and you
21 should consider the amount of the judgment and pending
22 rent. There's really nothing that tells me what I have to
23 set, and I can set the appeal bond very low or very high,
24 and there is inequity, I think, that may occur because
25 someone may decide that they would set a high appeal bond

1 for some reason or a low appeal bond.

2 So in a forcible there's really nothing that
3 prevents the judge from setting it at a hundred thousand
4 or one dollar if he chooses to. So part of the
5 supersedeas is to make that streamlined, because the only
6 purpose is to take care of the existing judgment. You
7 want to secure the judgment that's been granted. We no
8 longer have to worry about rent during the pendency of the
9 appeal because that's covered a little bit later. We're
10 going to get to that in just a second.

11 We're separating, uncoupling -- as the term
12 is used here -- uncoupling the concept of, one, appealing
13 the case itself by securing the costs; two, the appeal and
14 the supersedeas to satisfy the judgment, which really
15 should not be any more than the judgment to secure that;
16 and then the third issue, which is the payment of rent to
17 the registry of the court during the pendency of the
18 appeal.

19 So we've really separated that out into
20 three separate mechanisms instead of one that exists now,
21 which is not particularly equitable, and it can be abused.
22 I am not suggesting it ever has been abused, but it
23 certainly has the potential to be abused by having
24 basically an unfettered ability to set whatever appeal
25 bond you decide you want to set on a particular case with

1 very, very little in the way of guidelines.

2 (g) talks about the effect of appellant's --
3 now, this is -- we put (g) into the supersedeas because
4 this all deals with getting evicted during the course of
5 the appeal if you don't do something. Now, we could have
6 made this a separate rule, and we can certainly do that
7 easy enough, but it fits in 750 better than anywhere else.
8 And (g) talks about the effect of appellant's not paying
9 rent or the amount of fair market value into the registry
10 of the county court.

11 Currently the only time that a tenant is
12 required to pay rent into the registry of the court is if
13 it is an indigent that is appealing and it's a nonpayment
14 of rent case. If an indigent is appealing a non -- some
15 other nonrent breach of the lease, there's no requirement
16 currently that they pay rent into the registry of the
17 court. If a tenant who is not indigent appeals, although
18 you may as a judge, if you wish, set two or three times
19 the monthly rent to cover the cost of appeal, you don't
20 really have to do that. So there's really no protection for
21 that landlord, and the tenant would not under the existing
22 rules have to pay rent into the registry of the court any
23 time other than an indigent with a nonrent case.

24 So what we're doing is saying that
25 regardless of why you appeal it, regardless of the basis

1 of judgment, if there is, in fact, an obligation to pay
2 rent, that during the pendency of the appeal you have to
3 continue paying rent into the registry of the county
4 court; and if you don't, you can be evicted. Now, nobody
5 that I've talked to in the industry, so to speak, has had
6 a problem with continuing to pay rent that they're
7 obligated to pay under an oral or written lease agreement,
8 so we are not requiring them to do anything more than they
9 are already obligated to do, which is pay the monthly
10 rent.

11 Now we're saying, though, that during the
12 pendency of an appeal instead of paying rent to the
13 landlord and the landlord may say, "No, I didn't get the
14 rent" and not provide a receipt when the tenant pays it or
15 the tenant just may not pay it, we're going to have it
16 paid into the registry of the court, and there are
17 mechanisms and provisions for the landlord to be able to
18 draw that rent out and a requirement on the landlord that
19 he file a motion with the court if the rent's not paid.
20 So this was something that nobody had a particular problem
21 with.

22 (h) talks about when the judgment has been
23 suspended that you suspend -- supersedeas has been posted
24 that you suspend enforcement of the judgment, and if you
25 are already in the midst of enforcing the judgment, that

1 it be stopped.

2 (i) says that once the appeal has been
3 perfected and five days have expired since the day the
4 judgment was signed, actions to suspend the enforcement of
5 judgment have to be made to county court. Now, this was
6 actually far more complicated than it sounds right here
7 because when you get into the idea of, well now, which
8 judgment is in effect? Is the JP court judgment still
9 good or does the county court judgment have jurisdiction
10 now? Who would issue the writ of possession if something
11 isn't done? And this is also why the language in 748
12 becomes very important in trying to understand what
13 happens under (i) and when you can go back under the
14 supersedeas -- when you can go back in and seek eviction
15 if the supersedeas has not been posted and the status of
16 the judgment in trying to figure out where you file the
17 supersedeas and when you would file it, who you would file
18 it to.

19 (j), "If the appeal is perfected and the
20 tenant does not take any actions to suspend enforcement of
21 the judgment within five days after the judgment is signed
22 or if the tenant does not pay rent into the registry of
23 the county court as it becomes due, the county court where
24 the appeal is pending may issue a writ of possession at
25 any time." We've already actually told them this a couple

1 of times in the rules already, but we're just summing up
2 one more time what's going to happen to them if they don't
3 post a supersedeas or pay rent into the registry.

4 Now, also, there is a subpart (k). This is
5 in the small handout, 750(k). "If the appeal is perfected
6 by the approval of an affidavit of indigence, the
7 defendant must post a supersedeas bond, deposit, or
8 security with the justice court. If the affidavit of
9 indigence was approved in the justice court, the
10 supersedeas, deposit, or security must be posted within
11 one day after the affidavit of indigence is approved. If
12 the affidavit of indigence is approved in county court,
13 supersedeas bond, deposit, or security must be posted in
14 the county court within five days after the affidavit of
15 indigence." So what we're doing is we're extending the
16 time limits to post the supersedeas if the appeal is
17 granted based on an affidavit of indigence, either at the
18 JP court or the county court.

19 And then we have a note and comment
20 reinforcing one more time what's going to happen if the
21 tenant who perfects an appeal does not post a supersedeas
22 or pay rent, that a writ of possession can issue. So it's
23 four or five times in there we talk about that, what's
24 going to happen.

25 Now, Rule 751 is the form of supersedeas

1 bond. Rule 752, we start to get into the county court,
2 and I had some discussions with county court judges about
3 some of the problems they had, and the rest of the rules
4 really deal with the county clerk and the county court law
5 judge trying to solve some of the difficulties they have.

6 752, all we really did was make a couple of
7 style changes. We struck out one thing in the last
8 sentence that's going to be added a little bit later. 753
9 is a duty of the clerk to notify parties. The clerk
10 should notify him, and I think the product said something
11 about this, about the notice provisions. "The clerk shall
12 notify both appellant and the adverse party of the date of
13 receipt of the transcript, the docket number of the cause.
14 Such notice shall advise the defendant of the necessity
15 for filing a written answer in the county court when the
16 defendant has pleaded orally in the justice court." I
17 think that's the second time we've mentioned that.

18 PROFESSOR CARLSON: Can I just interject
19 there that the reason that is necessary is there's not a
20 separate summons that goes out in county court when
21 there's the de novo FED appeal? Correct?

22 HONORABLE TOM LAWRENCE: Uh-huh.

23 PROFESSOR CARLSON: So we've got to give the
24 defendant the notice or we thought it was desirable to
25 give the defendant notice that otherwise would be in a

1 citation.

2 HONORABLE TOM LAWRENCE: 753a is the default
3 provisions. This is the existing provisions. What we --
4 we changed "his" to "the defendants," and we changed "the
5 default may" -- that the defendant made no answer in
6 writing in the justice court and fails to file a written
7 answer within 10 days -- we extend that from 8 to 10 --
8 after transcript is filed in the county court, allegations
9 of the complaint may be taken as admitted and judgment by
10 default may be entered accordingly. We just changed 8 to
11 10 days there.

12 754, which is currently blank, we now call
13 "The Trial of the Case in County Court." (a), "The trial
14 of forcible entry and detainer as well as hearings and
15 motions shall be entitled to precedence in the county
16 court."

17 (b), "No jury trial shall be had in any
18 appeal unless a written request is filed with the clerk of
19 the court a reasonable time before the date set for trial
20 of the cause on the nonjury docket, not less than five
21 days in advance." The county court judges were concerned
22 about the question of Rule 216 and then also 245, and
23 we're trying to -- there is some case law that talks about
24 that that I think should relieve a lot of the concern that
25 they have now, but I think that was a February 2001 case

1 that talks about that, but we're really kind of
2 paralleling the case that's on point here, and we're also
3 making the time limits clear so that there's not any
4 confusion in the county court about the time limits for
5 the jury trial and when they can set it.

6 Now, generally discovery is not appropriate
7 in forcible entry and detainer appeals; however, the
8 county court has the discretion to allow reasonable
9 discovery. This -- the problem is with extended discovery
10 on the type of a case that is supposed to be done quickly,
11 even in county court. So we're trying to -- there's
12 really not anything that talks about discovery in a de
13 novo appeal of a county court case now. There's nothing
14 in the rules about it now, other than referring to the
15 general discovery rules. If you assume that they apply,
16 then I guess it would, but we tried to make some balance
17 between these cases supposed to be tried pretty quick at
18 the county court and discovery.

19 Now, this existing language is very similar
20 to the language the Legislature has already used in the
21 Small Claims Court Act which gives the judge in the small
22 claims court the ability to allow reasonable discovery.
23 So we're just using similar language to what is in the
24 Legislature -- or which the Legislature has put in the
25 Government Code now. There may be some discussion on

1 that, but we thought that -- we tried to adopt a balance.
2 Understand, this has probably been tried once. You know,
3 there may have been a default at the JP court level, but
4 in all likelihood if it's gotten here it's probably been
5 tried one time already. But, again, we want to make
6 provisions for discovery if it's appropriate.

7 (d) talks about when you can set it for
8 trial, and we're going to talk about changing Rule 245 in
9 a second. Now, (e) talks about what the county court can
10 do if there's a deficiency with the bond, either
11 supersedeas or appeal bond. (f) talks about what happens
12 if the appellant doesn't prosecute the appeal, and 755 is
13 writ of possession, and a writ of possession is -- we
14 change that -- that's 10 days to get the writ, and we also
15 changed a provision that is in conflict with the Property
16 Code. The Property Code talks about appealing a judgment
17 from the county court, and they use the term "unless the
18 premises was used as a primary residence."

19 I'm sorry. 755 currently says "unless it's
20 used as a primary residence," but the Property Code is
21 less restrictive. The Property Code is "unless the
22 premises was used as a residence." So we simply changed
23 that to reflect what the Legislature did in the Property
24 Code.

25 Rule 4 needs to be changed because we've

1 renumbered some of these rules, and Rule 4 deals with
2 computation of time. the five days rule. Rule 143a, we
3 are exempting forcible entry and detainer cases from that
4 because the proposal is that the filing fee be paid at the
5 time the appeal is perfected, not after a 20-day notice.
6 Now, 143a, I will point out, would still apply on appeals
7 from JP court that are not forcible entry and detainer.

8 Rule 190 we are exempting forcibles both in
9 JP court and county court from the discovery control
10 plans, and there's language in both the trial court and
11 the county court to allow discovery at the discretion of
12 the court.

13 And 216 says that the rule talking about the
14 request time for the jury trial would not apply. That's
15 because we have a separate rule in 754 to talk about
16 requesting the jury trial with different time limits, and
17 then 245 is the same thing. Some judges were worried
18 about, well, how -- it says we're supposed to give it
19 precedence but then this rule says you have to wait 45
20 days, so which is it? So we're trying -- since we talked
21 about the time limits for setting it for trial on 754,
22 we're exempting the trial in justice court and the appeal
23 from Rule 245. And that's the overview.

24 CHAIRMAN BABCOCK: For the record, I wonder,
25 anybody but Elaine or Judge Lawrence, can you tell us how

1 this substantial revision of the JP forcible entry and
2 detainer rules got to our committee? There was an
3 interplay with the rules committee. Carl may want to
4 speak to this.

5 PROFESSOR CARLSON: We received when this
6 committee convened at the beginning of the term from the
7 State Bar Rules Committee a request that there be a look
8 at the manner in which the appeal bond is set, and there
9 was concern expressed by the State Bar Rules Committee
10 about tenants using the process that currently exists to
11 basically ride out a supposed appeal and to effectively
12 live rent free during the gap of that time.

13 CHAIRMAN BABCOCK: So that was the impetus
14 to us. Carl, did your group propose any language or just
15 note the problem?

16 MR. HAMILTON: No. We sent a couple of
17 minor changes to the rule on the paupers affidavits and
18 some other things, and I guess that's one of the things
19 that prompted you-all to start --

20 PROFESSOR CARLSON: Those are -- excuse me,
21 Carl.

22 MR. HAMILTON: -- taking a look at that.

23 PROFESSOR CARLSON: Those are set forth
24 beginning on page 52 to 58, I think. Yeah, the State Bar
25 Rules Committee proposal or recommendation is included

1 there.

2 HONORABLE TOM LAWRENCE: There were some --
3 as we started looking at what Carl had sent and trying to
4 change that, that was -- would have been relatively simple
5 but for Dillingham, and then when we thought about -- when
6 Elaine brought up Dillingham and we started looking at,
7 well, this is not going to work, we need to make more
8 substantive changes and in addition to what Carl has
9 proposed, had proposed, there were some other things that
10 we identified that needed to be fixed. Now, primarily
11 that was in Rule 738 through 747, and those are not -- we
12 went over that last time.

13 CHAIRMAN BABCOCK: Right.

14 HONORABLE TOM LAWRENCE: That was not a big
15 deal. The real substantive changes is 748 on. But when
16 Dillingham came into effect that required a pretty
17 substantive revision to make everything work, so that's
18 why it got a little bigger than we had first anticipated.

19 CHAIRMAN BABCOCK: Chris, do you have any
20 sense of what the Court's view is about Dillingham's
21 effect on the JP rules regarding FEDs and what the Court's
22 thought process is or if it is even really focused on it?

23 MR. GRIESEL: No, I don't have have a sense
24 as to what the Court's view is on Dillingham. In terms of
25 the Court's thought process, it was a charge to the

1 committee, but in terms of are they actively looking
2 tomorrow to change FED rules, I'm uncertain of that. I do
3 know that this is an area where there is an incredibly
4 large number of cases in the state of Texas and an active
5 area where there's a lot of people who don't have lawyers
6 on their side.

7 CHAIRMAN BABCOCK: Okay.

8 MR. GRIESEL: It's also, as Judge Lawrence
9 said, an increasingly complicated area, too, because of
10 the number of commercial FEDs.

11 CHAIRMAN BABCOCK: Okay. And, Chris, one
12 other question. Are we aware of any legislative
13 initiatives in this area or any interest on the part of
14 any particular legislators that need to be accounted for?

15 MR. GRIESEL: No. There were scattered
16 legislative initiatives, and there always have been on FED
17 actions, but nothing approaching, I think, this this term.
18 There was a legislative initiative in the past session
19 dealing with uniform -- setting up discovery and discovery
20 mechanisms in justice of the peace court, but that
21 initiative didn't go anywhere.

22 HONORABLE TOM LAWRENCE: Yeah. I can speak
23 to that a little bit. In talking, as we started getting
24 into the rules and I started talking to the landlords'
25 attorneys and the tenants' attorneys, some of the rules in

1 here are specific requests from them, just what they
2 perceive to be problems. So not all of this is
3 necessarily generated through the subcommittee, and some
4 of the -- there are a few things in here that are
5 dovetailed with some bills that were introduced but for
6 whatever reason didn't pass that had some significant
7 support that would improve things. So we've actually made
8 some changes and some suggestions. When we had to fix
9 something, we said, "Well, let's look at what they
10 proposed," and that language was pretty good, and in some
11 cases the landlords' and tenants' attorneys had both
12 signed off. So even though it didn't pass we reflected
13 some of those changes.

14 So we looked at everything that went in this
15 this last session. Everything that passed I think is in
16 there. Even some of the stuff that didn't pass we looked
17 at and maybe adopted parts of it.

18 CHAIRMAN BABCOCK: And by "passed" what do
19 you mean, that there's now a statute that's been signed by
20 the governor?

21 HONORABLE TOM LAWRENCE: Yeah. But I don't
22 think there's anything that happened that would change --
23 I don't think anything passed. There's some stuff that
24 passed in the Property Code, but nothing that would affect
25 the rules or the trial.

1 CHAIRMAN BABCOCK: Okay. Steve, can I ask
2 just one more, or maybe two more, questions?

3 MR. YELENOSKY: Sure. You're the chair.

4 CHAIRMAN BABCOCK: Can you describe for us
5 the scope of your effort? I know both you and Elaine,
6 Judge, have talked about talking to people; and I'd like
7 to get a sense of what input the subcommittee has received
8 outside the subcommittee, if you know what I mean.

9 HONORABLE TOM LAWRENCE: Well, surprisingly
10 it's not been universally approved. There are -- the
11 landlords -- the groups involved would be, you know, the
12 landlords. Of course, you've got everybody from somebody
13 having one rent house to a mall or people with huge blocks
14 of apartment complexes.

15 CHAIRMAN BABCOCK: Right.

16 HONORABLE TOM LAWRENCE: Then you've got the
17 tenants, not only the people that represent the indigent
18 tenants, but also represent tenants. You've got the JP's,
19 the county clerks, the county court-at-law judges. There
20 are things in the changes that each group likes and things
21 that they don't like for the most part, so -- but they're
22 never ever going to agree on all of this because there's
23 just too much diametrically opposed thinking, but there
24 are parts of it -- the most controversial would be the
25 issue about the supersedeas for indigent tenants, which we

1 have -- the subcommittee has discussed longer and harder
2 and worked on more than anything else.

3 Everything else I don't think is going to
4 be -- I don't think is going to be that controversial,
5 but, you know, everybody likes some parts and doesn't like
6 other parts.

7 CHAIRMAN BABCOCK: In terms of people
8 outside your subcommittee or outside this committee, have
9 you talked to 5 people, 10 people, 100 people?

10 HONORABLE TOM LAWRENCE: 20.

11 CHAIRMAN BABCOCK: And they range -- they
12 cover the spectrum of these various interest groups that
13 you mentioned?

14 HONORABLE TOM LAWRENCE: Yes.

15 CHAIRMAN BABCOCK: Okay. I feel like I'm
16 taking a deposition. You nodding your head, "You must
17 answer outloud." Yeah, Stephen.

18 MR. YELENOSKY: I have a proposal, not of
19 language, but that we ask the subcommittee to do the
20 following, and I don't know if you want me to phrase it as
21 a motion or not.

22 CHAIRMAN BABCOCK: Let's hear it first.

23 MR. YELENOSKY: Okay. It would be that the
24 subcommittee take what they've done, which, as Justice
25 Lawrence has said, I think there's a lot that's really

1 good here; and I am not going to object to changes that
2 fix things; and some things I know you vetted with Fred
3 Fuchs, who knows a lot more about this and I think would
4 take the same position I would philosophically on it; but
5 I would ask the committee to redraft for this committee's
6 consideration a change that would not alter the current
7 situation with respect to appeal by indigents, such that a
8 supersedeas would not be required for indigents; and I
9 would also invite the committee, should it wish, to
10 propose something that would tighten up the requirements
11 of payment of current rent during pendency of appeal,
12 because I don't -- I don't object to that.

13 I've talked to Fred during the break. He
14 doesn't object to that, and what I understood to be the
15 concern earlier defined as people living rent free speaks
16 only to current rent, because at that point if there's a
17 back payment due, you know, they may eventually get
18 judgment for it, they may be able to collect on it, but
19 living rent free means they are not paying rent during the
20 pendency of appeal. That's what it means to me, and if
21 that's a concern during this 20 days and the committee
22 wants to propose some way in which the JP court or county
23 court can issue a writ of possession when a tenant doesn't
24 pay what would otherwise have to be paid then, you know,
25 that could also be considered, but my motion would be to

1 draft something that doesn't change the current situation
2 with respect to supersedeas for indigents while correcting
3 the current situation with respect to a lack of separation
4 of supersedeas and appellant bonds for nonindigents
5 because that's constitutionally required.

6 CHAIRMAN BABCOCK: And, Stephen, is your
7 suggestion that there be an alternative universe,
8 basically, that -- of rules that the subcommittee would
9 draft which would do as you say, not alter the current
10 situation with respect to supersedeas for indigents, and
11 would make that all fit within the framework of the rules
12 so that at a subsequent meeting we could look at that
13 framework and say, "Okay, we like that," and then look at
14 this, what we have before us now, and say, "Okay, we don't
15 like that" or "We do like it," whatever? Is that what
16 you're suggesting?

17 MR. YELENOSKY: Well, I mean, if the
18 consensus were to keep things as they are with respect to
19 nonindigents then I would love that consensus now where we
20 don't have to look at it later and consider both, because
21 obviously I would prefer that result. So if people are
22 ready to say, "That's what we want, bring that back to us
23 without, you know, an alternative, just bring that back to
24 us so we can look at the wording," then I'd be happier
25 with that, but barring that, give us both.

1 CHAIRMAN BABCOCK: You would be happiest
2 with --

3 MR. YELENOSKY: With us all deciding right
4 now that we don't want to erect a supersedeas barrier to
5 continue possession by indigents which does not currently
6 exist.

7 CHAIRMAN BABCOCK: Okay. So that's what you
8 -- that would be your number one choice.

9 MR. YELENOSKY: Yes.

10 CHAIRMAN BABCOCK: And then your second
11 choice would be, okay, draft around it so it doesn't
12 change the rule with respect to --

13 MR. YELENOSKY: Well, my second choice would
14 be I guess that we defer that question to another day when
15 they have it in front of us, but maybe we're ready to
16 decide that now. I know I'm not the only one who feels
17 this way. I know a couple of other people have spoken up.
18 A number -- most people have not spoken up, and so I don't
19 know what the sentiment of the committee is, but if the
20 majority of the committee agrees with what I just said,
21 maybe we ought to find that out now.

22 CHAIRMAN BABCOCK: Okay. Elaine.

23 PROFESSOR CARLSON: A couple of things I'd
24 like to say. One is that the problem that exists with the
25 appeal bond in forcible entry and detainer cases exists in

1 the 500 series of rules for regular JP proceedings. The
2 Dillingham problem is present in both. So just bear that
3 in mind on the big picture vote.

4 Secondly, I think I speak for the
5 subcommittee when I say we welcome as much definitive
6 input as we can get on issues so that we're not spinning
7 our wheels, and we realize -- we had hoped to get that
8 input at our last meeting and we simply didn't have the
9 time. So we have gone forward with specific suggestions,
10 thinking that might be more helpful to see what it looks
11 like.

12 MR. YELENOSKY: Right, and I wasn't able to
13 be at that meeting, so I --

14 PROFESSOR CARLSON: But we certainly are
15 willing to redraft and draft with the will of this
16 committee, but we really need some input on key issues.
17 Does the committee as a whole favor supersedeas at all of
18 a JP judgment in light of the fact that the case law says
19 that judgment is annulled and vacated? And Justice Duncan
20 pointed out they are not courts of record. Do we favor
21 that at all?

22 Do we want to change the law or suggest to
23 the Court a change in a rule that would change the law
24 that a dismissal out of the county court would revive a
25 justice court judgment when currently that doesn't exist?

1 That's a very strange anomaly to me in the law.

2 Do you concur that discovery should be
3 discretionary with the court? Do you concur that Rule 216
4 and Rule 245 should have -- continue the carving out or
5 expressly have carving out to continue an expedited
6 proceeding from the JP court to the county court, or do
7 you believe at the county court level if you appeal, this
8 should be wide open like any other county court
9 proceeding, or are we still trying to keep this -- because
10 it makes a big difference in how you structure the rules
11 and timing.

12 CHAIRMAN BABCOCK: Sarah.

13 HONORABLE SARAH DUNCAN: The overly
14 theoretical me again. I need first before we can --
15 before I can address those discrete issues, I need a
16 theoretical framework with which to think about this
17 problem; and to me that theoretical framework has to hinge
18 initially on whether the JP judgment is going to have
19 presumptive validity, and until -- if we continue the
20 current law, which is that an appeal to the county court
21 vacates or suspends the judgment, as I e-mailed Elaine, I
22 don't understand what there is to supersede.

23 So for me, at least -- and I'm hoping a
24 majority of the committee agrees -- the first thing that
25 we have to decide is whether this JP judgment, unlike

1 other JP judgments, is going to be given presumptive
2 validity and not vacated or suspended pending an appeal.

3 CHAIRMAN BABCOCK: Doesn't it have validity
4 if it's not appealed?

5 HONORABLE SARAH DUNCAN: Yes.

6 PROFESSOR CARLSON: Yes, and it is -- I
7 agree with you, Justice Duncan, but there is giving
8 validity to the justice court judgment in that the appeal
9 bond requires that the JP set the amount that considers
10 the amount of that judgment as well as future rent. So
11 there is some -- which is maybe not sensical, but it is
12 our current system. So the subcommittee struggled with
13 those two potentials, is it valid or isn't it? Do we
14 supersede it or don't we? Do we give any validity to the
15 JP judgment or is it a complete do-over?

16 CHAIRMAN BABCOCK: And the specific problems
17 that we were presented with or that we uncovered were,
18 one, with the so-called free ride during appeal problem
19 and, two, the Dillingham problem. Those are the basic two
20 problems.

21 PROFESSOR CARLSON: Those are the two
22 central problems, and then procedurally many minor things,
23 but, yes, those were the two major problems.

24 HONORABLE TOM LAWRENCE: But I would have a
25 question. If you want to allow an affidavit of indigence

1 to allow an indigent defendant not to post a supersedeas,
2 would that be only for the writ of possession or would
3 that also be for a writ of execution, abstract of
4 judgment, or other attacks?

5 MR. YELENOSKY: Are you asking me? My
6 opinion?

7 HONORABLE TOM LAWRENCE: Yeah.

8 MR. YELENOSKY: Well, my opinion would -- I
9 mean, I think Justice Duncan's point is obviously a very
10 good one, which is if you answer the question as she does,
11 I think, which I've described as to the left of me at this
12 point, you know, you wouldn't even have to worry about
13 that; but assuming you do have to worry about that, my
14 concern is the possession issue; and as a policy matter,
15 I'm less concerned about a landlord executing a judgment
16 for \$600 on an indigent who's, frankly, probably going to
17 be judgment-proof anyway if they cannot dispossess them of
18 the property.

19 HONORABLE TOM LAWRENCE: The subcommittee,
20 you know, understood the problem of a supersedeas and an
21 indigent. The difficulty we had was trying to figure out
22 some legal justification for treating them differently,
23 and we just were not able to do that.

24 PROFESSOR CARLSON: And do you know of any?
25 Because the case law from going county court to court of

1 appeals, as you know, an indigent must post a supersedeas
2 like any other litigant.

3 MR. YELENOSKY: I mean, historically -- I'm
4 sorry. Go ahead.

5 PROFESSOR CARLSON: But there is no such
6 thing as an affidavit of indigence for supersedeas.

7 MR. YELENOSKY: But as you know and you've
8 pointed out, historically, is this right that you couldn't
9 even get a judgment for rent. The only issue was
10 possession.

11 PROFESSOR CARLSON: That's right.

12 MR. YELENOSKY: That's right. So
13 historically there never was an issue of posting a
14 supersedeas that would cover back rent in order to remain
15 in possession.

16 PROFESSOR CARLSON: You're right.

17 MR. YELENOSKY: So I would argue
18 historically we have never had the situation where people
19 were in danger of being put out on the street because of
20 back rent. People -- it didn't allow for that, so when we
21 moved to a system where it allowed for a judgment for rent
22 we then coupled that payment, put the whole judgment
23 together, and then thereby in my opinion undermined the
24 protections that were there for possession.

25 HONORABLE TOM LAWRENCE: But there was still

1 a requirement that you post an appeal bond. Even if back
2 rent was not a part of the lawsuit you still had to post
3 an appeal bond, so it was the same problem.

4 MR. YELENOSKY: Right. But if you were
5 indigent you would post an affidavit of inability, and
6 that would cover the appeal bond, and you would owe zero
7 as far as the supersedeas. So to me, I mean, we could --
8 you're putting it into, understandably, a theoretical
9 framework; but, frankly, I think it is not cognizant of
10 the history and policy that's been behind this; and if,
11 given what we have now, you feel that we're boxed into a
12 particular situation, I would say let's figure out how to
13 get out of that box before we say we've got to do this.

14 CHAIRMAN BABCOCK: Justice Duncan.

15 HONORABLE SARAH DUNCAN: To add to the
16 historical context -- and I completely agree with Steve --
17 I just want to make the very simple point to remind people
18 we are talking about people's homes, and the law has
19 always been, I think, somewhat more protective of people
20 when you're talking about their home. As Steve says,
21 we're talking about putting people on the streets.

22 HONORABLE TOM LAWRENCE: Well, I agree, and
23 there are a lot of hoops that a landlord has to jump
24 through to evict somebody, but, you know, there also are
25 rights that a landlord would have. I mean, we're not

1 talking about always wealthy individuals that have
2 multimillion-dollar apartment complexes. We're talking
3 about people sometimes that have one rent house. They
4 can't pay their mortgage on it until they get their rent
5 in. So, you know, it's a pretty substantive right that a
6 landlord has.

7 MR. YELENOSKY: But we're writing rules that
8 aren't going to distinguish between those two and so --

9 HONORABLE SARAH DUNCAN: And can't.

10 MR. YELENOSKY: Right. And so if we change
11 the rules, you may be helping people that those of us
12 would agree are landlords who are themselves of low
13 income and preyed upon maybe by somebody who isn't, but
14 you're definitely going to hurt people on the other side
15 who maybe have been falsely facing eviction.

16 I mean, I'll give you an example. Earlier
17 -- I'm on the board of the Austin Tenants Council, so I
18 read their stuff and I'm getting filled in at board
19 meetings. You know, as much as we don't like to admit it,
20 there is still race discrimination going on out there.
21 You could have an individual who, yeah, they haven't paid
22 their rent in two months, but neither has their neighbor,
23 and they're getting evicted because they're African
24 American.

25 Now, when they go in before you the evidence

1 quickly before you in six days may be nonpayment of rent
2 for two months. It may take a bit to figure out and
3 establish that, yeah, that's true, but there's a
4 systematic practice here of evicting people of a
5 particular race who are in arrears while letting others
6 slide, and that's clearly illegal.

7 HONORABLE TOM LAWRENCE: The subcommittee --

8 CHAIRMAN BABCOCK: Justice Duncan.

9 HONORABLE SARAH DUNCAN: Well, I think it
10 just gets back to we need a theoretical framework for
11 viewing these types of cases. We don't need a pro any
12 given interest group framework for discussing these cases,
13 and to me the theoretical framework has to be is there a
14 basis for giving presumptive validity to a JP FED judgment
15 when we don't give presumptive validity to any other type
16 of JP judgment because it's not a court of record.

17 CHAIRMAN BABCOCK: Judge Peeples, you
18 haven't said a word all day. Got anything to add to that?

19 HONORABLE DAVID PEEPLES: When I have
20 something to say I'll say it.

21 CHAIRMAN BABCOCK: I know you're storing up
22 your energies for a later topic. Well, I think that's
23 well put; and the issue is, Elaine, how can we frame a
24 motion or a question or whatever that the whole committee
25 can vote on to give you and Judge Lawrence a sense of what

1 the committee is and what you can do to fulfill that
2 sense?

3 PROFESSOR CARLSON: I'll speak first, and
4 Tom can chime in since he has been the principal
5 scrivener, and we're willing to keep going, but I think it
6 would be very helpful to know whether it's the sense of
7 the full committee that a JP judgment should be superseded
8 or not.

9 CHAIRMAN BABCOCK: Let's -- why don't we
10 state what the issues are and then we will take them one
11 at a time. Whether a JP judgment should be superseded or
12 not.

13 MR. YELENOSKY: Whether it exists after an
14 appeal such that it needs to be superseded.

15 PROFESSOR CARLSON: Yeah. Appeal trial de
16 novo to county court.

17 MR. YELENOSKY: Justice Duncan can phrase it
18 better than I, but, I mean, there's -- the question is, is
19 there anything to supersede at the point that an appeal is
20 filed or is it gone?

21 PROFESSOR CARLSON: And currently we --
22 maybe I am not making myself clear. There's an anomaly.
23 Right now we have case law saying that the judgment is
24 vacated by the de novo appeal, but there's a rule that
25 says, "but, by the way, go ahead and secure that judgment

1 by an appeal bond." So to me it's not as clear as it is
2 to Justice Duncan that we don't give some presumptive
3 validity if we're requiring someone to put up an appeal
4 bond that can cover it, except for indigents.

5 CHAIRMAN BABCOCK: And maybe I missed this,
6 but in addition to that, if something happens up at the
7 county court, either because the fees aren't paid or
8 because somebody loses interest, there can then have
9 something subsequently occur to the JP court in terms of
10 issuing a writ of possession.

11 HONORABLE TOM LAWRENCE: Not necessarily.

12 PROFESSOR CARLSON: In some instances.

13 HONORABLE TOM LAWRENCE: If the fees aren't
14 paid and jurisdiction is not invoked at the county court,
15 then, yes, the JP court judgment can be enforced.

16 PROFESSOR CARLSON: Because there's a rule
17 that says that.

18 HONORABLE TOM LAWRENCE: But if jurisdiction
19 is invoked in the county court then the JP court judgment
20 is gone forever.

21 CHAIRMAN BABCOCK: There's nothing you can
22 do.

23 MR. YELENOSKY: Well, the county court can
24 issue a writ of possession.

25 HONORABLE TOM LAWRENCE: Yeah, the county

1 court can, but the JP court judgment, no matter what the
2 county court does, once the jurisdiction is invoked then
3 the JP court judgment is nullified in that sense.

4 PROFESSOR CARLSON: It's not revived.

5 HONORABLE TOM LAWRENCE: It can never be
6 revived.

7 PROFESSOR CARLSON: Under our current
8 scheme, but yet we've got a rule that says, "but go ahead
9 and secure that judgment." That's why I said what do you
10 want to do with this? These are intellectual conflicts in
11 our rules.

12 CHAIRMAN BABCOCK: Okay. All right. So
13 question one in some variation is whether it's the sense
14 of this committee that the rules should be written to
15 promote the concept that a JP judgment should be
16 superseded.

17 PROFESSOR CARLSON: Or we can take up
18 Sarah's question first. Do you want to give any
19 presumptive validity?

20 MS. BARON: I think we need to decide the
21 ultimate question of whether that judgment is still intact
22 before we decide whether or not it can be superseded.

23 MR. LOW: Right.

24 CHAIRMAN BABCOCK: Say that again, Pam.

25 MR. YELENOSKY: That's it.

1 MS. BARON: I think we need to determine
2 whether there's any continuing effect of the judgment
3 while the case is being transferred from one to the other.
4 Because it affects a lot of these issues that we're
5 talking about. It affects supersedeas. It affects
6 failure to pay the fee.

7 MR. LOW: Right.

8 HONORABLE TOM LAWRENCE: Under the proposed
9 748 we tried to solve that. We didn't finish that rule,
10 but in the next couple of sentences we tried to address
11 that problem.

12 CHAIRMAN BABCOCK: All these things are sort
13 of subspecies of the same question. Judge Brister. Chief
14 Judge Brister.

15 HONORABLE SCOTT BRISTER: Thank you. I am
16 not too familiar with JP practice or anything, but I'm
17 just assuming two circumstances in our sewage case. One,
18 one is the tenant pays money and fixes it and, therefore,
19 has no money to pay the rent. In that circumstance it
20 seems to me you ought to be able to appeal without posting
21 something. You have already paid something.

22 On the other hand is the case where
23 something needs to be fixed and you don't fix it and you
24 just don't pay. You have spent nothing. You just want to
25 stay rent free because you think the place is worth less

1 because this hasn't been fixed. In that case it seems to
2 me you ought to have to pay.

3 So, in other words, I'm thinking as far as
4 equities there's some circumstances where it may look like
5 this is somebody just wanting to stay free, some
6 circumstances not; and if you do it in terms of, well, to
7 appeal you have to file an appeal bond or you have to make
8 a deposit of one month's rent, it's either one way or the
9 other for all those cases, which is going to create some
10 unfairness.

11 Supersedeas, on the other hand, is something
12 that judges have discretion on. We can adjust supersedeas
13 to what the equities require in that situation, if I'm
14 reading it right; and if that's so, it seems to me
15 supersedeas is the better way to go because it allows the
16 judge to say, "Well, look, I'm going to make you post this
17 much if you want to stay in there and appeal"; and they
18 say, "Hey, I can't post that because I already paid to fix
19 the sewage" then that is something a JP can take into
20 consideration. I'm just afraid any other circumstance
21 you're going to be unfair to one side or the other;
22 whereas a supersedeas might allow some play of the
23 equities. Am I right or wrong about that?

24 HONORABLE TOM LAWRENCE: Well, Rule 7 --
25 proposed Rule 750(f)(i) will allow the judge to do exactly

1 that, to set a lower amount or even no amount if they want
2 to.

3 CHAIRMAN BABCOCK: Skip Watson.

4 MR. WATSON: I'm wondering -- to address
5 Pam's question, let me ask a question about de novo
6 appeals in general, whether at the county court or at the
7 district court, and it goes to what happens to the subject
8 matter. Let me use by way of an analogy a condemnation
9 case in which the commissioners have made an award and
10 said, "Okay, State you can take Farmer Brown's farm for
11 the interstate and you're going to dispossess him of his
12 home and his right to make a living, but you've got to pay
13 him X" and the state appeals that condemnation award I
14 think usually to district court for a trial de novo.

15 What happens in this type of trial de novo
16 to the award below? Does Farmer Brown have to vacate his
17 house? Does he have to post a supersedeas? I'm trying to
18 find an analogy of a trial de novo that also has the
19 weighty consequences we're dealing with here. On one hand
20 we're holding up the interstate highway, which those of us
21 who drive know that's no small thing, from the other side
22 where they kick someone. How does it work? Anybody know?

23 HONORABLE SARAH DUNCAN: I don't know, Skip,
24 but you also need to remember we're not talking about an
25 appeal from one court of record to another court of

1 record. We're talking about --

2 MR. WATSON: That's why I used the analogy
3 of the commissioners court because that's not a court of
4 record either.

5 HONORABLE SARAH DUNCAN: Right.

6 MR. WATSON: It's the same thing.

7 HONORABLE TOM LAWRENCE: Well, let me
8 read -- I can't answer the question about condemnation,
9 but let me read this 1886 case. I mean, that's how far
10 back this goes, and there are cases this year that say the
11 same thing. "The Constitution provides that in all
12 appeals from justice court there should be a trial de
13 novo. An appeal from a judgment rendered in a justice
14 court does not merely suspend its execution until the
15 determination of the cause in the appellate court, as does
16 an appeal from the district court to this court, but it
17 does serve to annul the judgment. On such appeals the
18 appellate court does not affirm or reverse the judgment of
19 the justice court but tries the case de novo on its merits
20 and renders such judgment as ought to be rendered, and
21 there is not a procedendum," and I've got four or five
22 other cases if you want to read that say essentially the
23 same thing. That's the status of an appeal from JP court
24 to county court.

25 HONORABLE SARAH DUNCAN: And that's for

1 every JP court case.

2 HONORABLE TOM LAWRENCE: Every JP court
3 case, not just forcible.

4 CHAIRMAN BABCOCK: Carlyle.

5 MR. CHAPMAN: Well, we have some history
6 about this before the combat was amended in Texas law. We
7 had an administrative decision that was not a record
8 decision but was binding if not appealed, but once
9 appealed the administrative decision was of no further
10 value or effect. It was vacated. The parties went
11 forward with regard to their claims and had to make proof
12 de novo, and there was no concept that there was any
13 weight to be given to the administrative award below.

14 So that's the way it worked, and either side
15 could appeal. There was a re-alignment of parties,
16 however; and the burden remained on one party as opposed
17 to the other; that is, on the claimant; and that's a
18 little different in terms of this circumstance; but the
19 concept that the determination of a tribunal that had no
20 record below was vacated and no further effective was very
21 well accepted and worked without a lot of difficulty.

22 CHAIRMAN BABCOCK: Frank.

23 MR. GILSTRAP: It seems to me we may be
24 approaching this problem backwards, and we're approaching
25 it theoretically. If you take Carlyle's reasoning to its

1 ultimate extent then any time there's an appeal from the
2 justice court by the tenant, the tenant stays in the house
3 because there's no judgment kicking him out.

4 MR. YELENOSKY: Right.

5 MR. GILSTRAP: And that obviously is
6 unacceptable. It seems to me the real bottom line here is
7 can you stay in the rented premises without paying your
8 rent, and once we decide that we can fix the rules pretty
9 much the way we want to, and I think that's -- and my
10 concern is that in latching onto these concepts of
11 jurisdiction and vacated judgment we're really going to be
12 masking the real issue underneath.

13 MR. CHAPMAN: Well, I don't accept that
14 premise. It seems to me that you could have a situation
15 where the JP court determination is vacated, of no further
16 import, and yet with regard to a certain category of cases
17 -- in this case the forcible entry and detainer case --
18 would be expedited in the court, in the county court. You
19 could get a determination made in short order. As a
20 matter of fact, the rules already provide for that.

21 It would be an expedited proceeding, and the
22 county court could have -- as a matter of fact, the rules
23 provide for that, too -- ways in which to deal with the
24 various inequities of the parties upon being presented
25 with those circumstances. That is not a new or novel

1 concept, and certainly that's something that we could
2 easily accomplish. The question, though, is whether or
3 not there's any reason to make a court that is not of
4 record to have precedential value, and I don't think I
5 have heard any reason why we should.

6 CHAIRMAN BABCOCK: Buddy Low.

7 MR. LOW: Chip, let me ask the question.
8 Assume that somebody owes me rent. I'm the landlord, and
9 I file suit to kick them out. A judge says, "Yeah, you've
10 got no reason not to pay the rent, you're kicked out."
11 They give notice of appeal and go through all that. Then
12 I don't have that judgment. Then they dismiss their
13 appeal. What do I do? Do I file again --

14 HONORABLE TOM LAWRENCE: That's right.

15 MR. LOW: -- and then he appeals again?

16 HONORABLE TOM LAWRENCE: That's right.

17 MR. LOW: I mean, and I guess they could
18 live there forever. I guess I just give the property to
19 the government and let them live there forever.

20 HONORABLE TOM LAWRENCE: If the landlord
21 doesn't make sure he goes forward and gets a judgment in
22 county court and that gets dismissed without there being a
23 judgment then the landlord has to start all over again in
24 JP court and refile it.

25 MR. LOW: And then what about the next time?

1 I get a judgment again. Can he just repeat it, or how
2 many times can it repeat?

3 HONORABLE TOM LAWRENCE: Well, next time
4 you'll probably go forward and try to get the judgment --

5 MR. CHAPMAN: Why would you sit back and do
6 nothing --

7 HONORABLE TOM LAWRENCE: -- but it sure
8 could happen more than once.

9 PROFESSOR CARLSON: But if you're the
10 landlord you've got the judgment on the tenant.

11 MR. LOW: Well, the tenant appeals.

12 PROFESSOR CARLSON: Gotcha.

13 MR. LOW: I'm not going to appeal. He gave
14 me what I wanted.

15 CHAIRMAN BABCOCK: Carl.

16 MR. HAMILTON: I have a question. If the
17 tenant appeals and then the landlord dismisses, you
18 indicated that -- is there a way for the landlord to
19 protect the judgment in the county court if the tenant is
20 the appellant and then he dismisses it?

21 HONORABLE TOM LAWRENCE: Yeah, understand
22 the burden of proof doesn't shift at the appellate court.
23 The burden of proof is the same as at the JP court. The
24 original plaintiff, the landlord, has a burden to go
25 forward and to get that judgment.

1 MR. HAMILTON: Then how can a tenant dismiss
2 it?

3 HONORABLE TOM LAWRENCE: Well, he gets
4 dismissed for want of prosecution or for some other
5 reason..

6 MR. CHAPMAN: No, wait. Isn't there a
7 notice?

8 MR. HAMILTON: If the landlord is the
9 prosecutor, how can that happen?

10 HONORABLE TOM LAWRENCE: It happens. It
11 happens all the time.

12 MR. YELENOSKY: Can a landlord file an
13 original proceeding?

14 HONORABLE TOM LAWRENCE: No. Justice courts
15 have original jurisdiction, exclusive; and, yes, there are
16 notices.

17 HONORABLE DAVID PEEPLES: Can I ask
18 something?

19 HONORABLE TOM LAWRENCE: I mean, the notices
20 that I read --

21 CHAIRMAN BABCOCK: I knew you'd get drawn
22 into this.

23 HONORABLE TOM LAWRENCE: -- are existing
24 notices that they have to give now.

25 MR. CHAPMAN: So both parties are getting

1 notice from the county court that there is an intent to
2 dismiss for want of prosecution.

3 HONORABLE TOM LAWRENCE: Because the
4 landlord doesn't go forward, doesn't file any motions,
5 doesn't ask for a judgment to be entered, doesn't ask for
6 a default judgment, doesn't ask for a trial setting.
7 Everybody just kind of sits back and waits for somebody to
8 do something, and the court just DWOPs it.

9 HONORABLE SARAH DUNCAN: I don't have a lot
10 of sympathy in those circumstances.

11 CHAIRMAN BABCOCK: Judge Peeples. Quiet,
12 quiet, quiet.

13 HONORABLE DAVID PEEPLES: Do we have any
14 information on how long it takes to get these cases heard
15 in county courts?

16 HONORABLE TOM LAWRENCE: It varies from
17 county to county. In Harris County a rule of thumb is
18 three months, but sometimes it's faster. I'm sure it's
19 slower in some counties.

20 CHAIRMAN BABCOCK: Buddy Low.

21 HONORABLE TOM LAWRENCE: There's not a time
22 period built into the rules now that says you have to hear
23 it in a certain time. It just says -- in county court it
24 just says you give these precedence.

25 HONORABLE DAVID PEEPLES: I'm just wondering

1 how long in the real world it takes these county judges to
2 get the cases disposed of.

3 HONORABLE TOM LAWRENCE: Well, I think it
4 could be three months sometimes.

5 MR. YELENOSKY: But the time frame -- and
6 Frank I think said something about living rent free. Do
7 we all agree that what we're talking about here is maybe a
8 20-day period where the JP court doesn't have jurisdiction
9 to issue a writ of possession and the county court doesn't
10 have it yet, where no writ of possession can be issued,
11 but after that 20 days, however long it takes to get to
12 county court, the county court can issue a writ of
13 possession if the tenant doesn't pay rent? Do we all
14 agree that that's the law?

15 And if that's the law, when we talk about
16 living rent free, I think that we shouldn't use that term
17 because that's not what's happening. During the pendency
18 of the appeal it's true that any back rent will not be
19 ordered paid if they don't have to post a supersedeas, but
20 they're not accruing new debt to the landlord without risk
21 of a writ of possession.

22 CHAIRMAN BABCOCK: Judge Lawrence.

23 HONORABLE TOM LAWRENCE: I don't know that I
24 agree that there is an obligation. Where in the rules
25 does it say that once a appeal is perfected the tenant has

1 to pay rent into the registry of the county court? The
2 only place it says that, if the tenant has an -- has a
3 pauper's affidavit and it's a nonrent case. That's the
4 only time the tenant has an obligation. Otherwise, the
5 landlord can go in and file motions and ask the county
6 court judge to do something, but there's nothing in the
7 rules now that require rent to be paid into the registry
8 of the court.

9 MR. YELENOSKY: Well, then that's a problem
10 that we may want to address.

11 HONORABLE TOM LAWRENCE: Well, we did. We
12 have.

13 MR. YELENOSKY: Well, that may be something
14 you can address without doing the other thing that I don't
15 like.

16 CHAIRMAN BABCOCK: Okay. Here's some --
17 Here's some questions I've heard. One question is, is
18 there any presumption of validity to a JP decision, what
19 do we believe, and we can express that in affirmative or
20 negative terms. We could vote on if the full committee
21 believes that there should be presumptive validity to a JP
22 decision.

23 Another question is should there be
24 continuing effect of the judgment from JP court to the
25 county court; and then Frank's issue, shall we make it so

1 that you can't stay on the rent premises without paying
2 the rent, which is more kind of basic. So those are the
3 three things I've heard.

4 Elaine, I would like you to frame a question
5 that we could vote on that would give you some assistance
6 in -- you and Judge Lawrence -- in the process.

7 PROFESSOR CARLSON: Can I ask more than one?

8 CHAIRMAN BABCOCK: Yeah. You can ask as
9 many as you want.

10 PROFESSOR CARLSON: That would be a long
11 question. Okay. Should we give any presumption of
12 validity to a JP judgment once the appellate court's
13 jurisdiction has been invoked through a de novo appeal?

14 CHAIRMAN BABCOCK: Those people who believe
15 we should give presumptive validity to a JP decision once
16 the de novo process is -- I knew you were going to say
17 something -- has commenced? Raise your hands, but Sarah
18 wants to say something.

19 HONORABLE SARAH DUNCAN: I just want to -- I
20 would like for the Chair to clarify whether you're asking
21 this question solely in the context of FED cases or are
22 you asking whether all JP court judgments should be given
23 presumptive validity?

24 CHAIRMAN BABCOCK: Our discussion is limited
25 to FED.

1 MR. LOW: Let me ask a question. What do
2 you mean by presumption of validity? What is the effect
3 of that? I mean, I know what a presumption of validity
4 means, but I don't know what it means in the context of
5 your question.

6 HONORABLE SARAH DUNCAN: Like when a
7 district court judgment in your personl injury case, that
8 judgment is in effect until a mandate issues and it's
9 supplanted by a --

10 MR. LOW: Until another court -- all right.
11 And then if I dismiss then it's gone back into effect.
12 Okay. That's what I thought you meant, but I have voted
13 before when I didn't know what I was voting on.

14 HONORABLE SARAH DUNCAN: Me, too.

15 MR. LOW: I didn't want to do it again.

16 CHAIRMAN BABCOCK: Judge Lawrence.

17 HONORABLE TOM LAWRENCE: All right. Let me
18 ask a question. What about the situation where you have
19 rent that continues to accrue during the course of the
20 appeal and you're three or four months down the line,
21 there's been no more rent paid into the registry of the
22 court, the county court dismisses, and the original JP
23 court judgment is now in effect, and you can execute on
24 that, but that doesn't have anything to do with the other
25 three or four months rent that have accrued. So aren't

1 you cutting out that landlord from being able to collect
2 more rent? You're going back to the original judgment
3 that ignores any more attorneys fees, any more rent.

4 MR. LOW: Do you file another suit?

5 CHAIRMAN BABCOCK: Elaine, would this be a
6 way to say it? All those who think a JP decision should
7 have presumptive validity while the case is in the process
8 of being appealed de novo to the county court raise your
9 hand.

10 MR. HAMILTON: I have a question first.

11 CHAIRMAN BABCOCK: Carl. Yeah.

12 MR. HAMILTON: Is there any judgment that a
13 JP court can enter other than a money judgment? I'm
14 talking about in all cases.

15 MR. YELENOSKY: They have no injunctive
16 power, right?

17 MR. HAMILTON: A money judgment and this
18 judgment for possession in a forcible detainer?

19 HONORABLE TOM LAWRENCE: Well, we -- in a
20 small claims court action it's money only; and in a
21 justice court suit you have some additional powers subject
22 to the jurisdictional limit of the court; and you can ask
23 for other things; and while, no, we don't have injunctive
24 powers, we do have the ability to issue a writ of
25 possession; and a writ of re-entry, we have the right to

1 put somebody back into the property, which is like an
2 injunction, but it's not an injunction.

3 MR. HAMILTON: That's all in a FED
4 proceeding, though.

5 HONORABLE TOM LAWRENCE: But in a regular
6 justice court suit we can do other things than money
7 judgments.

8 PROFESSOR CARLSON: Detachment and
9 garnishment.

10 CHAIRMAN BABCOCK: Nina.

11 MS. CORTELL: Let me ask a question. Are we
12 trying to pass upon a question that's been part of our
13 jurisprudence for over a hundred years, or did I
14 misunderstand the law that's been cited to us?

15 CHAIRMAN BABCOCK: Judge Lawrence nods his
16 head in the affirmative.

17 HONORABLE TOM LAWRENCE: We are. The law
18 has been like this for a long time.

19 CHAIRMAN BABCOCK: All those who think a JP
20 decision should have presumptive validity while the case
21 is in the process of being appealed de novo to the county
22 court raise your hand.

23 MR. YELENOSKY: In FEDs.

24 CHAIRMAN BABCOCK: In FEDs. Thank you.

25 All those who think it should not raise your

1 hand.

2 HONORABLE ANN McCLURE: I vote "no," Chip.

3 CHAIRMAN BABCOCK: Thank you. Well, that is
4 clarifying indeed. It's eight in favor and seven against,
5 unless I missed somebody over there. Did you guys vote?

6 MR. HARWELL: I didn't.

7 CHAIRMAN BABCOCK: Does that clear things up
8 for you, Elaine?

9 PROFESSOR CARLSON: Really clear. Thanks.

10 HONORABLE TOM LAWRENCE: I guess I don't
11 know what we just voted on exactly, but are you saying
12 that the judgment can be revived if it's dismissed by the
13 county court, or does the judgment just remain in effect
14 until such time that you get final judgment?

15 CHAIRMAN BABCOCK: Ask your Chair there.
16 She's the one that put this thing together.

17 PROFESSOR CARLSON: I hope it's the latter.

18 MR. GILSTRAP: Chip?

19 CHAIRMAN BABCOCK: Yeah, Frank.

20 MR. GILSTRAP: I think maybe we should try
21 it from the functional approach.

22 CHAIRMAN BABCOCK: Yeah. All right. Here's
23 the question: Should we make it so you can't stay in the
24 rent premises without paying rent? All those who agree
25 with that --

1 MR. YELENOSKY: Point of order. I'm not
2 sure what that means, based on my prior comments.

3 MR. GILSTRAP: It's a lot clearer than
4 "presumptive validity," I promise you that.

5 MR. YELENOSKY: Well, it is clearer than
6 that, but are we talking about an arrearage that's been
7 awarded in a judgment, or are we talking about rent that
8 comes due at that time that would otherwise be paid under
9 the lease contract?

10 MR. GILSTRAP: I think he's right. Maybe we
11 should break those down.

12 CHAIRMAN BABCOCK: Okay. State it so we can
13 talk about it.

14 MR. GILSTRAP: Well, you know, first of all,
15 should the tenant be allowed to stay in the premises rent
16 free without paying the current rent as it comes due, to
17 distinguish that from the accrued rent?

18 CHAIRMAN BABCOCK: And I think to state it
19 in a way that the vote would be clear we would say all
20 those who think the tenant should be prohibited from
21 staying in the rent premises during the appeal de novo
22 proceedings without paying rent as it comes due raise your
23 hand.

24 MR. EDWARDS: I think that I'd like to
25 suggest kind of an alternative to that, and that is

1 whether or not the county court should be allowed to
2 prohibit the defendant from staying in the premises rent
3 free, because maybe the county court when it hears it,
4 maybe there's a dad-gum good reason for them staying in
5 there rent free.

6 HONORABLE SARAH DUNCAN: Right. Should the
7 county court be permitted to issue a writ of possession if
8 the tenant does not --

9 MR. EDWARDS: Yeah.

10 HONORABLE SARAH DUNCAN: Or if the tenant
11 does not pay rents as they accrue.

12 MR. CHAPMAN: Current.

13 MR. EDWARDS: Suppose that your lease says
14 that all utilities are going to be paid, and the landlord
15 is not paying the utilities, and in order to keep your
16 utilities from getting turned off you're going to pay an
17 amount of -- to the electric company, the city, the gas
18 company, the water bill, an amount almost equal to your
19 rent or maybe more than your rent because the fuel
20 adjustment clause in the electric bill? Why should you
21 get kicked out while you're fighting with the landlord?

22 MR. LOW: But, Bill, we've got the provision
23 if the county court doesn't acquire jurisdiction then how
24 can he do that?

25 MR. YELENOSKY: Well, that's a separate

1 question.

2 MR. EDWARDS: That's a separate question.

3 MR. GILSTRAP: But, see, you know, what Bill
4 says may be true and there may be some exceptions you want
5 to make, but I think voting on it that way kind of
6 obfuscates the underlying issue, and that is as a matter
7 of policy are we going to allow the people to stay in the
8 place without paying the current rent?

9 CHAIRMAN BABCOCK: Well, here's one way,
10 with Bill's suggestion in mind, that we could say it. Let
11 me see if it works for you, Frank. All those who think
12 the county court should be able to prohibit the tenant
13 from staying in the rent premises without paying rent as
14 it becomes due during the appeal process.

15 MR. HAMILTON: Rent determined by the court
16 to be due.

17 HONORABLE ANN McCLURE: Chip, would you say
18 that again?

19 CHAIRMAN BABCOCK: Yes. All those who think
20 the county court should be able to prohibit the tenant
21 from staying in the rent premises without paying -- and
22 there was a friendly amendment here -- without paying rent
23 as determined by the court.

24 MR. HAMILTON: As determined by the court to
25 be due.

1 MR. EDWARDS: It's not past rent.

2 HONORABLE SCOTT BRISTER: It seems to me
3 this is getting too complicated. You ought to do an 80/20
4 rule. I mean, what is it going to be most of the time --

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE SCOTT BRISTER: -- and then
7 whoever is the exception ought to have the burden to come
8 into the court.

9 CHAIRMAN BABCOCK: Yeah.

10 HONORABLE SCOTT BRISTER: Because otherwise
11 you're going to have the county courts on every case has
12 to have a hearing on this, and there's just not enough
13 county court judges or time in the day.

14 CHAIRMAN BABCOCK: All those who think the
15 county court should be able to prohibit the tenant from
16 staying in the rent premises without paying rent as it
17 becomes due during the appeal process raise your hands.
18 That's the question. You don't have to raise your hands
19 yet. Did you get that, Justice McClure?

20 HONORABLE ANN McCLURE: I did. Thanks.

21 CHAIRMAN BABCOCK: Okay. Let's vote on
22 that. Let me state the question one more time and then
23 raise your hand. All those who think the county court
24 should be able to prohibit the tenant from staying in the
25 rent premises without paying the payment of rent as it

1 becomes due during the appeal process raise your hand.

2 HONORABLE ANN McCLURE: I vote "yes" on
3 that.

4 CHAIRMAN BABCOCK: And all those who vote
5 against raise your hands.

6 So that, by a vote of 21 to nothing, is a
7 principle that this committee unanimously believes, and is
8 that helpful to you or --

9 PROFESSOR CARLSON: No, that's helpful.

10 MR. YELENOSKY: Do you have a next question
11 on the back rent?

12 MR. GILSTRAP: Past due rent, yes.

13 CHAIRMAN BABCOCK: Okay. Steve, can you
14 frame the question on the back rent?

15 MR. YELENOSKY: I don't know that I can.
16 Frank, you want to phrase it?

17 MR. GILSTRAP: All those who think that the
18 county court judge should be able to prohibit the tenant
19 from staying in the premises while paying the past due
20 rent raise your hand.

21 MR. HAMILTON: How could the county court do
22 that 'til the appeal is decided?

23 HONORABLE TOM LAWRENCE: Let's phrase it
24 this way and get to the real issue, which is -- well, I
25 guess we need to take two votes on this. One is do you

1 want to have a provision for supersedeas bond on an appeal
2 from JP court to county court enforceable to secure the
3 judgment?

4 I think we need to take a second vote on
5 whether or not an affidavit of indigence should apply to
6 that, but just in general do we want to have this dual
7 track so you appeal the case and then post a supersedeas
8 to suspend the enforcement of the judgment? I mean,
9 that's really the issue, isn't it?

10 MR. GILSTRAP: Well, Chip, as I see it, I
11 mean, once you make the decision that the tenant can be
12 kicked out if he doesn't pay the rent then I think
13 Dillingham mandates a supersedeas bond procedure; but, you
14 know, the real issue, again, is functionally, you know,
15 are we going to allow the tenant to stay in the apartment
16 rent free -- without paying the past due rent while the
17 FED appeal is being decided? And once we decide that then
18 I think the committee can come up with a plan.

19 CHAIRMAN BABCOCK: Let me see if I've
20 written it faithfully to what you just said, Frank. All
21 those who think the county court should be able to
22 prohibit --

23 HONORABLE SARAH DUNCAN: Could you just
24 phrase it positively? Should the county court do X, Y, or
25 Z?

1 CHAIRMAN BABCOCK: Well, the problem is when
2 you do it that way --

3 MR. GILSTRAP: We've already submitted one
4 that way.

5 CHAIRMAN BABCOCK: Yeah. All those who
6 think the county court should be able to prohibit the
7 tenant from staying in the rent premises without payment
8 of past due rent during the appeal process raise your
9 hands.

10 MR. CHAPMAN: Well, isn't that what the
11 appeal process is about?

12 MR. HARWELL: Yeah. That's not --

13 CHAIRMAN BABCOCK: So you'll vote against
14 it.

15 HONORABLE TOM LAWRENCE: You mean post a
16 supersedeas. You don't mean they come up with the rent on
17 the spot.

18 CHAIRMAN BABCOCK: Huh? I'm trying to get
19 their language down.

20 HONORABLE TOM LAWRENCE: Yeah, you don't
21 mean they come up with the back rent on the spot. You
22 mean they post a supersedeas.

23 HONORABLE HARVEY BROWN: For the back rent.

24 MR. CHAPMAN: I mean, that's part of what's
25 being decided by the appeal.

1 MR. GILSTRAP: Without paying the back rent
2 or superseding the judgment for back rent. I think that
3 would solve the problem.

4 MS. BARON: Can I just make the point that
5 superseding it is financially the same to these people as
6 coming up with the money?

7 MR. GILSTRAP: Sure.

8 MR. YELENOSKY: Right. And historically it
9 was a nonissue because there wasn't a judgment for
10 damages, so historically somehow we have made a decision
11 that it didn't.

12 CHAIRMAN BABCOCK: Okay. Let's just try to
13 get the language. All those who think the county court
14 should be able to prohibit the tenant from staying in the
15 rent premises without superseding the judgment for back
16 rent during the appeal process raise your hand.

17 Does that get it? Don't raise your hands
18 yet. Does that language frame it in a way that would be
19 helpful to the subcommittee?

20 Okay. So now we're going to vote on it.
21 All those who think the county court should be able to
22 prohibit the tenant from staying in the rent premises
23 without superseding the judgment for back rent during the
24 appeal process raise your hands.

25 All right. All those who disagree raise

1 your hands.

2 HONORABLE ANN McCLURE: I vote with that
3 group.

4 CHAIRMAN BABCOCK: In favor or against?

5 HONORABLE ANN McCLURE: Against.

6 CHAIRMAN BABCOCK: The votes in favor are
7 eleven. The votes against are nine. So that doesn't --

8 PROFESSOR CARLSON: That doesn't help.

9 CHAIRMAN BABCOCK: It doesn't help except
10 that it seems to me that if we're going to be changing 150
11 years of law that maybe there ought to be a greater
12 consensus than 8 to 7 and 11 to 9.

13 MR. YELENOSKY: The next question is going
14 to be --

15 HONORABLE DAVID PEEPLES: I kind of think
16 there ought to be a better reason for changing it than an
17 1890 case that we've co-existed with.

18 MR. EDWARDS: It's the Constitution of the
19 state that's the reason, as I understand it.

20 HONORABLE DAVID PEEPLES: Well, I have not
21 had a chance to read this case. I'm not persuaded that it
22 mandates no supersedeas.

23 MR. GILSTRAP: Judge Peeples, do you mean
24 Dillingham? Are you talking about that case?

25 HONORABLE DAVID PEEPLES: Yeah.

1 MR. GILSTRAP: Okay. I just want to make
2 that for the record.

3 CHAIRMAN BABCOCK: Okay. Any other votes we
4 could take that would help --

5 HONORABLE TOM LAWRENCE: Yeah. We need to
6 take a vote on whether or not if there is a supersedeas
7 that an affidavit of indigence could suffice and allow an
8 indigent tenant to not post a supersedeas.

9 MR. YELENOSKY: And that's the -- Chip,
10 that's the current state of the law and has been then --
11 well, in the sense that the effect has been that if you're
12 indigent you don't post a supersedeas. I think it would
13 do the same presumption that you just stated.

14 MR. HARWELL: And, Chip, I have a quick
15 question. The supersedeas bond, does that only cover --
16 because we had discussed in our committee meeting that it
17 wouldn't only cover the rent but also possibly attorney
18 fees or is it only rent we're talking about?

19 HONORABLE TOM LAWRENCE: No, no. We're
20 talking about everything. Anything monetary in the
21 judgment the supersedeas would cover.

22 PROFESSOR CARLSON: In the JP judgment.

23 HONORABLE TOM LAWRENCE: In the JP court
24 judgment.

25 MR. GILSTRAP: Well, but there is a

1 difference between requiring the tenant to supersede the
2 judgment for rent and order to stay in the premises as
3 opposed to superseding the judgment for rent and attorneys
4 fees. It seems to me it makes sense that's a logical
5 distinction there.

6 MR. HARWELL: That's why --

7 MR. EDWARDS: Well, when you get to the
8 county court level isn't there a right, if you think you
9 can't recover the stuff that's going on, that you can seek
10 a writ of attachment on the property to pay the costs?

11 MR. GILSTRAP: You mean to collect the
12 judgment?

13 MR. EDWARDS: To collect the judgment.
14 There's a procedure already in place at that level that
15 allows the person that thinks they're going to come up
16 short to go out and post a bond and grab the property.

17 MR. GILSTRAP: Assuming there's property to
18 grab.

19 MR. EDWARDS: Well, it may be possession of
20 the premises.

21 HONORABLE TOM LAWRENCE: You're talking
22 about a post-judgment collection.

23 MR. EDWARDS: No. I'm talking about --

24 MR. HAMILTON: When we talk about
25 superseding the money judgment, are we assuming that the

1 money judgment says if you don't pay you give up
2 possession? Or do we have to have a supersedeas for the
3 money judgment and a separate supersedeas for the
4 possession?

5 HONORABLE TOM LAWRENCE: No. You have one
6 supersedeas for everything, but if you don't post a -- the
7 supersedeas is to suspend the enforcement of the judgment
8 and the judgment for possession and the judgment for back
9 rent, for costs and attorneys fees. So if you don't post
10 a supersedeas then a landlord could go in and try to
11 enforce judgment by getting a writ of possession for
12 possession or writ of execution on abstract of judgment,
13 garnishment, turnover, whatever they want to do.

14 MR. LOW: What would happen, though, in a
15 situation where you pay in your current rent but you don't
16 pay your back rent. Then ordinarily you would be able to
17 enforce the judgment that you owe for the back rent, but
18 they couldn't kick you out of the house --

19 HONORABLE TOM LAWRENCE: Well --

20 MR. LOW: -- because you're paying the
21 current rent.

22 HONORABLE TOM LAWRENCE: But the back rent
23 is now going to -- you would post an appeal bond
24 currently, which the judge presumably sets to encompass
25 the amount of the judgment for back rent and attorneys

1 fees plus back -- rent during the pendency of the appeal,
2 presumably. So if you don't post the appeal bond now,
3 then you don't appeal and you get evicted.

4 CHAIRMAN BABCOCK: All right. Here's --
5 Steve, let's try this out. All those in favor of the
6 proposition that the filing of a proper certificate of
7 indigency should allow the tenant to stay in the rent
8 premises without paying the back rent or current rent
9 during the pendency of the appeal raise your hand.

10 HONORABLE TOM LAWRENCE: Not current.

11 PROFESSOR CARLSON: Not the current.

12 MR. YELENOSKY: Not current.

13 CHAIRMAN BABCOCK: Not current. Back rent?

14 MR. YELENOSKY: Well, without paying a
15 judgment for money damages.

16 HONORABLE TOM LAWRENCE: It's not just rent.

17 CHAIRMAN BABCOCK: Okay. Without paying a
18 judgment for money damages?

19 MR. YELENOSKY: You could -- Justice
20 Lawrence, whatever. Would it be a judgment?

21 HONORABLE TOM LAWRENCE: Well, it's the
22 posting of a supersedeas. I mean, that's what this is
23 about.

24 MR. YELENOSKY: Without posting a
25 supersedeas. Yeah.

1 HONORABLE TOM LAWRENCE: Yeah. What we're
2 voting on is do we want to let an affidavit of indigence
3 to allow an indigent tenant not to post a supersedeas and
4 continue to appeal.

5 MR. YELENOSKY: Yeah, I think that question
6 will get to it.

7 CHAIRMAN BABCOCK: All those in favor of the
8 proposition that the filing of a proper certificate of
9 indigence should allow the tenant to stay in the rent
10 premises without posting a supersedeas bond during the
11 pendency of the appeal. How does that work?

12 MR. GILSTRAP: We're just talking -- we're
13 not talking about ongoing rent. We're just talking about
14 the judgment that the JP court rendered.

15 HONORABLE TOM LAWRENCE: Yeah.

16 MR. GILSTRAP: Okay.

17 CHAIRMAN BABCOCK: All those -- let me read
18 it one more time. All those in favor of the proposition
19 that the filing of a proper certificate of insurance -- of
20 indigency. Wait.

21 All those in favor of the proposition that
22 the filing of a proper certificate of indigency should
23 allow the tenant to stay in the rent premises without
24 posting a supersedeas bond during the pendency of appeal
25 raise your hands.

1 HONORABLE ANN McCLURE: Yes.

2 MR. EDWARDS: Well, that -- I'm going to
3 stay out of that one.

4 CHAIRMAN BABCOCK: All those against raise
5 your hands.

6 The yea's had it by a vote of 13 to 3, so
7 that proposition passed by a vote of 13 to 3 votes. Does
8 that give you a sense of how this committee feels, Elaine,
9 even though you voted against it?

10 PROFESSOR CARLSON: Yeah. And one other
11 thing would be helpful.

12 CHAIRMAN BABCOCK: All right. What other
13 thing would be helpful?

14 PROFESSOR CARLSON: Is it a sense of the
15 full committee that you -- that we want to shift from
16 perfection of a de novo appeal to the county court from
17 filing fee to notice of appeal with the 143a catch-up
18 provision?

19 CHAIRMAN BABCOCK: Say that again.

20 PROFESSOR CARLSON: I know you're
21 frustrated, Tom, but I want to know.

22 HONORABLE TOM LAWRENCE: Say that again.

23 PROFESSOR CARLSON: Is it a sense of the
24 full committee that we want to shift from perfection of
25 appeal by filing fees to the county court to a notice of

1 appeal will perfect county court jurisdiction with a
2 20-day catch-up provision like that in 143a?

3 HONORABLE TOM LAWRENCE: My only comment
4 would be that the Texas Association of Counties is
5 probably not going to like that because we're talking
6 about filing fees for all appeals from all JP courts, and
7 that's a substantial amount of money. You're talking
8 about a free appeal with no filing fee whatsoever.

9 PROFESSOR CARLSON: No. A filing fee, but
10 it's not jurisdictional.

11 MR. CHAPMAN: But it's not jurisdictional.

12 PROFESSOR CARLSON: You perfect by the
13 notice of appeal and then if you haven't -- you're suppose
14 to pay a filing fee, but if you don't, we keep the 20-day
15 hiatus.

16 MR. CHAPMAN: 143b. 143a. I'm sorry.

17 HONORABLE TOM LAWRENCE: All right. So
18 you're saying -- so the vote you want is to have the
19 filing fee paid as it is now, not at the time that the
20 appeal is perfected.

21 MR. CHAPMAN: Right.

22 HONORABLE SARAH DUNCAN: And the appeal will
23 be perfected when the notice of appeal is filed.

24 CHAIRMAN BABCOCK: Yeah. Here's how I can
25 frame it. All those in favor of shifting from perfection

1 of an appeal with the payment of filing fees to a system
2 of a notice of appeal which perfects jurisdiction.

3 MS. BARON: I have a question.

4 CHAIRMAN BABCOCK: Yes, Pam.

5 MS. BARON: Elaine, in that system then if
6 you don't make the payment within 20 days and we have
7 no -- the appeal is perfected, and there's no underlying
8 judgment, right?

9 MR. EDWARDS: That's the real problem.

10 PROFESSOR CARLSON: That is the problem.

11 MS. BARON: So it can't work.

12 MR. GILSTRAP: No. We can fix that.

13 MS. BARON: No, because we voted -- we
14 didn't have a good vote on whether the judgment has any
15 validity.

16 HONORABLE SCOTT BRISTER: Not if -- if we're
17 going to let deadbeats off on the other two votes, this
18 lets them completely off.

19 MR. LOW: Just by filing a piece of paper.

20 MR. HAMILTON: As I understand Elaine, the
21 question is whether we want to go with the way they
22 proposed it, which is the filing of the fee in the JP
23 court which perfects the appeal, or to rely upon Rule 143a
24 for the notice; but as I understand Rule 143a, if that fee
25 is not paid then it's just a nullity and nothing happens

1 to the JP court.

2 PROFESSOR CARLSON: That's true. Can I ask
3 Andy to address what your practice is one more time?

4 MR. HARWELL: Well, when the notice of
5 appeal is brought to us, it in essence just sits there for
6 20 days; and we don't issue a cause number or anything to
7 the docket; and if the fees are not paid then everything
8 is sent back to the JP court.

9 MR. HAMILTON: So there's never an appeal
10 under 143 if the fee's not paid; isn't that right?

11 PROFESSOR CARLSON: That's the effect of it.

12 HONORABLE TOM LAWRENCE: And that's the
13 current case law. There are cases that say that if the
14 filing fee is not paid then the appeal is not perfected.
15 It goes back and JP court has to issue a judgment.

16 MR. EDWARDS: Exactly.

17 HONORABLE HARVEY BROWN: So is the motion
18 whether we should retain that current law?

19 PROFESSOR CARLSON: Exactly. Because the
20 proposal that we made was to perfect the appeal by the
21 filing of the notice and the filing fee, which is
22 distinctive from the current practice.

23 MR. EDWARDS: No. Not really.

24 MR. HARWELL: You're just asking for the
25 filing fee -- well, you're just asking for it up front.

1 PROFESSOR CARLSON: 20-day grace period.

2 HONORABLE HARVEY BROWN: Right, the 20-day
3 grace period.

4 MR. EDWARDS: Well, you've got to pay the
5 fee or it isn't perfected.

6 PROFESSOR CARLSON: We didn't have the
7 20-day 143a. We're requiring -- forcible was not in 143a,
8 right?

9 HONORABLE TOM LAWRENCE: That's right.

10 HONORABLE SARAH DUNCAN: Under your
11 proposal.

12 PROFESSOR CARLSON: Under the proposal.

13 MR. HARWELL: But that's different from what
14 you said a little earlier about it not being perfected
15 when the notice was filed and no fee was paid. You're
16 saying pay the fee along with the notice at the JP level
17 and then it goes to the county courts at that time rather
18 than the 20 days, waiting the 20 days.

19 PROFESSOR CARLSON: Right. So do we want
20 the 20-day grace period that 143a gives, kind of a
21 floating time to perfect, realizing that that then is
22 enlarging the time for the forcible entry trial in a
23 county court because they've got to wait the 20 days, but
24 Steve Yelenosky I think would say that's a good thing. Do
25 you think that's a good thing?

1 HONORABLE TOM LAWRENCE: My argument would
2 be under the current system there's confusion and you
3 don't know when the appeal has been perfected because the
4 county court's jurisdiction is not invoked until that
5 happens. There are notice requirements that it extends
6 it. It's confusing to the county court-at-law judges
7 sometimes because they -- sometimes they send back notices
8 thinking that they have -- do not have jurisdiction over
9 the case or they have jurisdiction, which it's just the
10 opposite result. It's confusing.

11 If you pay the filing fee up front then,
12 yeah, I realize it's another 120 or 40 dollars that they
13 have got to pay now as opposed to in 25 days. You don't
14 have these issues about when the jurisdiction is invoked.
15 I mean, you know that the appeal is perfected then. It
16 goes up. It's docketed, and everything moves along, and
17 from the standpoint of actual practice it would be better
18 to have it paid at the time you file the appeal bond.

19 CHAIRMAN BABCOCK: Let me see if I can frame
20 the question. All those in favor of a system where you're
21 perfecting an appeal in FED cases only upon filing a
22 notice of appeal and payment of a contemporaneous filing
23 fee. Is that what you're looking for?

24 PROFESSOR CARLSON: Right. Right.

25 CHAIRMAN BABCOCK: That's what we're going

1 to vote on. So all those who are in favor of a system
2 where you perfect an appeal in FED cases only upon filing
3 a notice of appeal and payment of a contemporaneous filing
4 fee raise your hand.

5 HONORABLE ANN McCLURE: Yes.

6 CHAIRMAN BABCOCK: Wait a minute. Let's
7 keep your hands -- if you have your hands up, put them up.

8 MR. YELENOSKY: Wait a minute. Am I voting
9 for this or against this? I got lost. I have found my
10 way again, with Justice Duncan's --

11 CHAIRMAN BABCOCK: All right. Put them up
12 one more time and keep them up. I see people popping them
13 up and down.

14 And you voted "yes," Justice McClure? Did I
15 hear that?

16 HONORABLE ANN McCLURE: Yes, I did.

17 CHAIRMAN BABCOCK: All those opposed? It
18 passed 12 to 8. So, again, I don't think you have a
19 strong consensus to change 150 years of Texas law.

20 MR. EDWARDS: I don't think that changes 150
21 years of --

22 CHAIRMAN BABCOCK: I don't think you have
23 consensus to change five years of law.

24 HONORABLE SCOTT BRISTER: So let me make
25 sure I've got it. The consensus of the committee is if

1 I'm in my apartment --

2 CHAIRMAN BABCOCK: Oh, I love the way you're
3 going to wind up with that.

4 HONORABLE SCOTT BRISTER: If I'm in my
5 apartment and decide I'd like to stay there for awhile but
6 I have some other things I'd like to spend my money on,
7 stop paying rent. Eventually I get an FED notice.
8 Eventually that goes to trial, and I have no defense. I'm
9 just wanting to stay free, and so I lose. All I do is
10 file a notice of appeal with the county court, don't spend
11 a dime.

12 MR. GILSTRAP: You start -- no, you start
13 paying rent.

14 HONORABLE SCOTT BRISTER: Let me finish.
15 Let me finish. I file a notice of appeal with the county
16 court, and then I get another 20 days to stay there.

17 MR. YELENOSKY: Paying rent.

18 HONORABLE SCOTT BRISTER: Without -- well,
19 if I don't pay rent, what happens? How is it any
20 different? I just don't pay, and I get another 20 days,
21 and if that's right, why in the world are we for that?

22 MR. YELENOSKY: Well, we voted earlier that
23 we didn't think people should get away with --

24 PROFESSOR CARLSON: But who has jurisdiction
25 then?

1 HONORABLE SCOTT BRISTER: And so you file
2 another FED for the rent that I'm --

3 MR. YELENOSKY: I don't know.

4 HONORABLE SCOTT BRISTER: And I'm --

5 CHAIRMAN BABCOCK: Justice Brister, if there
6 are -- the answer to your hypothetical, I think, and I
7 would think the whole committee would share this, is if
8 there are deadbeats out there as clever as you, we're
9 probably going to let them do it. Let's break for lunch.

10 HONORABLE SCOTT BRISTER: My experience
11 after twelve years on the bench is there are.

12 (A recess was taken at 1:05 p.m., after
13 which the meeting continued as reflected in
14 the next volume.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand
Reporter, State of Texas, hereby certify that I reported
the above meeting of the Supreme Court Advisory Committee
on the 28th day of September, 2001, Morning Session, and
the same was thereafter reduced to computer transcription
by me.

I further certify that the costs for my
services in the matter are \$ 1,290.50.

Charged to: Jackson Walker, L.L.P.

Given under my hand and seal of office on
this the 9th day of October, 2001.

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