1
2
3
4
5
6 *
7 **MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**
8 November 2, 2001
9 (MORNING SESSION)
10
11 *
12
13
14
15
16
17 COPY
18
19
20 Taken before *D'Lois L. Jones*, Certified
21 Shorthand Reporter in Travis County for the State of
22 Texas, reported by machine shorthand method, on the 2nd
23 day of November, 2001, between the hours of 9:08 a.m. and
24 12:45 p.m., at the Texas Law Center, 1414 Colorado, Room
25 101, Austin, Texas 78701.

INDEX OF VOTES

Votes taken by the Supreme Court Advisory Committee during this session are reflected on the following pages:

Vote on	*Page*
Rule 6	4919
Rule 740(a)(2)	4994
Rule 740(a)(2)	5055
Rule 749b	4955

1 *-*-*-*-*

2 CHAIRMAN BABCOCK: Okay. We're on the
3 record, Steve. Everybody pull out your notes. We're
4 going to post this on the website. We're going to post
5 this on the website, and we're going to send e-mails to
6 everybody, but the schedule for next year's meetings are
7 as follows: January 25-26, March 8-9, May 17-18, June
8 14-15, September 20-21, and November 15-16. As everybody
9 knows, there's a lot of moving parts, football weekends,
10 the hotel, the Bench/Bar Conference, which we didn't do a
11 very good job on this year, but I think we got that
12 covered for next year.

13 MR. SOULES: State Bar Convention.

14 CHAIRMAN BABCOCK: And there have been other
15 people who have e-mailed us with particular problems,
16 which we've tried to accommodate to the extent we could.

17 HONORABLE SARAH DUNCAN: These aren't the
18 same dates that you e-mailed out?

19 CHAIRMAN BABCOCK: They are the same dates
20 except for March.

21 MS. SWEENEY: Could you say them again for
22 those of us in the slow-moving group?

23 CHAIRMAN BABCOCK: It is January 25-26,
24 March 8-9. That's different from the date we e-mailed
25 out. We e-mailed March 1-2, but there's a problem with

1 something on that. May 17-18, June 14-15, September
2 20-21, and November 15-16. And, as I said, we'll e-mail
3 this to everybody, and we'll put it on the website, but
4 those are the dates, and we've got the hotel lined up, and
5 I think we've got this room lined up, correct?
6 MS. LEE: That's right.
7 CHAIRMAN BABCOCK: Okay. So we're --
8 MR. SOULES: You're aware that the June
9 meeting is right on top of the Bar convention?
10 CHAIRMAN BABCOCK: In terms of on top of it,
11 at the same time?
12 MR. SOULES: Yes, sir.
13 CHAIRMAN BABCOCK: No, we're not aware of
14 that.
15 MR. SOULES: There's a big sign out there.
16 MR. ORSINGER: What city is it in, Luke?
17 MR. SOULES: Dallas, I think.
18 CHAIRMAN BABCOCK: In Dallas? Well, we
19 probably can't do that then.
20 MR. SOULES: Probably wouldn't be a problem
21 if you met in Dallas, but I do have some sensitivity to
22 scheduling --
23 HONORABLE JAN PATTERSON: We could have a
24 partial meeting in public at the State Bar. Wouldn't that
25 be --

1 CHAIRMAN BABCOCK: Yeah. We'll look into
2 that. Let's leave that date for now, but, Debra, look
3 into another weekend we can do that.
4 All right. Well, the first item on the
5 agenda, as always, is the report from Justice Hecht. By
6 next meeting we're going to have a list of at least our
7 records of what this committee has done since I've been
8 chair that has been sent to the Court for consideration;
9 but, Justice Hecht, do you have a report, ad hoc or not ad
10 hoc?
11 JUSTICE HECHT: Yeah. I feel it necessary
12 to say that I plan to stay on the Court. I know reactions
13 to that will be mixed, but we had an announcement by
14 Justice Hankinson this week, or last Friday, that she is
15 not going to seek re-election, and there seems to be some
16 interest in our Court. We've got a sign-up sheet back
17 there at the back in case you want to run for the
18 position. Justice Baker has announced he's not going to
19 to run. Chief Justice Phillips has announced he is. So
20 there have been some changes around our shop a little bit,
21 either real or anticipated.
22 The Court's started work on the TRAP rules
23 but has not finished them, and we've started to get
24 together with the Court of Criminal Appeals about the only
25 rule in the batch that I think they may have a problem

1 with, which is a big one, TRAP 47. So we're working on
2 that, and we have two additional referrals to the
3 committee, both from the Texas Judicial Council, which is
4 a group, administrative group, whose charge is to sort of
5 oversee some areas of administration of the judiciary, and
6 they have passed out of their group Proposed Uniform Court
7 Rules for Coverage of Judicial Proceeding in Texas Trial
8 and Appellate Courts; in other words, electronic media
9 coverage, cameras, and that sort of thing that would be --
10 that would be a statewide rule; and we've had local rules
11 and rules in the appellate rules for a long time; but this
12 would be a statewide rule; and they have asked that this
13 committee look this over, even though it's not totally
14 within our bailiwick, but parts of it are and so they want
15 our response to that.
16 And then the other referral from the
17 Judicial Council is a set of rules -- a rule on visiting
18 judge peer review, and this would be some mechanism for
19 having the abilities and performance of visiting judges
20 reviewed by other judges and sometimes by lawyers. So,
21 again, this is not -- this is more their area, but they
22 would like to have our thoughts on that rule, so both of
23 those I give to the chair to assign and take a look at,
24 and that's all we have.
25 Let's see, Judge Rhea resigned from the

1 committee, just for personal and work reasons, and we'll
2 miss him and look for another district judge to take his
3 place.
4 CHAIRMAN BABCOCK: Okay. On Rule 47 there's
5 an excellent article in the Houston Lawyer that was just
6 published last week about our handiwork.
7 JUSTICE HECHT: Written by the chair.
8 CHAIRMAN BABCOCK: That's why I took the
9 liberty of calling it an excellent article. And there is
10 also another development in that area. The Ninth Circuit,
11 Judge Kominski, has written a lengthy opinion about
12 unpublished opinions and very scholarly work and takes the
13 Eighth Circuit absolutely to task, and you'll be
14 interested to know that it arose in the context of a
15 disciplinary proceeding against a lawyer who cited an
16 unpublished opinion in court and the court instituted
17 disciplinary proceedings against the lawyer for citing an
18 unpublished opinion in contravention of the Ninth Circuit
19 local rule that says you can't do that; but their local
20 rule is somewhat similar to Rule 47, although there were
21 some important differences; and, of course, they let the
22 lawyer off the hook but said, "Our rule stands and so from
23 now on, lawyers, beware. Don't go citing these
24 unpublished opinions, because you're not allowed to."
25 MR. GILSTRAP: What's that case, Chip, or

1 the name of the judge?
2 CHAIRMAN BABCOCK: Kominski is the judge,
3 and Hart I think is the plaintiff and --
4 MR. WATSON: Can you e-mail that to us?
5 CHAIRMAN BABCOCK: I can get you the cite,
6 though.
7 MR. GILSTRAP: Well, you know, the Fifth
8 Circuit has turned it down. There was a dissenting
9 opinion that came down --
10 CHAIRMAN BABCOCK: Yeah.
11 MR. GILSTRAP: -- that --
12 CHAIRMAN BABCOCK: Right, in the Dart case.
13 Yeah. That is covered in the article that I wrote. I'm
14 going to try to update this article to take into account
15 the Ninth Circuit opinion, but I have seen just myself in
16 briefs that I've seen others author, and some people even
17 in my firm, they are now citing unpublished opinions and
18 citing to the work of this committee as "Hey, we all know
19 we're going to change this rule," so I hope the Court will
20 look more favorably on -- from a disciplinary standpoint
21 on lawyers that do that in the Ninth Circuit.
22 MR. WATSON: Can they hold us in contempt?
23 CHAIRMAN BABCOCK: Huh?
24 MR. WATSON: Can the court hold us in
25 contempt?

1 CHAIRMAN BABCOCK: I wouldn't know. I mean,
2 I suppose a rule is a rule; and if you willfully violate
3 it, you better have a reason, I guess.
4 MR. WATSON: No, I mean for aiding and
5 abetting.
6 CHAIRMAN BABCOCK: Oh, hold us in contempt,
7 yeah.
8 HONORABLE SCOTT BRISTER: If your brief was
9 two pages too long we wouldn't throw you in jail. I can't
10 imagine why some judge decided that, because the easy
11 answer is the sanction for citing an unpublished opinion
12 if it's against the rule is strike the cite.
13 CHAIRMAN BABCOCK: Yeah.
14 HONORABLE SCOTT BRISTER: Seems rather
15 straightforward.
16 CHAIRMAN BABCOCK: Well, it did look like
17 that maybe this was a vehicle for the judge who had
18 written prior Law Review articles on this topic to take
19 his handiwork and put it into opinion.
20 JUSTICE HECHT: I did talk to -- just ran
21 into a judge on the Fifth Circuit several weeks ago that
22 says they're probably going to look at their rule
23 administratively following the Dart case, so...
24 HONORABLE SCOTT BRISTER: I just wanted to
25 mention one thing on that that I've run into because it's

1 bothered me some about the unpublished and especially in
2 the criminal context. I understand the idea is you switch
3 from unpublished to memorandum opinions. It just seems to
4 -- we ought to make sure, you know, we talk with the Court
5 of Criminal Appeals and get their point because, of
6 course, a ton of the criminal cases are factual
7 sufficiency cases, and you can't just write a memorandum
8 opinion on a factual sufficiency case because it's about
9 the facts and you really don't want to read, you know, a
10 thousand factual sufficiency cases a year on these
11 criminal appeals.
12 MR. YELENOSKY: Could you still call it a
13 memorandum?
14 HONORABLE SCOTT BRISTER: Well, yeah, I
15 mean, but it's not a memorandum opinion according to what
16 the rule says a memorandum opinion is because a memorandum
17 opinion is you don't go into the facts.
18 MR. YELENOSKY: Right.
19 HONORABLE SCOTT BRISTER: If we all agree
20 that we're just going to keep the same rule but call
21 unpublished -- do not publish memorandum opinions, I guess
22 we could do it that way, but it's not -- in the criminal
23 context that is the vast majority of the cases, and they
24 really add no worth to the jurisprudence.
25 CHAIRMAN BABCOCK: Not to get off on

1 unpublished opinions --
2 HONORABLE SCOTT BRISTER: Yeah. Just --
3 CHAIRMAN BABCOCK: -- but I think the rule
4 that we drafted and sent to the Court is broad enough, the
5 memorandum opinion part of it is broad enough to encompass
6 those cases that you talk about. I'd have to pull it out
7 and look at it, but I think that was the intent, that we
8 were trying to give a lot of flexibility to the court.
9 HONORABLE SARAH DUNCAN: I just don't want
10 to let Judge Brister go unchallenged that the factual
11 sufficiency case cannot be written in a memorandum
12 opinion.
13 CHAIRMAN BABCOCK: You think it can be?
14 HONORABLE SARAH DUNCAN: Yes.
15 CHAIRMAN BABCOCK: Okay. Moving right
16 along, about the agenda, there has been -- I've received
17 some comment that we ought to move things around for a
18 number of reasons, and in the past I have taken people's
19 schedules and other things into account and not gone
20 strictly by the order that we've listed them. That could
21 cause some problems for members of the public for
22 interested people who are attending here in reliance upon
23 the posted agenda. I think we concluded we're not subject
24 to the Open Meetings Act strictly, although we try to
25 loosely comply with it, but we're not under the Open

1 Meetings Act. We are under the Open Records Act, so I
2 don't think it's a legal issue, but how does everybody
3 feel? Should we just be flexible about the agenda and
4 just continue to deal with it when we get here and people
5 have scheduling conflicts?
6 MS. SWEENEY: Do you mean in general forever
7 or today?
8 CHAIRMAN BABCOCK: Well, starting with today
9 and forever.
10 MS. SWEENEY: Because there are times when
11 it's important to know when something is going to come up
12 for discussion for various reasons.
13 PROFESSOR DORSANEO: I don't think we need
14 to worry about forever. I think we can worry about today,
15 and it will probably be good.
16 CHAIRMAN BABCOCK: Well, what Paula is
17 talking about is sometimes there are issues on the agenda
18 -- I don't know that they have come up so much since I
19 have been chair, but I remember when Luke was chair there
20 would be an issue and all the plaintiffs lawyers would
21 want to be here to be heard on it.
22 MS. SWEENEY: Hypothetically.
23 CHAIRMAN BABCOCK: Or all the defendants
24 lawyers. I mean, we all know that that happens. So I
25 think there probably is some need to stick more or less to

1 the agenda. I was going to suggest that in the future at
2 the end of our meeting on Saturday maybe we all come up
3 with a proposed agenda for next time and just agree on
4 that and then try to have that be somewhat inflexible.
5 HONORABLE JAN PATTERSON: I'd like to speak
6 in favor of predictability and that if someone does have
7 time concerns or they can be here for part of the meeting
8 and are going to present, that perhaps if we knew in
9 advance that we were going to stick with the agenda then
10 they could lobby you on the order of the agenda in
11 advance, so that once the agenda is set it has some
12 measure of integrity.
13 CHAIRMAN BABCOCK: Yeah. Well, that's sort
14 of what I was thinking. What I was trying to drive us --
15 not for today, Bill, but in the future maybe if at the end
16 of the meeting we say, "Okay, here's kind of what we're
17 thinking about" and then have some period of time before
18 our next meeting if somebody comes up and says, "Hey, I
19 can't be there Saturday and I really want to talk about
20 this," then we can adjust it maybe a couple weeks out and
21 then once we do that then it's pretty much set. Does that
22 seem reasonable to everybody or not? Okay. Yeah,
23 Richard.
24 MR. ORSINGER: Just because everyone is on
25 the other side I want to speak for flexibility. You know,

1 there have been times where we could have started into
2 some package like, you know, 15 appellate rules, but we
3 could clean up one detail on one other subcommittee that
4 will allow them to get back to work and do their work, and
5 we have flexed around about that, I think just kind of at
6 the discretion of the chair getting a sense of the house
7 at the time, and I really wouldn't want to be so rigid
8 that we don't feel like we can run the meeting effectively
9 and use our time well.
10 CHAIRMAN BABCOCK: Yeah.
11 MR. ORSINGER: And if it looks like we're
12 almost all finished and aren't even going to come back
13 Saturday, you know, then I think we ought to have the
14 freedom for you to make an executive decision that we're
15 so close, we have so little to do tomorrow, we'll defer to
16 the following meeting.
17 HONORABLE JAN PATTERSON: Predictability
18 does not necessarily encompass rigidity.
19 MR. ORSINGER: Well, that's fine.
20 CHAIRMAN BABCOCK: Bill.
21 PROFESSOR DORSANEO: Well, Justice Hecht
22 indicated that the Court is working on the TRAP rules, and
23 there are some TRAP rules in this package that we have. I
24 think at least one of them, 9.2, will take no time as I
25 would just simply report that delivery confirmation is

1 probably not superior to a certificate of mailing and take
2 that off the list.
3 The Court might consider it helpful to
4 finish up the part of the project that the Court is now
5 willing to work on, and one doesn't know whether the other
6 parts will be put on the Court's agenda at any time in the
7 foreseeable future.
8 CHAIRMAN BABCOCK: Okay. Luke, you got
9 anything to add? You've got more experience than anybody
10 in the room on this issue.
11 MR. SOULES: Well, I don't know about that.
12 What drove some changes and, as I recall, the major reason
13 that there were changes in the agenda sometime back was
14 the interest of the Court in having as much input as
15 possible from a broad constituency on particular rules,
16 and usually that had to do with not all the rules maybe on
17 the agenda but some particular ones, and when we would run
18 into a situation like an ATLA convention or TTLA
19 convention or something like that where people or some
20 large group of people or defense counsel were going to be
21 -- were of necessity going to be absent, we would shift
22 those so that we could have -- hear from all the
23 constituents, all the stakeholders, on an important rule
24 change. And where that's going, where there are reasons
25 such as that or reasons such as the Court is already

1 engaged on a particular -- in a particular group of rules,
2 I would try to put those early on Friday when we had most
3 of the people, and Saturday was sort of clean-up day.
4 That was the practice. Whether it made sense or not is
5 subject to your opinions as well.
6 CHAIRMAN BABCOCK: Well, this is helpful.
7 We'll try to have more predictability but retain our
8 flexibility, which brings us to today. Judge Lawrence and
9 Elaine, we promised we'd start with you this morning.
10 Where are we in this process? There have been some
11 informal private motions to push you back to the next
12 millennium.
13 PROFESSOR CARLSON: I thought everybody was
14 here for forcible rules. Judge Lawrence will not be here
15 tomorrow. If you want to hear on the subject today, we're
16 ready to go, if that's the will of the chair.
17 CHAIRMAN BABCOCK: Okay. And what did -- and
18 how long do you think -- recognizing you can't predict
19 this crowd very accurately, how long do you think it will
20 take to get through what you've done?
21 HONORABLE TOM LAWRENCE: Well, it's kind of
22 hard to predict. I mean, to go through and explain it all
23 will probably take under an hour, and depending on how
24 much discussion we have on individual things, the things
25 that were -- took a lot of discussion last time, I think

1 we have a suitable alternative for those that should clear
2 that up, and it's probably just going to be the issue of
3 going through the rules line-by-line. I don't anticipate
4 that anything else should be that controversial.
5 CHAIRMAN BABCOCK: Okay. So we certainly
6 could get it done in half a day?
7 HONORABLE TOM LAWRENCE: I would think so,
8 easily.
9 PROFESSOR CARLSON: And part of the reason
10 the packet is so large is we have three alternatives to
11 propose, and once the committee goes in one of the
12 directions we'll go down that path.
13 CHAIRMAN BABCOCK: Well, we'll do that
14 today. Professor Dorsaneo has got some time problems, and
15 he says that Rule 9.2, which is Item 2.5 on the agenda,
16 will only take a second. So, Bill, why don't we go to
17 that right now?
18 PROFESSOR DORSANEO: Well, as I understand
19 it, the Court had asked about whether a new service called
20 delivery confirmation introduced by the postal service as
21 reflected in the -- in a letter from Mike Hatchell should
22 be added to Rule 9.2 as another way to prove a mailing,
23 when a particular item was mailed for, in effect, filing
24 purposes.
25 The certificate of mailing processes have

1 been in the rule for quite sometime. Delivery
2 confirmation is new, and when it came up for the first
3 time nobody here really knew how that exactly was meant to
4 work. I'm not sure we're tremendously beyond that, but I
5 went over and talked to the postal people about delivery
6 confirmation, and what the postal people told me is that
7 delivery confirmation is delivery confirmation, not proof
8 of mailing, okay, not a proof of mailing.
9 By the way the delivery confirmation form is
10 drafted, you would be able to ascertain, you know,
11 mailing, because there is a part that says "postmark
12 here"; but, quite frankly, it just doesn't seem that
13 delivery confirmation is superior to a certificate of
14 mailing process in any way to me; and I couldn't get
15 literature from the postal people about how exactly this
16 was meant to work because they didn't have any. So I
17 would recommend that we do nothing on delivery
18 confirmation and nothing with Rule 9.2 with respect to it.
19 CHAIRMAN BABCOCK: Anybody have any thoughts
20 about that? Hatchell is not here to defend himself, but
21 anybody else have any comment on that? Okay. So that
22 will be our recommendation then. Is that all right with
23 you, Justice Hecht?
24 JUSTICE HECHT: Yep.
25 CHAIRMAN BABCOCK: Okay.

1 HONORABLE JAN PATTERSON: Let me just
2 mention one thing, though. When we spoke about this last,
3 some of us talked to the clerks, and they were interested
4 in the concept of keeping an eye out for new processes
5 that did work, because they spend an enormous amount of
6 time verifying and getting affidavits, and so if something
7 does become available I think we ought to be open to that,
8 and I think by not accepting this form that doesn't mean
9 we're foreclosing the notion entirely.
10 CHAIRMAN BABCOCK: Sure. Good point. Okay.
11 I think the next item, 2.6, Rule 6, Pam Baron, is probably
12 an easy one because I think, Pam, you and I agreed we're
13 going to defer this to the next meeting; is that right?
14 MS. BARON: Well, I think it would help to
15 get the sense of the committee, but hopefully it will take
16 about three minutes. The issue is whether or not Rule 6
17 prohibits execution on Sunday, service of a writ of
18 execution on a Sunday. The rule has been interpreted as
19 not applying to -- at least to service of execution back
20 when it applied to legal holidays, on legal holidays.
21 Sunday is actually a different issue because it's
22 controlled not just by statute but by common law, because
23 on Sunday you can't perform judicial acts, and then you
24 get into the question of whether it's a judicial act or
25 administerial act to serve writ of execution.

1 And, really, there's no answer to it. If
2 you look at CJS, they say there's lots of conflicting
3 authority on whether you can do this on Sunday. I think
4 we can decide whether we think we should execute -- allow
5 execution on Sunday, and we can either write the rule to
6 say you can or you can't, even though the rule doesn't
7 specifically apply or address it. So if anybody has
8 strong feelings about execution on Sunday or we can just
9 take a quick show of hands and see if anybody is offended
10 by that notion.
11 CHAIRMAN BABCOCK: Bill. Offended or just
12 got a comment?
13 PROFESSOR DORSANEO: No. I think, just on
14 the face of the rule, which is in the general rules
15 preceding all of the rules that, you know, it seems to
16 suggest, because it says literally, "No civil suit shall
17 be commenced nor process issued or served on Sunday," that
18 process should not be issued or served on Sunday,
19 including process called a writ of execution. I didn't --
20 I haven't read these cases, but --
21 MS. BARON: They say --
22 PROFESSOR DORSANEO: -- I would like not to
23 need to read the cases when the rule literally provides
24 otherwise, or seems to provide otherwise; but I would
25 agree with Pam that this issue is or should not be a

1 debate about history, but whether we should have or allow
2 execution on Sunday or not; and I'm ready to vote on that.
3 HONORABLE SARAH DUNCAN: I'm sorry, Bill.
4 What do you think the rule says now?
5 PROFESSOR DORSANEO: Well, it says in
6 English, "No civil suit shall be commenced, nor process
7 issued or served on Sunday."
8 HONORABLE SARAH DUNCAN: "Except in cases of
9 injunction, attachment, garnishment, sequestration, or
10 distress proceedings."
11 PROFESSOR DORSANEO: Yeah.
12 HONORABLE SARAH DUNCAN: That's a big
13 exception.
14 PROFESSOR DORSANEO: Yeah.
15 HONORABLE SCOTT BRISTER: Yes, but that's
16 not execution.
17 PROFESSOR DORSANEO: That's not execution.
18 HONORABLE SARAH DUNCAN: Those are means of
19 executing.
20 PROFESSOR DORSANEO: Well, I don't think
21 that they are. I think garnishment is arguably a type of
22 execution. Okay? None of the rest of them are.
23 Attachment is execution before suit. Sequestration is
24 completely different. Okay? If anything it's -- you
25 know, just proliferates into levels of complexity. It

1 doesn't say "execution." If you're going to read it
2 literally, execution is a different animal from these
3 other -- from these things.
4 CHAIRMAN BABCOCK: Pam, your recommendation
5 is for your subcommittee to hash this out a little bit and
6 then --
7 MS. BARON: Well, I think if we know if
8 there's objection to execution on Sunday, I want to know
9 that now, but otherwise we can go back and write the rule
10 so you can execute on Sunday.
11 CHAIRMAN BABCOCK: Anybody on this committee
12 feel that we should not execute on Sunday?
13 (No response.)
14 MS. BARON: Okay, fine.
15 JUSTICE HECHT: As a practical matter, do
16 you have to have an officer to execute?
17 MR. ORSINGER: Yes.
18 PROFESSOR DORSANEO: Uh-huh.
19 MR. ORSINGER: What actually happens with a
20 writ of execution is, is that the officer makes a demand
21 of the debtor, judgment debtor, "Do you have nonexempt
22 property to satisfy this judgment?" and the answer is
23 inevitably "no," and then they return the writ no a bona,
24 or whatever the Latin term is, and then you have to go
25 about collecting the judgment the hard way. So it's

1 really --
2 JUSTICE HECHT: So you have to get a sheriff
3 or somebody to go out and --
4 PROFESSOR DORSANEO: There are office
5 levies, too. You might could get a sheriff to do an
6 office levy with respect to real property by executing the
7 day, you know, of the writ, but --
8 JUSTICE HECHT: But, I mean, just as a
9 practical matter, you don't find a sheriff on a Sunday to
10 execute process.
11 CHAIRMAN BABCOCK: Some counties maybe.
12 MS. BARON: I think you can.
13 PROFESSOR DORSANEO: Well, I guess you can
14 find one to do a writ of attachment, you know, maybe,
15 so...
16 MR. ORSINGER: But, see, that has the force
17 of a court order. That's different from a writ of
18 execution.
19 PROFESSOR DORSANEO: The way the
20 recodification draft deals with this is it takes this rule
21 and splits it in half and puts part of it in the general
22 rule and the other part in citation, okay, so it avoids
23 this ambiguity about what process is because it's located
24 in the general rules.
25 CHAIRMAN BABCOCK: Okay. All right.

1 MS. BARON: All right.
2 CHAIRMAN BABCOCK: Pam, you've got enough
3 direction?
4 MS. BARON: We have direction.
5 CHAIRMAN BABCOCK: All right. You'll be on
6 the agenda somewhere next time, on January 25-26. Okay.
7 The next thing that may be an easy one, Bill, is yours and
8 Gilstrap, I think, the TRAP 41.2, en banc court.
9 MR. ORSINGER: That's not easy.
10 CHAIRMAN BABCOCK: That's not an easy one?
11 MR. ORSINGER: No, no. That's a rough one.
12 CHAIRMAN BABCOCK: Okay.
13 PROFESSOR DORSANEO: It should be easy, but
14 people want to make it into something more complicated.
15 MR. WATSON: It's easy if you follow Bill's
16 way.
17 CHAIRMAN BABCOCK: Okay. Well, we won't do
18 that just now. Is there anything -- I didn't spot
19 anything else that looks like it's just kind of an easy
20 two-, three-minute thing. Is there anything else like
21 that on the agenda that anybody knows of?
22 JUSTICE HECHT: On 2.8, parental
23 notification, I think Judge McClure's committee is still
24 working.
25 CHAIRMAN BABCOCK: Okay.

1 HONORABLE SARAH DUNCAN: She withdrew that.
2 JUSTICE HECHT: There's an update.
3 MR. GRIESEL: But they're still working on
4 it, yes.
5 CHAIRMAN BABCOCK: Okay. So that will be
6 deferred 'til next time as well. And does she wish to
7 give an update today?
8 MR. GRIESEL: No. No, she didn't.
9 CHAIRMAN BABCOCK: Okay. All right. So
10 that will be the second item that will be on the January
11 agenda. Anybody else want to petition to jump ahead of
12 FED?
13 Okay. Go ahead, Elaine, or Judge Lawrence,
14 whoever is up to bat.
15 PROFESSOR CARLSON: I'll kick it off. At
16 our June meeting we went over Rule 736 through 747a, and
17 the committee signed off on the proposed changes, except
18 for Rule 740 dealing with the possession bond. There were
19 a number of comments and suggestions made pertaining to
20 Rule 740. Our subcommittee has responded to those
21 suggestions; and in the handout that Debra passed out
22 called, very imaginatively, "Table of Contents," if you'll
23 turn to page six of that packet, you'll see our proposed
24 amended Rule 740; and I will defer to Judge Lawrence, who
25 is the scrivener on that.

1 HONORABLE TOM LAWRENCE: Okay. Rule 740 is
2 what is called a possession bond, and that is a mechanism
3 by which a landlord can get a tenant out sooner than
4 through the normal trial processes. For example, a
5 landlord, if there's a tenant that's tearing the place up
6 or is committing criminal activities or doing something
7 that harms the adjoining neighbors, he may want to avail
8 himself of a possession bond.
9 We discussed at the June meeting doing away
10 with the possession bond because as currently written
11 there are some severe problems with it; but the committee
12 felt that we wanted to have the mechanism for a possession
13 bond and asked the committee to rewrite, which is what
14 we've done; and the Rule 740 you see on page six and seven
15 is a rewrite of that to try to make it work a little bit
16 better. One of the problems -- a couple of problems to
17 keep in mind as we go through it, is that -- one issue is
18 that you sue for forcible detainer, forcible entry and
19 detainer, and a citation is served, and on the citation is
20 a date for the defendant or the tenant to come back to
21 court for the trial. A possession bond allows that date
22 to be superseded by a new trial date. So the question
23 is -- one of the problems is, is, well, what does a tenant
24 do? Does he come for the new possession bond trial date
25 or the trial date on the original citation? Does he show

1 up for both? There's just -- there's a conflict there.
2 Another conflict is that the existing rule
3 allows that if the tenant does not request either a trial
4 or post a possession bond, which lets him remain in
5 possession, that the constable or sheriff can put him out,
6 and so those are two of the issues that we tried to solve.
7 Rule 740 on page 6, "The plaintiff may at
8 the time of filing his complaint or thereafter, prior to
9 trial in the justice court, execute and file a possession
10 bond to be approved by the justice in such amount as the
11 justice may fix as a probable amount of cost of suit and
12 damages which may result to defendant in the event that
13 the suit has been improperly instituted and conditioned
14 that the plaintiff will pay defendant all such costs and
15 damages as shall be adjudged against plaintiff" and
16 that -- with a couple of brief changes that's essentially
17 the existing rule. We've not made any changes to that
18 part.
19 Second paragraph, "The justice court shall
20 notify the defendant that plaintiff has filed possession
21 bond." Now, one of the other problems we had was how is
22 the notice to be served on the defendant? We're saying
23 it's to be served on the defendant in the same way as a
24 normal forcible entry and detainer is except because of
25 the accelerated time table we need to have this return of

1 service back to the court within one day because the court
2 needs to know that it's got to prepare and notice the
3 plaintiff for trial. So we need sufficient time to know
4 when it was served to know when we can set the trial date
5 on the possession bond, so that's the reason for the
6 change in the second paragraph.
7 (a), "The defendant may remain in
8 possession" -- and this is kind of the heart of it -- "if
9 the defendant executes and files a counterbond prior to
10 the expiration of six days from the date the defendant is
11 served with notice of the filing of plaintiff's bond.
12 Said counterbond may be approved by the justice and shall
13 be in such amount as the justice may fix as probable
14 amount of cost of suit and damages which may result to
15 defendant in the event possession has been improperly held
16 by defendant." No change from the existing rule there.
17 (2) talks about the alternative. If the
18 defendant is not able to post a counterbond then the
19 defendant can come in in (2) and demand a trial, which
20 must be held prior to the expiration of six days from the
21 date the defendant is served with notice of the filing of
22 plaintiff's possession bond.
23 Now, here's where it may get slightly
24 controversial. There's a problem with how you determine
25 what type of a trial you would have on this possession

1 bond hearing. I think it's necessary that you really only
2 want to have one trial on this, not two separate trials.
3 If you have to hold the trial within a limited time
4 period, the subcommittee's recommendation is any trial
5 held under this rule must be a trial by judge. "If the
6 defendant requests a trial under this rule, it will be the
7 only trial held in this cause and will supersede the trial
8 which would have been held under the original citation."
9 So what we're saying, if you want a possession bond and
10 the defendant comes in and requests a trial on that, that
11 there will only be one trial on that. There won't be two
12 separate trials. There will be a final disposition one
13 time.
14 Now, the reason that the subcommittee is
15 recommending a bench trial or a trial by judge only is the
16 mechanics of trying to get a jury in in that limited
17 amount of time. I just don't think it's going to be
18 possible to get jurors in. Most of the JP courts do not
19 have access to the central jury wheel. They are in
20 outlying areas. You have maybe one or two courts, at
21 least one court in a particular county, that will be
22 downtown that may be able to pull from the central jury
23 system, but all the other courts are not able to pull from
24 the central jury system. There's no mechanism to bus
25 people out to the outlying courts in different parts of

1 the county.
2 Typically we tell our constable to summon
3 jurors in for certain dates, and they summons them in, and
4 there's a process with that. Now, the only way that we
5 could have a jury trial would be to basically send the
6 constable out to round up citizens on the street, and if
7 that's what we want to preserve the jury trial, and that's
8 done from time to time in Texas, but otherwise, I don't
9 know how we can get the jurors in with this limited time
10 period because you're really only going to have about four
11 days probably at the most to try to get the jurors in, and
12 that's at the most and probably in many cases less than
13 that.
14 CHAIRMAN BABCOCK: How are you doing it now?
15 HONORABLE TOM LAWRENCE: Well, if somebody
16 asks for a jury trial now, there's a little more time on
17 that. Usually we can set it on the next available jury
18 docket, and, frankly, we don't --
19 PROFESSOR CARLSON: You mean in a
20 nonforcible or a forcible?
21 HONORABLE TOM LAWRENCE: You're talking
22 about a forcible, right?
23 CHAIRMAN BABCOCK: I'm talking about what
24 you're talking about in this rule.
25 HONORABLE TOM LAWRENCE: Yeah, a possession

1 bond?
2 CHAIRMAN BABCOCK: Yeah.
3 HONORABLE TOM LAWRENCE: I've never had
4 anybody request a jury trial on a possession bond yet.
5 Under the rule now I probably would -- I probably would
6 try to give them the jury trial, but I couldn't do both.
7 I couldn't both give them a jury trial and do it in six
8 days.
9 MR. YELENOSKY: How many days would you
10 need?
11 HONORABLE TOM LAWRENCE: Something would
12 have to give.
13 CHAIRMAN BABCOCK: Elaine.
14 PROFESSOR CARLSON: I was sort of the
15 dissenting member of the subcommittee on this, or I had
16 real concerns about this. You know, can we really do away
17 with someone's constitutional right to a trial by jury,
18 even though it's a very expedited proceeding. What Judge
19 Lawrence said was, "Well, what would the person rather
20 have, the talisman, you know, the person off the street,
21 or no jury," but I'm not sure that we can make that call,
22 and I say that with all due respect.
23 MR. YELENOSKY: Yeah, that was going to be
24 my question; and even if we could, should we; and if the
25 time crunch were an issue then an alternative is to change

1 the time frame, I guess, rather than change the right to
2 jury.
3 HONORABLE TOM LAWRENCE: If we want to
4 change the time frame then we might as well do away with
5 the possession bond rule entirely and just let it go under
6 the normal trial processes, because there's no reason to
7 have the possession bond if you're not going to do it
8 expeditiously. You'd just do away with the possession
9 bond and just have a normal trial process.
10 MR. YELENOSKY: Well, most of the time don't
11 they file the bond and there isn't a response or request
12 for trial, and then in that instance doesn't the -- I
13 don't remember this well, but doesn't the possession bond
14 expedite things for the landlord in that instance, if
15 there's no response?
16 HONORABLE TOM LAWRENCE: Well, the
17 possession bond actually would not really expedite things
18 for the landlord. The quickest way for the landlord would
19 be if the possession bond -- if the counterbond is not
20 filed.
21 MR. YELENOSKY: Right.
22 HONORABLE TOM LAWRENCE: And they ask for
23 the trial within six days. That would be the quickest for
24 the landlord.
25 CHAIRMAN BABCOCK: Bill.

1 PROFESSOR DORSANEO: Well, are we sure that
2 Article 1, Section 15, applies to this type of proceeding
3 in justice court?
4 PROFESSOR CARLSON: I don't know of a case
5 on that, Bill.
6 PROFESSOR DORSANEO: How about -- and I'm
7 demonstrating my ignorance here, but is there a -- in the
8 detainer context there is a de novo appeal, right?
9 HONORABLE TOM LAWRENCE: Yes.
10 PROFESSOR DORSANEO: And there would be --
11 is there a right to jury trial in the de novo appeal?
12 HONORABLE TOM LAWRENCE: Oh, yeah. Yes.
13 PROFESSOR DORSANEO: Well, there's no right
14 to jury trial problem then in my view, if you get one, if
15 you're entitled to one --
16 MR. YELENOSKY: After you've lost
17 possession.
18 PROFESSOR DORSANEO: -- you know, before
19 you're through.
20 MR. YELENOSKY: After you've lost
21 possession.
22 MR. SOULES: What gets tried?
23 HONORABLE TOM LAWRENCE: No, you wouldn't
24 necessarily lose possession if it gets appealed.
25 MR. SOULES: What gets tried?

1 HONORABLE TOM LAWRENCE: Well, I'm saying
2 that under the possession bond there would be a full trial
3 on the merits.
4 MR. SOULES: Well, see, we have
5 sequestration, which is judge done; and then we have
6 replevy bond, which means a person can post a bond and
7 hold onto that person's property pending a trial. That's
8 all judge done, and then you go to trial on the merits
9 eventually and somebody -- you decide who gets the
10 property or the money or the bond or what have you, but
11 that preliminary process of securing the property one way
12 or another is all judge done in the district courts.
13 HONORABLE TOM LAWRENCE: Well, but securing
14 the property in this instance would be evicting somebody.
15 MR. SOULES: Well, evicting somebody of a
16 Caterpillar tractor may be almost as bad whenever that's
17 the only way they've got to feed their family, and it
18 could be --
19 PROFESSOR DORSANEO: Sequestration could be
20 evicting somebody, too.
21 MR. SOULES: Yeah. It's eviction, too. It
22 could be real property. Right? Sequestration, you can
23 sequester real property.
24 PROFESSOR CARLSON: This is not preliminary.
25 PROFESSOR DORSANEO: That's correct.

1 PROFESSOR CARLSON: This is not preliminary
2 the way this is structured. You're moving up your FED
3 trial.
4 HONORABLE SARAH DUNCAN: That's my question.
5 MR. SOULES: Well, can't you still have the
6 bonding process and disposition -- dispossession and then
7 have the FE&D, and if it fails, the party gets the
8 property, gets to go back into the property?
9 CHAIRMAN BABCOCK: Justice Duncan.
10 HONORABLE SARAH DUNCAN: I guess that's my
11 question, because I've never done one of these, so I'm
12 speaking out of turn in a sense, but just from looking at
13 the old rules and the structure of those rules, it seems
14 to me that what was contemplated is a two-step process and
15 all that would be tried at this point is the right to
16 immediate possession, not the right to ultimate possession
17 or back rent or attorneys fees, and what we've done with
18 the subcommittee's proposal is collapse those two trials
19 into one.
20 PROFESSOR CARLSON: Yeah.
21 HONORABLE SARAH DUNCAN: And that, to me, is
22 going far afield of what the original rules were intended
23 to do.
24 CHAIRMAN BABCOCK: Judge Lawrence.
25 HONORABLE TOM LAWRENCE: Well, the problem

1 with the rules as they exist is that they leave unanswered
2 a lot of questions. For example, what happens if
3 somebody -- they get a notice for the trial to be ten days
4 from today and then the next day they come in and they
5 file -- and the landlord files a possession bond and the
6 tenant doesn't do anything and after six days there's a
7 writ of possession and he's evicted. Well, then he comes
8 to court on this tenth day, which is on his original
9 citation, he comes to court and says, "Okay, I'm ready for
10 my trial," to find out that he's already been evicted and
11 there's a writ of possession saying he's gone, so -- and
12 that could happen under the rules now, which is why we're
13 trying to fix these, and it doesn't make sense to have two
14 separate rules for a possession bond on this issue.
15 If you ask for a possession bond then let's
16 have one trial and take care of everything at one time.
17 It's going to be expedited a little bit from the normal
18 trial processes, but, you know, I don't know how you
19 handle the problem now. I fortunately never had that come
20 up where somebody didn't respond to the possession bond
21 and then comes to court for his regular trial later, but
22 that could happen, which is what we're trying to correct.
23 MR. SOULES: Is the remedy for wrongful FE&D
24 conversion like it is for sequestration?
25 HONORABLE TOM LAWRENCE: You have a number

1 of causes of action in the Property Code for someone that
2 has improperly evicted somebody. There are several causes
3 of action.
4 MR. SOULES: That's what they walk into when
5 they go in and get these judicial acts performed and then
6 they're ultimately reversed.
7 HONORABLE TOM LAWRENCE: But a reversal
8 doesn't do the tenant much good because the landlord may
9 release the property.
10 MR. SOULES: Yeah, it may do them a lot of
11 good. It may get them a lot of money that they didn't
12 have.
13 HONORABLE TOM LAWRENCE: I mean, I guess
14 that's up to the court, but as a practical matter, the
15 tenant is not going to have -- he's going to be evicted.
16 He's not going to get back in. There's no mechanism in
17 the rules to have the court, either the justice court or
18 county court, or the landlord to readmit the tenant and
19 give him his premises back. Nothing in the Property Code,
20 nothing in the rules that would allow that.
21 CHAIRMAN BABCOCK: Judge, this thing that
22 you're trying to fix here, it's never come up in your
23 experience?
24 HONORABLE TOM LAWRENCE: Well, I've never
25 had the problem occur, but it could happen tomorrow.

1 There aren't as many possession bond files probably in
2 Harris County as there are in some counties. I'm told by
3 the Texas Apartment Association that they use it quite a
4 bit in some areas.
5 CHAIRMAN BABCOCK: Have you heard from any
6 other JP or litigants that this is a problem in other
7 counties?
8 HONORABLE TOM LAWRENCE: Well, I've never
9 had anybody tell me they had this arose, but JPs have
10 talked about this for years that they don't know how to
11 handle it. There's no mechanism for the appeal of a
12 possession bond, which is something else that we're trying
13 to fix. So there are just all sorts of problems with the
14 existing rule.
15 CHAIRMAN BABCOCK: Okay. And the
16 alternatives to doing what we have here on page six is to
17 just go back to the language of the rule and leave it
18 as-is, which is an area that's not satisfactory to you.
19 HONORABLE TOM LAWRENCE: Well, I would --
20 that's not much of an alternative to me to leave it like
21 it is. I would think either fix it or do away with it,
22 and the committee felt in June at the meeting that we
23 wanted to have it, and the landlords I think want this.
24 Some of them use it in some areas.
25 CHAIRMAN BABCOCK: Okay. Stephen.

1 MR. YELENOSKY: Well, I would just propose
2 that, unless you've already ruled this out, that the
3 committee would fix whatever problems you identify without
4 eliminating the right to jury trial and not fix anything
5 that requires elimination of that right.
6 HONORABLE TOM LAWRENCE: Well, I mean, I
7 could take that out, but here's the practical problem. If
8 I get somebody that wants a possession bond and they
9 are -- or that asks for a trial in the possession bond
10 hearing, I'm probably not going to be able to get them a
11 jury in there. So we need to provide some guidance to the
12 justice courts of which is more important, the six-day
13 time limit or the jury trial. If you say it's the jury
14 trial overrides the six-day then let's do away with the
15 six days and have it a longer period, but I don't think we
16 can do both.
17 MR. YELENOSKY: Well, then whatever, because
18 as a practical matter, I mean, the reality here is if
19 you're out on a six-day bond, like you said, you're not
20 getting back in. People don't generally get moved out by
21 a constable and then manage to get back in. I mean, as
22 much as they might want to, they probably have other
23 things in their lives going on, and they try to stay
24 somewhere else and then get a new apartment. So it's
25 really a one-shot deal, and we may want to diminish the

1 importance of a jury trial, but if we diminish it here,
2 why don't we diminish it everywhere else?
3 CHAIRMAN BABCOCK: Sarah.
4 HONORABLE SARAH DUNCAN: Isn't the only
5 problem, as Luke said, if you collapse the two
6 proceedings? If this is a trial on the right to immediate
7 possession, it's okay if it's a bench trial and you're not
8 depriving anybody of their right to trial by jury. I
9 guess I don't understand at this point, and so I am not in
10 a position to vote one way or the other, why do we have to
11 collapse the two proceedings?
12 If I were a tenant, I would like the
13 opportunity to contest immediate possession. I'd like the
14 opportunity to establish that I am entitled to the right
15 to immediate possession. If I lose that and I come back
16 on the 10th day for my trial on the merits, I would like
17 all the time of my 10 days to prepare my case on the
18 merits, and I don't understand why it's so essential that
19 we collapse the two proceedings and generate the jury
20 trial problem that this proposal generates.
21 HONORABLE TOM LAWRENCE: Well, let me try to
22 set it up. A possession bond is so the landlord can get
23 possession in an expedited manner, within six days; and if
24 you have a hearing on the possession bond, either way it
25 goes, what's the point of that if you've still got to wait

1 for the trial on the merits four or five days later,
2 whatever the time is going to be? What's the purpose of
3 the possession bond? If the trial on the merits is going
4 to be the ultimate arbiter of what happens, why do we need
5 a possession bond? I mean, I'm not sure --
6 MR. YELENOSKY: Doesn't it still operate,
7 though, if they don't respond? Doesn't it expedite?
8 HONORABLE TOM LAWRENCE: If the tenant does
9 not respond at all then the landlord can get a writ of
10 possession.
11 MR. YELENOSKY: In six days.
12 HONORABLE TOM LAWRENCE: Yes.
13 MR. YELENOSKY: Which without the possession
14 bond he could not get that quickly.
15 HONORABLE TOM LAWRENCE: That's correct.
16 MR. YELENOSKY: So it does still serve that
17 purpose, and I imagine in a lot of cases that happens,
18 right?
19 HONORABLE TOM LAWRENCE: The normal --
20 Elaine asked me what the normal trial date was. The
21 normal trial date is supposed to be 6 to 10 days after
22 service. I mean, I typically tell people, in Harris
23 County at least, that a possession bond, you're not really
24 going to achieve very much. Maybe one day, but for some
25 reason in a lot of counties it's a bigger deal and they

1 use it quite a bit.
2 JUSTICE HECHT: But if you get possession
3 under a possession bond after a bench trial or whatever,
4 some sort of judicial review, it doesn't seem to me like
5 there's much left to try.
6 HONORABLE TOM LAWRENCE: There's nothing
7 left.
8 JUSTICE HECHT: So it doesn't seem to me
9 that there's much harm in leaving the action because it's
10 going to be like a temporary injunction. After you've
11 heard it and decided it, the case is going to go away.
12 And at some point a lot of times in a temporary injunction
13 the parties just agree to try what's their dispute right
14 then and there and then it's largely over with. That's
15 not always the case.
16 HONORABLE SARAH DUNCAN: Mightn't there be
17 rent concerns?
18 JUSTICE HECHT: Be which?
19 HONORABLE SARAH DUNCAN: Rent.
20 HONORABLE TOM LAWRENCE: Yeah, that should
21 be taken care of all at one time on possession bond.
22 Everything will be --
23 HONORABLE SARAH DUNCAN: That's under your
24 proposal, but I'm asking if the immediate right to
25 possession is the only issue tried in a preliminary bench

1 trial, can't there still be issues of back rent and
2 attorneys fees left to be decided?
3 HONORABLE TOM LAWRENCE: Well, I would think
4 it would typically be decided in the possession bond.
5 Typically the judge that hears the possession bond is
6 going to decide that all at one time, now.
7 MR. SOULES: Is there a right to counterbond
8 and stay in the property?
9 HONORABLE TOM LAWRENCE: Yes.
10 CHAIRMAN BABCOCK: Skip.
11 MR. WATSON: I'm just wondering from the
12 judge's experience or from the anecdotal evidence of other
13 judges talking, what roughly percentage of time is there a
14 trial after possession bond is issued?
15 HONORABLE TOM LAWRENCE: I don't know. It
16 would -- well, a fairly high percentage, over 50 percent,
17 would either ask for the trial or -- I mean, I'm just
18 guessing over 50 percent would either post the counterbond
19 or ask for the trial on the possession bond.
20 MR. WATSON: Why? I mean, I'm sort of like
21 Justice Hecht. Once the person is out --
22 HONORABLE TOM LAWRENCE: Well, they're not
23 out at that point.
24 HONORABLE SARAH DUNCAN: You-all are talking
25 about two different things.

1 HONORABLE TOM LAWRENCE: Are you talking
2 about after the possession bond trial?
3 MR. WATSON: Correct.
4 HONORABLE TOM LAWRENCE: Well, I think a lot
5 of times the tenants probably don't show up, but they
6 could show up.
7 MR. WATSON: Well, no, my question is not
8 could they. My question is how often does it really
9 happen, either from your experience or anecdotally?
10 HONORABLE TOM LAWRENCE: I think I've had it
11 happen once or twice where they came in on the original
12 trial, where they didn't do anything on the possession
13 bond and came in for their forcible hearing on the
14 original citation. I've had that happen a couple times.
15 MR. WATSON: I just -- I don't see the
16 reason for a couple of times to change the way it is.
17 HONORABLE TOM LAWRENCE: Well, I would hope
18 we're not going to leave a rule in effect that doesn't
19 make sense and doesn't work. That's the problem I've got
20 with the existing rule.
21 MR. SOULES: If that rule is patterned on
22 the present sequestration rule then all the constitutional
23 rights of the tenant are protected, whether or not they
24 have the right to immediate possession; and, you know, the
25 landlord's got some constitutional rights, too; and the

1 sequestration rules were passed by the Court on the advice
2 of this committee after Fuentes vs. Shevin came down out
3 of The Supreme Court of the United States; and all of this
4 skirmishing about immediate right to possession is judge
5 stuff, and you get to the merits later; and why should
6 persons who are tenants and the real property owned by
7 landlords have any particular advantages over persons in
8 other types of property situations? I mean, it could be
9 an owner of a house that gets sequestered out of that
10 person's house just by the creditor, and that's fine now
11 under our rules of sequestration.
12 They bond to get the property, the person in
13 possession can replevy or bond and stay in the property.
14 There can be all kinds of hearings about the amounts of
15 the bonds, whether they're adequate, whether the sureties
16 are any good, that go on to the bench while this immediate
17 right to possession is being resolved; and then ultimately
18 somebody gets a trial on the merits; and when you get
19 there you can have a jury. It seems to me like we ought
20 to pattern this just the same as sequestration, and there
21 shouldn't even -- that possession bond hearing ought to be
22 a bench hearing, and it doesn't not -- the Constitution of
23 Texas or U.S. do not require that that be a jury hearing.
24 PROFESSOR CARLSON: If it's interim.
25 CHAIRMAN BABCOCK: Stephen.

1 MR. YELENOSKY: Well, Luke, we had a long
2 discussion last time about --
3 MR. SOULES: I apologize.
4 MR. YELENOSKY: Not about that in
5 particular. I don't intend to -- but at the end of that
6 discussion I think the majority vote was that we wanted to
7 maintain a system where an individual would not -- who was
8 indigent would not have to post a supersedeas in order to
9 remain in possession in the regular process, and that's
10 not constitutionally required either, but I think what we
11 came to the conclusion we came to after that long
12 discussion, I hope, or I think the vote indicates, was
13 that with respect to eviction from your home, with the
14 sequestration issue, with a private-owned home aside for a
15 moment, is a special case; and whether or not it's
16 constitutional rights, it's something that does deserve
17 special attention; and it's not something that a person of
18 average means who is the one usually -- or below average
19 means gets into this system can readily remedy or find a
20 remedy that's meaningful. And that may also be true in
21 the sequestration process with homes, and I don't know
22 about that process, but if that's also a problem then I
23 wouldn't want to replicate that problem here where I think
24 it is going to be much more prevalent.
25 CHAIRMAN BABCOCK: Judge, did you have your

1 hand up?
2 HONORABLE TOM LAWRENCE: Well, let Richard
3 go ahead. I'll wait.
4 CHAIRMAN BABCOCK: Richard.
5 MR. ORSINGER: I'm kind of following up on
6 Skip Watson's comments. It seems to me that the people
7 who are the targets of the writ of possession are
8 probably -- are almost never after they're evicted going
9 to show up for a trial to move back into the premises, and
10 I think from a practical standpoint probably the reason
11 that some counties use the writ of possession more than
12 others is because it's pretty much the de facto final
13 hearing in the case, and there's no jury, and it's very
14 expedient, and when they win it it's over.
15 And so from my standpoint, I think this writ
16 of possession business should be seen in most instances as
17 being the final trial and that we're permiting a nonjury
18 dispossession that will in most instances dispose of the
19 case; and I know the kind of people that are being thrown
20 out on these writs of possession are not the kind of
21 people that are going to hang in there and sue for
22 damages, know how to prove their damages, or even can we
23 measure their damages for being dispossessed for three
24 days before they're allowed to move back in; and so, you
25 know, to me, I mean, I would argue that we should look at

1 the writ of possession as a preemption of a jury trial for
2 practical purposes, and if we're willing to preempt the
3 jury trial, let's leave it there; and if we're not willing
4 to preempt the jury trial then make the landlord wait
5 another two or three days and have the trial on the
6 merits.
7 CHAIRMAN BABCOCK: Yeah, Bill.
8 PROFESSOR DORSANEO: Well, I haven't done a
9 lot of these detainer cases, but I've done some, and if I
10 was working on -- I mean, it says in the citation rule
11 that you're supposed to -- or suggests strongly that
12 you're entitled to a jury trial whether it's -- well, you
13 are, whether it's in the Constitution or just here, and
14 you have to request it five days after service of
15 citation.
16 If I'm representing Lone Star Cycle, and I'm
17 served, you know, with a detainer petition, I'm going to
18 request the right to jury trial within five days, you
19 know, within the time provided; and I'm kind of thinking
20 that I'm probably entitled to that jury trial with respect
21 to at some point in this proceeding, you know, down the
22 road; and the engineering doesn't -- as you say, the
23 engineering doesn't work right; but I don't know how you
24 make it work right by saying that the jury trial right
25 that you demanded up here doesn't count, right, once you

1 get back over to this part, if it turns left and goes down
2 this path.
3 I'm not so much troubled with constitutional
4 issues. I'm troubled with the fact that it just doesn't
5 seem to make any sense that I could demand a jury trial,
6 but if somebody does the bond for immediate possession,
7 that that kind of canceled me out and that I have -- my
8 jury trial will be in the, you know, county court on the
9 de novo appeal.
10 HONORABLE SARAH DUNCAN: What it basically
11 does is forces -- as I understand it, is it forces you to
12 choose between a jury trial and a trial on immediate
13 possession on a bond issue, and I don't -- I don't see a
14 basis for forcing that choice.
15 HONORABLE TOM LAWRENCE: The only basis for
16 it would be if you want to have a possession bond. If the
17 Court wants to -- the committee and the Court wants a
18 possession bond, it doesn't make sense to have it unless
19 you're going to give the plaintiff possession quicker than
20 they would get through a normal trial process. That's the
21 whole point of a possession bond, which has been in the
22 rules forever. If you want to do that then you can't do
23 that and still have a jury trial, I don't think. I don't
24 think it's going to work most of the time.
25 PROFESSOR DORSANEO: When do you have your

1 jury trials? When do you have them? Do they have to be
2 like in the first week or two weeks, or can they be just
3 like later?
4 HONORABLE TOM LAWRENCE: You're supposed to
5 do it within six days if it's a possession bond.
6 PROFESSOR DORSANEO: Well, forget that.
7 HONORABLE TOM LAWRENCE: Well, normally
8 you're supposed to do it 6 to 10 days Sometimes you're
9 not. Sometime it's later than that because of the problem
10 of getting a jury in.
11 PROFESSOR DORSANEO: In six days?
12 HONORABLE TOM LAWRENCE: That's the regular
13 FED trials.
14 PROFESSOR CARLSON: For FED trials.
15 MR. ORSINGER: So we're talking about a two-
16 or three-day difference here.
17 PROFESSOR CARLSON: Right.
18 HONORABLE SARAH DUNCAN: Well, that's not
19 all we're talking about. I mean, I'm thinking about it
20 from a tenant's perspective, and let's say that my
21 landlord files an FED action and then goes in and files a
22 possession bond; and I'm like, "Wait a minute, he's got no
23 grounds to evict me from this apartment, and I want to
24 stay in my apartment"; and for me to move from my
25 apartment is a huge deal.

1 I go in on either with the six-day or the
2 counterbond and I tell the judge, "Look, Judge, I'm good
3 for whatever damages it's going to cost the landlord to
4 wait four more days and me get an attorney and have a
5 trial, and I'm happy to put up a bond for the landlord's
6 damages, but I can't do this trial today," so -- and the
7 judge looks at me and he says, "Okay, Duncan, if you file
8 a bond, you can have your trial on day 10 and get your
9 lawyer and be fully prepared."
10 And we get to day 10, we have the trial. I
11 show that I haven't done anything to breach the lease and
12 I've paid my rent and everything else. If you deprive me
13 of the opportunity to a hearing quickly on the possession
14 bond then I could end up being evicted, and once I'm
15 evicted my damages are going to be considerable, and I do
16 want a trial on the merits because I want my damages back
17 and I want to prove that there was no basis to evict me
18 anyway.
19 PROFESSOR CARLSON: But, Sarah, you can do
20 that under (a)(1).
21 HONORABLE TOM LAWRENCE: That's right. With
22 the counterbond you can --
23 PROFESSOR CARLSON: It's either-or. The
24 tenant can come in and say, "Here's my counterbond. I'm
25 waiting for the trial" --

1 HONORABLE SARAH DUNCAN: I understand that.
2 PROFESSOR CARLSON: -- "three days later" or
3 I can say, "I want an immediate trial. I'm not going to
4 put up a bond."
5 HONORABLE SARAH DUNCAN: But I want an
6 immediate trial on the immediate right to possession.
7 HONORABLE TOM LAWRENCE: Well, that's what
8 you're going to get.
9 HONORABLE SARAH DUNCAN: No, you're going to
10 make me have a trial on all of it.
11 HONORABLE TOM LAWRENCE: Well, it doesn't
12 make sense to me to have two separate trials on this. Why
13 would you want to have a trial on the possession bond, and
14 what happens if I render a writ of possession and find for
15 the plaintiff on a possession bond, render a writ of
16 possession? Isn't it moot at that point? What's the
17 point of having another trial? I've already issued a writ
18 of possession, and that starts the appellate timetable, so
19 I don't know how you can hold another trial on it once you
20 render a writ of possession and set that aside.
21 HONORABLE SARAH DUNCAN: I have damages
22 arising out of the writ of possession.
23 HONORABLE TOM LAWRENCE: Well, then you can
24 file a separate lawsuit that's not related to the
25 eviction, but I'm saying that once you render a writ of

1 possession on the possession bond trial I'm not sure that
2 everything is not moot from that point forward and that's
3 the end of the case and you really can't have another
4 trial. But there's nothing in the existing rule that even
5 talks about that, and that's the problem with the existing
6 rule, is that it leaves all these questions unanswered and
7 doesn't tell the courts what the procedure is, so we need
8 to change the rule or just do away with it entirely.
9 CHAIRMAN BABCOCK: Richard.
10 MR. ORSINGER: Well, Tom's comments go back
11 to what I was saying. I think that in reality this is a
12 de facto preemption of a right to a jury trial, and I
13 think we ought to see it as such. Either we're going to
14 allow it to be disposed of by posting a cash bond and
15 thereby waiving the jury and it's all over, or we ought to
16 take this away and make the landlord wait another three
17 days and have a real trial like we say we will.
18 HONORABLE TOM LAWRENCE: Well, now, if you
19 post a counterbond then you can have your jury trial.
20 That will be later, but if you demand a trial within six
21 days, that's the problem, getting the jury in within that
22 time period.
23 PROFESSOR CARLSON: The landlord puts up a
24 bond and punts it to tenant to put up a counterbond, and
25 if they can't or won't or don't want to then the tenant

1 can say, "Well, I'm not putting up a counterbond, but I'm
2 ready to go to trial today."
3 HONORABLE TOM LAWRENCE: And if he wants the
4 trial to be held immediately then what I'm saying is
5 that --
6 MR. ORSINGER: Well, he has to have the
7 trial held immediately because you're about to move him
8 out if he doesn't have the trial.
9 HONORABLE TOM LAWRENCE: No.
10 MR. ORSINGER: I'm not talking about the way
11 these rules are put together. As a practical matter I
12 think that this is being used by landlords to throw people
13 out before there's time for a jury trial. I think what
14 you're saying confirms what I'm saying. There's almost
15 never a jury trial after the writ of possession is issued.
16 HONORABLE TOM LAWRENCE: Well, I've never
17 heard that. I mean, do you know that?
18 MR. ORSINGER: No. What you're saying is
19 that once the writ of possession is granted under a bond,
20 that's it. The case is over. They don't show back up for
21 trial and pick a jury and have at each other. Usually
22 their stuff is on the street, and they're trying to find
23 someplace to put it in trucks and get it to some new
24 residence. Isn't that usually the deal?
25 HONORABLE TOM LAWRENCE: Well, actually what

1 the rule says now, if you want to be specific, the rule
2 says now that if the defendant does not post a counterbond
3 or the defendant does not ask for trial within six days
4 that the sheriff or constable puts them on the street.
5 MR. ORSINGER: Right.
6 PROFESSOR CARLSON: That's our current.
7 HONORABLE TOM LAWRENCE: That's the current
8 rule.
9 MR. ORSINGER: I know. What I'm saying is
10 we're talking about all this constitution philosophy and
11 procedure, but, as a practical matter, the writ of
12 possession is a way for a landlord to eliminate a jury
13 trial and get the tenant out, and I think we ought to see
14 it as that. What the landlord gains is a two- or
15 three-day speed-up of the disposition, and what the tenant
16 loses is the right to a bona fide jury trial. I think we
17 ought to see the choices.
18 HONORABLE TOM LAWRENCE: I mean, are you
19 aware now that the rule now does not actually require the
20 JP to issue a writ of possession? It says that the
21 sheriff or constable will put them in possession. That's
22 what the rule says now. It doesn't talk about a court
23 order in this. It just says that the sheriff or constable
24 puts them in possession.
25 MR. ORSINGER: Okay. Well, that goes back

1 to Luke's -- I mean, Luke better listen to that because
2 there's no judicial intervention on the writ of
3 possession.
4 HONORABLE TOM LAWRENCE: That's right.
5 That's why this thing is so bad.
6 MR. ORSINGER: You post your possession bond
7 and then in three days, or however long it is, it's time
8 for the constable to move their furniture, and they dump
9 it just on the outside of the property line in the street
10 where it gets rained on and driven over.
11 CHAIRMAN BABCOCK: Bill.
12 PROFESSOR DORSANEO: I have even a more
13 basic question. Where does it say that you're going to
14 have the trial in 10 days or some faster time than that?
15 HONORABLE TOM LAWRENCE: Rule 7 -- well,
16 let's see. Where's the rule?
17 PROFESSOR DORSANEO: 739, citation?
18 HONORABLE TOM LAWRENCE: Yeah.
19 PROFESSOR DORSANEO: That would be a
20 surprise to me. Does the citation say that this -- you
21 know, you appear for trial? I mean, that's a fairly
22 unusual thing. When I'm reading -- I'm not tuned into
23 this, but, you know, the trial part says, "If no jury
24 trial is demanded by either party the justice shall try
25 the case. If a jury is demanded by either party the jury

1 shall be impaneled and sworn as in other cases."
2 "As in other cases," does that mean in other
3 cases under the Rules of Procedure generally or --
4 HONORABLE TOM LAWRENCE: These -- the
5 existing rules are silent to a whole lot of things. There
6 are a lot of issues that are unresolved in the existing
7 rules, which is why we're trying to amend these to make it
8 clearer, but it is the practice in the JP courts that you
9 hold the trial within 6 to 10 days after service of
10 citation.
11 PROFESSOR DORSANEO: Well, I think that's
12 amazing, because it doesn't say that anywhere.
13 MR. ORSINGER: Well, the citation says that.
14 Doesn't Rule 739 tell the tenant that he's going to get a
15 trial in no more than 10 days? So, I mean, the citation
16 says that. Hopefully the procedure is followed with the
17 citation.
18 HONORABLE TOM LAWRENCE: Uh-huh.
19 PROFESSOR DORSANEO: I bet the citation
20 doesn't tell you you better appear for trial and be ready
21 to proceed.
22 HONORABLE TOM LAWRENCE: Well, I think it
23 does. I don't have a citation.
24 PROFESSOR DORSANEO: It says "citation." I
25 don't think "citation" means "notice of trial."

1 HONORABLE SARAH DUNCAN: And "appear"
2 doesn't mean "trial." "Appear" means "answer."
3 PROFESSOR DORSANEO: Yeah.
4 HONORABLE SARAH DUNCAN: And we're not just
5 talking about somebody with a one bedroom apartment.
6 We're talking about your cycle shop and other tenants, and
7 just because I don't file a bond doesn't mean I am not
8 good for whatever damages accrue from a delay of
9 possession.
10 CHAIRMAN BABCOCK: Yeah. Okay. I think
11 we've talked about this pretty thoroughly. Let's see what
12 the sense of our committee is about the proposal to Rule
13 740(a), subpart (2). Those in favor of making the changes
14 as proposed by the subcommittee raise your hand.
15 And those against raise your hand. And keep
16 them up. Sorry.
17 It fails by a vote of 7 to 10. 10 against,
18 7 in favor.
19 PROFESSOR DORSANEO: Mr. Chairman?
20 CHAIRMAN BABCOCK: Yeah.
21 PROFESSOR DORSANEO: I may be out of order,
22 but you did 739 last time? If 739 is meant to mean that
23 you're going to appear and be ready to try this case,
24 okay, within 10 days, I think it needs to say that instead
25 of saying, you know, "appear." I mean, it may be -- a

1 lawyer wouldn't even think that means appear and be ready
2 to try the case, and certainly a regular person wouldn't
3 think that. And if somebody came to me and asked me,
4 "What does appear mean," you know, well, I would give them
5 the wrong information on this.
6 HONORABLE TOM LAWRENCE: Well, then maybe we
7 need to clarify, but all I can tell you is that the
8 practice in the justice courts among the judges and the
9 litigants and the attorneys that practice is that the
10 trial is 6 to 10 days after service of citation. That's
11 been the practice as long as I've been a JP.
12 MR. ORSINGER: How does the tenant learn
13 about the trial date?
14 HONORABLE TOM LAWRENCE: It's on the
15 citation.
16 MR. ORSINGER: Okay. So basically the word
17 "appear" on the citation in an FE&D is not like it is on
18 an original petition where you just appear by the 20th day
19 you file a written answer. Here it's like a notice of a
20 trial setting.
21 CHAIRMAN BABCOCK: Yeah, it says "appear
22 before such justice at a time and place named in such
23 citation."
24 MR. ORSINGER: Okay. Well, I think Bill's
25 confusion, which is mine also, is that in ordinary civil

1 litigation "appear" means file an answer. Here this is
2 like a notice of trial setting. You're there at 10:30
3 a.m. next Thursday morning for your trial, if you want to
4 have a trial. So the citation is a notice of the setting
5 as well as the notice of the lawsuit action, right?
6 MR. WATSON: Chip?
7 CHAIRMAN BABCOCK: Yes.
8 MR. WATSON: I think I heard Bill move to
9 amend to add the words "for trial" after the word
10 "appear." I second that.
11 CHAIRMAN BABCOCK: Okay.
12 HONORABLE TOM LAWRENCE: Can we finish with
13 740 first? Are we -- is 740 out now?
14 CHAIRMAN BABCOCK: No. I think that's a
15 good point. We'll get back to 739 in a minute.
16 MR. SOULES: Chip, before we leave that last
17 vote, I would like to see the committee structure what we
18 just voted on parallel to the sequestration rules that we
19 have and see if we can't give the JPs some relief from
20 this confusion. That would solve the problem.
21 JUSTICE HECHT: And that would be a hearing
22 in essence within six days on the writ and then you could
23 have a trial -- if there's anything left to try, you can
24 have a trial later.
25 MR. SOULES: You can have a hearing any time

1 before the trial, because you can -- and you've got the
2 three-day rule, which may have to be complied with and
3 maybe not, because the judge can do whatever they want to
4 do. But there could be a hearing any time. When the bond
5 is posted for sequestration, the sheriff goes out to get
6 the property. There could be a replevy bond filed
7 immediately. There can be whatever hearings there are
8 about the immediate right to possession and then you
9 finally reach the trial on the merits; and if the sheriff
10 can or constable can just dump the tenant's property in
11 the public street and walk away, that needs to be fixed,
12 too, because the sheriff can't do that in a sequestration.
13 JUSTICE HECHT: Well, we have a statute,
14 right, Judge?
15 HONORABLE TOM LAWRENCE: The Property Code
16 says that the sheriff or constable can do exactly that.
17 MR. YELENOSKY: Yeah. I think --
18 MR. SOULES: Well, so be it.
19 MR. YELENOSKY: Well, I think we're all
20 seeing a part of the law -- or many of us are seeing a
21 part of the law that we're not used to dealing with, and I
22 think it would be a mistake to talk about it in terms that
23 we usually talk about replevy or whatever, because the
24 reality is so much different. I mean, it really is king's
25 X. If the person's out, that's it. That's the end of the

1 story, and we can talk about the hypothetical ways to
2 prevent that, like posting a counterbond. That would be a
3 real interesting thing to suggest to the low income
4 client. They have no capability of posting a counterbond.
5 The reality is are they going to be tried
6 within a certain amount of days, are they going to get a
7 jury trial or not, and then that's going to be the end of
8 it. And, I mean, we're surprised -- we shouldn't be, but
9 the lack of parallel is even in the remedy. I mean, for
10 eons it's been true that the constable just puts the stuff
11 out on the street. That's what happens to tenants when
12 they get evicted. The stuff literally goes on the street.
13 CHAIRMAN BABCOCK: Carl.
14 MR. HAMILTON: I don't know if the
15 sequestration and those particular rules would apply to
16 allow a landlord to use those against a tenant, but if
17 they are applicable then I don't think we need all this
18 possession stuff. I think we ought to revise the citation
19 to require there be a trial date within 6 to 10 days and
20 just have a jury trial or whatever and forget the
21 possession bonds.
22 CHAIRMAN BABCOCK: Richard.
23 MR. ORSINGER: I would second Carl's
24 comment, but I don't see this as analogous to
25 sequestrations and attachments because there is a

1 significant delay between judicial intervention at the
2 beginning of a normal lawsuit and the time you get your
3 final trial, which could be -- it's got to be at least 21
4 days later and probably months later. We're talking here
5 about a matter of two or three days between a preemptive
6 act, which apparently doesn't even have judicial
7 intervention. If the bond is posted, it just becomes a
8 matter of law enforcement at that point.
9 HONORABLE TOM LAWRENCE: That's the way the
10 current rule reads.
11 MR. ORSINGER: Right. I would favor that we
12 eliminate this because what we gain for the landlords by a
13 two- or three-day advance is the sacrifice of the jury
14 trial which we purport to offer, and as a practical matter
15 I think it is a final disposition, even though it's only
16 intended to be a temporary disposition. For most of the
17 defendants in these cases it will be the only opportunity
18 they have, and I am not even convinced that it's really a
19 judicial event. Just post a bond and the stuff is out on
20 the curb without the intervention of a judge, so I think
21 we ought to get rid of this and just have the trial on the
22 merits within 10 days.
23 JUSTICE HECHT: Is it true, Judge -- a lot
24 of us are speaking from a lot of ignorance -- that there
25 is a statute allowing for writs of possession? Whether we

1 have a rule or not, we have a statute on the books that
2 lets them use this remedy. Is that true or not?
3 HONORABLE TOM LAWRENCE: Well, I don't think
4 there is anything in the Property Code about the
5 possession bond.
6 JUSTICE HECHT: Well, I'm looking at
7 24.0061, writ of possession. That's different?
8 MR. ORSINGER: That's what you get at the
9 end of your FE&D trial, isn't it?
10 HONORABLE TOM LAWRENCE: Yeah. That's
11 the --
12 MR. ORSINGER: There's nothing in there
13 about a bond --
14 JUSTICE HECHT: All right.
15 MR. ORSINGER: -- and moving somebody out in
16 three days with no trial.
17 HONORABLE TOM LAWRENCE: Yeah, that's not
18 really the possession bond under 740 now.
19 JUSTICE HECHT: All right.
20 HONORABLE TOM LAWRENCE: That's the normal
21 writ of possession under 748.
22 MR. ORSINGER: That's after a trial where a
23 judge hears some evidence and maybe a jury hears some
24 evidence.
25 HONORABLE TOM LAWRENCE: You know, the whole

1 reason that I think it's better to have only one trial on
2 this instead of two, I am not sure what you would do at
3 the possession bond hearing. If you render a judgment for
4 the plaintiff for possession, for example, at the
5 possession bond and you don't mess with back rent or
6 anything else, are you saying then that you come back and
7 on the 10th day after original citation, then you have a
8 trial on what, just the question of back rent and court
9 costs and attorneys fees? So when does the appeal time
10 start to run, on the writ of possession that you rendered
11 after possession bond or on the trial on the merits after
12 the second one? It just doesn't make any sense to have
13 two trials when one could clear up all the issues at one
14 time.
15 If you don't want to have a possession bond,
16 that's fine. The committee voted in June that we wanted a
17 possession bond, so we went back and rewrote it to make it
18 workable. Now, if you choose not to do it, that's okay.
19 I can only tell you that the Texas Apartment Association
20 is pretty strongly in favor of having a possession bond.
21 CHAIRMAN BABCOCK: Yeah, Sarah.
22 HONORABLE SARAH DUNCAN: Am I the only one
23 that draws a distinction between immediate possession and
24 ultimate possession?
25 PROFESSOR DORSANEO: No.

1 HONORABLE SARAH DUNCAN: It seems to me like
2 those are two conceivably very different questions, and
3 there may be reasons to give a tenant immediate
4 possession, even though they ultimately lose on the
5 possession issue.
6 HONORABLE TOM LAWRENCE: What does that
7 mean, immediate possession? Does that mean I issue a writ
8 of possession, they are evicted, and they come back later
9 for a trial?
10 HONORABLE SARAH DUNCAN: I'm taking the
11 opposite scenario, that I go in and I say, "Judge, I'm
12 good for whatever the damages are." And judge says,
13 "Yeah, Duncan, you're fine. You don't have to bond it.
14 I'm setting this for trial on the 10th day or 12th day or
15 whatever it is." And we go in and I don't prove my
16 possession case and ultimately I lose possession, but I've
17 been entitled to keep possession pending trial.
18 HONORABLE TOM LAWRENCE: So on the
19 possession bond hearing what is the judge going to do at
20 that hearing?
21 HONORABLE SARAH DUNCAN: Decide if the risks
22 of damages to somebody are greater by requiring me to move
23 or stay, pending trial.
24 HONORABLE TOM LAWRENCE: Am I going to issue
25 a writ of possession or what am I going to do as a result

1 of that hearing?

2 HONORABLE SARAH DUNCAN: Yeah. You're

3 either going to issue a writ of possession or not, but

4 that's just a writ of possession through trial. It's

5 not -- it's not the final determination of possession.

6 MR. GILSTRAP: But once the writ of

7 possession is issued, the stuff goes to the street, and it

8 seems like that can't be undone. You see what I'm saying?

9 You can't go back and say, "Now put it back in the

10 apartment."

11 HONORABLE SARAH DUNCAN: Right, but I'm

12 taking the opposite attack --

13 MR. GILSTRAP: I understand. If the

14 opposite --

15 HONORABLE SARAH DUNCAN: -- that I, the

16 tenant, remain in possession.

17 MR. GILSTRAP: I can see the two-step

18 process if you allow the tenant to stay in possession, but

19 if the result of the first step is eviction then

20 possession is done.

21 CHAIRMAN BABCOCK: Steve and then Skip.

22 MR. YELENOSKY: My understanding of how this

23 works now or at least my recollection of how it worked

24 before was that the landlords were gambling on a tenant

25 not responding, and the advantage of the possession bond

1 under the current rule was that if the tenant did nothing
2 then he could get and would get without judicial
3 intervention a writ of possession within -- I don't know,
4 what's the max, 11 days or something; whereas if they
5 didn't file a writ of possession then they would not get
6 the -- or rather, if they didn't file a possession bond
7 they couldn't get the writ of possession that quickly.
8 But they were gambling on the tenant not
9 responding, and when you say the apartment association
10 supports the possession bond, they support it now under
11 that system. Now, surely they would like what you're
12 proposing, but what they don't get now that you're
13 proposing is that they get to eliminate the trial by jury
14 if the tenant responds. Right now if the tenant responds,
15 you've got to set up a trial, and if the tenant demands a
16 jury, you've got to give them a jury.
17 PROFESSOR DORSANEO: And it doesn't happen
18 in 10 days I'll bet.
19 MR. YELENOSKY: Right.
20 HONORABLE TOM LAWRENCE: Not always.
21 MR. YELENOSKY: And so when you say they
22 support it, surely they see some advantage to how it is
23 now and surely they'd like what you prefer; and the
24 question for us is, first of all, should we give them more
25 than they have now, which is I think what you're

1 proposing, because your proposal attempts to solve what
2 are some procedural problems by effectively eliminating
3 the tenant's current right to demand a jury trial.
4 CHAIRMAN BABCOCK: Skip.
5 MR. WATSON: I see -- I mean, I think we've
6 correctly identified perhaps the real reason for the
7 possession bond and the writ of possession. That's pretty
8 clear. I can see a legitimate reason for a possession
9 bond and a writ of possession in a circumstance in which
10 the tenant -- the landlord is truly going to be damaged if
11 we wait 6 to 10 days without a counterbond being -- I
12 mean, let's say that the landlord goes in and instead of
13 this person hasn't paid rent for two months and I want
14 them out of here because I've got somebody interested in
15 the apartment and this is the quick, clean way to do it,
16 let's say he goes in and they're breeding roaches or, you
17 know, they're knocking the walls out or whatever.
18 CHAIRMAN BABCOCK: Drugs.
19 HONORABLE SARAH DUNCAN: They're milling
20 anthrax.
21 MR. WATSON: Okay, whatever.
22 MR. ORSINGER: Milling anthrax.
23 MR. WATSON: But, you know, in that
24 circumstance, you know, there is damage to property as
25 opposed to damage from lost rent, and I'm trying to draw a

1 distinction between those two.

2 CHAIRMAN BABCOCK: Judge Lawrence. I'm

3 sorry. Go ahead.

4 MR. WATSON: And I tend to side with Richard

5 when we're talking about damage from lost rent, that, you

6 know, you can wait 6 to 10 days and that's fine. The

7 system needs to accommodate it. If it's damage from

8 breeding roaches and the property itself is being damaged

9 or other tenants are in jeopardy, then you have your bond,

10 but I think it should be tightly limited to specific types

11 of demonstrable damage.

12 CHAIRMAN BABCOCK: Judge Lawrence.

13 HONORABLE TOM LAWRENCE: Well, Steve, I

14 guess I disagree with you that this proposed rule gives

15 the tenants some great advantage.

16 MR. YELENOSKY: Landlords.

17 HONORABLE TOM LAWRENCE: The landlords. If

18 you consider the tenants' status now, if they don't do

19 anything, the sheriff or constable under this rule puts

20 their stuff in the street, they're out of there, and I'm

21 not sure what good it does to hold a trial four or five

22 days later when their stuff is out, because the result of

23 the trial, even if it says "judgment for the plaintiff for

24 possession" there's no mechanism that I can order the

25 landlord to put that tenant back in. That genie is out of

1 the bottle, and it's not going back in. The landlord is
2 not going to readmit them because my judgment for the
3 plaintiff doesn't require that.
4 The other thing is that under the existing
5 rule there's no right to appeal anything from the
6 possession bond. So I don't think the tenants have a
7 pretty good deal under the existing rule. I think the
8 proposal is pretty fair and even-handed. The only problem
9 from the tenants' standpoint is no right to jury trial,
10 but I would submit that you can't have both. You can't
11 have a trial within this expedited period and then still
12 make it a jury trial and have everything fit. The courts
13 are not going to be able to do that.
14 CHAIRMAN BABCOCK: Frank.
15 MR. GILSTRAP: Recognizing that most tenants
16 aren't going to respond and they're going to be out and
17 the apartment association is going to be happy, and then
18 at the same time recognizing that we have to give these
19 people a jury trial if they ask it, why don't we just say
20 that if they don't show up and respond within the six-day
21 period they're out? If they do and ask for a jury trial,
22 they get a jury trial --
23 MR. YELENOSKY: Right.
24 MR. GILSTRAP: -- but later.
25 MR. YELENOSKY: That's essentially what I

1 think happens now. I mean, I have heard that -- you know,
2 where the possession bond is filed, and my recollection is
3 a tenant that responds and asks for a jury trial, although
4 required to hold that within a different period of time,
5 they have held them after that because they needed more
6 time to put the jury together or whatever, but my
7 understanding was that the landlords were gambling on a
8 nonresponse, and that was the advantage of the possession
9 bond, and that's the current system, and if people don't
10 want to make that more favorable to the tenants, you know,
11 that's not something I'm going to try to change here, but
12 if they want to make it less favorable to the tenants,
13 which I think it is under your system if the tenant
14 responds, then I oppose that.
15 CHAIRMAN BABCOCK: Bill, you had your hand
16 up. Do you still want to speak?
17 PROFESSOR DORSANEO: It just -- if somebody
18 does demand a jury trial within the five-day time period
19 as provided in 739 and a later rule, it would seem to me
20 that they ought to be entitled to a jury trial when the
21 jury trial is available and that this writ of possession
22 procedure should not somehow eliminate that. That just
23 doesn't seem to make any sense to me that the writ of
24 possession or immediate possession procedures should trump
25 the ordinary process that would be involved.

1 I'm surprised, because I don't think it says
2 this anywhere, that there is a setting in the original
3 citation of the trial within some 10-day time period. I'm
4 surprised that's so. When I was a young lawyer, you know,
5 doing, you know, all kinds of things, traffic ticket
6 appeals, counting the points on stars to see if we could
7 quash it, and doing detainer cases, these cases didn't get
8 tried like immediately. It didn't happen like that. I
9 would be astonished if it happens like that.
10 If I represented Lone Star Cycle, that
11 wouldn't happen like that. The case would -- I would
12 demand a jury trial. It would be set, and for one reason
13 or another it would happen later. Maybe because the
14 lawyers aren't ready to try this real dispute about
15 whether, you know, having a certain kind of light on the
16 property is a violation of a covenant in the lease. I
17 think 739 needs to be worked up to make it plain what it
18 does that says somebody needs to appear for trial. That
19 needs to be spelled out. Maybe we could put in there
20 something about when the JP can set the trial on the
21 merits like we see in other contexts.
22 HONORABLE TOM LAWRENCE: The subcommittee
23 actually talked about that, Rule 743 and Rule 739, about
24 doing that, and the subcommittee voted not to do it.
25 CHAIRMAN BABCOCK: Okay. Let's stick to 740

1 right now. Let me ask you a question, Judge Lawrence.
2 The vote on subsection (a)(2), which was against the
3 proposed changes, does that -- is that tantamount to also
4 voting on (b), (c), and (d) and the notes and comments?
5 In other words, are those changes -- were
6 the changes to (b), (c), and (d) meant to be consistent
7 with what's kind of the policy question, which was
8 740(a)(2) or not?
9 HONORABLE TOM LAWRENCE: Well, it does all
10 go together because there are references to (a)(2) in (b)
11 certainly. Not in (c) or (d), but certainly in (b).
12 CHAIRMAN BABCOCK: Okay.
13 HONORABLE TOM LAWRENCE: But I'm assuming if
14 some people don't like (a)(2) they're not going to like
15 (d) either.
16 CHAIRMAN BABCOCK: Right.
17 HONORABLE TOM LAWRENCE: I don't know. I
18 don't know how -- I mean, if you want to -- if the right
19 to a trial by jury is overriding and trumps everything
20 else, that's fine, but then we're not going to have the
21 trial in six days. If we're not going to have the trial
22 within six days, what's the point of the possession bond,
23 which gets back to what we talked about in June? You
24 know, we had two options. One was to do away with the
25 possession bond; the other was to have it. The committee

1 voted "yes, we want it," but what you're really saying, if
2 the jury trial trumps everything else, is that if the
3 tenant asks for a jury trial then you're not going to have
4 it on this expedited time schedule. It's going to have to
5 be moved back. So whatever the committee wants to do.
6 MR. YELENOSKY: But doesn't it still -- as
7 I've said and I think Frank has said, doesn't the
8 possession bond still have the advantage for the landlord
9 when the tenant does not respond?
10 HONORABLE TOM LAWRENCE: Under the existing
11 rule if the tenant doesn't respond or do anything, yes,
12 the constable or sheriff puts them on the street and
13 then -- and this is what I was talking about earlier. The
14 conflict then is what if the tenant shows up for the
15 regular trial as per the citation that he got?
16 MR. YELENOSKY: No, but I'm just focusing on
17 when they don't respond, because what you're saying is you
18 can't both be for a possession bond and be for a jury
19 trial, and I'm responding to that comment because there
20 are people here who are going to be for a possession bond
21 and for a jury trial, and it seems to me you can be, and
22 what you say is, "I'm for a possession bond because I
23 think the landlords ought to have an expedited procedure
24 if the tenant doesn't respond," but if the tenant responds
25 then they've lost the gamble. The tenant gets the right

1 to the jury trial, and it's going to take longer. So
2 that's all I'm responding to.
3 HONORABLE TOM LAWRENCE: Well, I didn't say
4 that you can't be for both a jury trial and a possession
5 bond. What I said is that if you want a jury trial then
6 you can't expect to have that within six days as --
7 MR. YELENOSKY: Right. Right. But people
8 could say that "I'm for a possession bond that works when
9 the tenant doesn't respond, but essentially is negated
10 when a tenant responds."
11 CHAIRMAN BABCOCK: Bill.
12 PROFESSOR DORSANEO: I don't know whether
13 I'm for a jury trial in this whole context, all right, in
14 the JP court. I don't -- you know, that's a nice issue to
15 me, but if I'm going -- if there's going to be a provision
16 for a right to jury trial under these rules and perhaps
17 under some other, you know, law then it needs to make
18 sense; and it doesn't make sense to me that the possession
19 bond deal would eliminate the right to jury trial when
20 that's the key issue, the key point in the litigation
21 process.
22 And I could see you could take out and you
23 could simplify it by taking out the right to jury trial
24 and just do the bench trial within a relatively short
25 period of time on the possession issue and eliminate the

1 need for having, you know, a lot of this complexity as
2 long as all of that was plain; but once you put the right
3 to jury trial in there, it seems to me there needs to be,
4 you know, in recognition that that's a vital right, if the
5 client -- if the tenant would show up later for the trial
6 on the merits and say, "I want a right to jury trial,"
7 well, you know, the issue would be whether I get back in
8 possession. And for a regular apartment dweller that
9 might not make any sense because they've already moved,
10 but I'm telling you for Lone Star Cycle on I-75 in
11 Richardson, you know, he wants back in there to be selling
12 motorcycles again, even if he's temporarily out.
13 So, you know, the third thing is it could be
14 engineered so that the jury trial takes place at some
15 plausible point in time, okay, and you still have a
16 possession bond to deal with that interim situation only.
17 So I think there are three choices. You know, do it
18 without a jury trial in the process to begin with,
19 assuming we could do that by modifying these rules,
20 assuming the right doesn't exist somewhere else; spell out
21 in these rules more clearly about when the jury trial, you
22 know, occurs and how that fits together with the
23 possession bond issue. If the jury trial occurs very
24 quickly in 10 days, okay, then the possession bond thing
25 does get to be kind of foolishness in your county with the

1 way you're doing it, but perhaps not elsewhere, huh?
2 And I guess the third way would be to
3 stretch out the trial. It troubles me the trial is so
4 fast, as a jury trial, to me, that I have a right to jury
5 trial, like, now, okay, as opposed to a right to jury
6 trial and time --
7 HONORABLE SCOTT BRISTER: That's what JP
8 courts are for.
9 PROFESSOR DORSANEO: -- to conduct one.
10 CHAIRMAN BABCOCK: Carl, then Sarah.
11 MR. HAMILTON: Under the present rule if a
12 plaintiff files a possession bond the defendant can do two
13 things. He can, first of all, demand a trial within six
14 days.
15 MR. SOULES: That means make the demand in
16 the six days.
17 HONORABLE SARAH DUNCAN: No, it says "to be
18 held."
19 MR. YELENOSKY: No, it has to be held.
20 MR. SOULES: To be held, okay.
21 MR. HAMILTON: I think the demand has to be
22 tried within six days, be held prior to six days from the
23 date served for notice of possession bond. The second
24 thing he can do is file a counterbond. If he doesn't do
25 either one then the plaintiff gets possession under the

1 bond. So why not leave all of that, but instead of making
2 it six days, make it say 10 days to give enough time for a
3 jury to be summoned, and then if the plaintiff demands his
4 trial he gets his trial before a jury within 10 days.
5 Otherwise, he forfeits if he doesn't demand and he doesn't
6 put up the counterbond.
7 HONORABLE TOM LAWRENCE: Well, my response
8 to that would be then why have a possession bond procedure
9 at all, because the whole point of that was to let the
10 plaintiff get possession quicker than through the normal
11 process?
12 MR. HAMILTON: The only point of it is if
13 the defendant doesn't do anything.
14 HONORABLE TOM LAWRENCE: Right. Well, but
15 if you want to extend process and give a little more time
16 then why have a possession bond? Let's just have one
17 trial.
18 CHAIRMAN BABCOCK: Sarah.
19 HONORABLE SARAH DUNCAN: The reason we need
20 a possession bond, it seems to me, is that this -- neither
21 this committee nor any other committee can predetermine
22 what the circumstances are going to be in any given FED
23 action, and Bill's cycle shop is, I think, the perfect
24 example. Let's say they come in on day two and they say,
25 "Judge, we've got a legitimate dispute over whether we can

1 have this light on this property under this lease, and
2 this is going to be a difficult issue, and we've got to
3 get, you know, all of our testimony about what was
4 intended" and blah-blah-blah-blah; and the judge says,
5 "Okay, the cost of moving the cycle shop is too big for me
6 to make that determination today with inadequate
7 information. I'm going to set this for trial on X day,
8 and you guys get ready and then we'll try this very
9 difficult issue of what the lease means." That to me is
10 the perfect example of why there needs to be this interim
11 possession determination.
12 On the other hand, if there is no response
13 at all, we want the landlord to be able to have a speedy
14 means of obtaining possession, and that's what the writ of
15 possession and the possession bond do. So I guess I'm
16 back to where I was 45 minutes ago. I still don't
17 understand why the two-step process that I think we've got
18 in the rule now doesn't make good sense.
19 CHAIRMAN BABCOCK: Stephen.
20 MR. YELENOSKY: Well, I was just going to
21 propose something, which is, is just what I was saying
22 before, that essentially the subcommittee, if they want to
23 change this rule, write the rule so that the possession
24 bond operates to expedite a landlord's possession of the
25 property when there's no response; but, otherwise, it's

1 the regular system. And that eliminates the concern you
2 have about which trial is the real trial; and it makes
3 only one; but it makes the one trial the standard,
4 traditional FED trial, which, you know, is going to be a
5 few days later than it would be under immediate possession
6 bond and keep the possession bond just for the situation,
7 which is pretty common, that the tenant doesn't respond
8 because in a lot of cases because they know that they're
9 not going to win.
10 CHAIRMAN BABCOCK: Sarah.
11 HONORABLE SARAH DUNCAN: And let's remember,
12 too, that this isn't 1947, right, when the rule was
13 enacted.
14 CHAIRMAN BABCOCK: Stipulated.
15 HONORABLE SARAH DUNCAN: And it may not be
16 possible to get a jury together in six days, but our
17 administrative problems in getting a jury together
18 shouldn't cause the tenant to lose their right to a jury
19 trial, and it could say something like "as soon as a jury
20 can be," you know, "impaneled." "As soon as practical."
21 MR. SOULES: Actually, it seems to me the
22 tenant can do three things, the last two being maybe the
23 same. One, he can post a bond. Second, the defendant can
24 promptly ask for a trial, some kind of preliminary trial
25 that's got to take place in six days. Third, the tenant

1 can show up at 4:45 on the sixth day and demand a trial,
2 which has to be held in the next 15 minutes.
3 MR. YELENOSKY: Right.
4 MR. SOULES: And now the tenant cannot --
5 the possession cannot go to the landlord because the trial
6 wasn't held within six days. So that's over. Immediate
7 possession is over until you get to the trial on the
8 merits, after which there can be a writ of possession.
9 CHAIRMAN BABCOCK: Is that right, Judge?
10 MR. SOULES: And that writ of possession is
11 statutory. I don't know how we use the same words here,
12 because what we're talking about as writ of possession in
13 this 740 is not what's in the statute, and it ought to be
14 called something else, because that writ of possession can
15 only be -- the statutory writ of possession can only be
16 issued after there has been a trial, and that's talking
17 about the JP final trial on the merits, but anyway, it's
18 kind of strange that --
19 CHAIRMAN BABCOCK: We've got -- go ahead.
20 MR. SOULES: -- a smart tenant can
21 absolutely kill this bond and possession by showing up at
22 the 11th hour on the sixth day. It's over.
23 CHAIRMAN BABCOCK: We've had a narrow vote
24 on this, on the rule, and from here it seems to me we can
25 proceed a number of different ways. We can ask the

1 subcommittee to go back and try to redraft along the line,
2 taking into account the concerns that led to the 10 people
3 voting against this as they did, or we can move on to the
4 next rules, and when we submit this to the Court, anybody
5 that wants to write a dissenting view on this rule can do
6 it. And those seem to me to be our two options, but I
7 think we've thoroughly discussed Rule 740, and we need to
8 move on to --
9 MR. SOULES: Move on.
10 CHAIRMAN BABCOCK: -- a number of other
11 rules, so we're going to get done with this this time. So
12 what's everybody's sense? Judge Lawrence, let me start
13 with you. Would you and Elaine like the opportunity to go
14 back and try to redraft Rule 740, taking into account the
15 concerns that have been raised and maybe some of the
16 suggestions so you can pick up four votes, or would you
17 rather go to the minority report rule route? Minority
18 report route.
19 HONORABLE TOM LAWRENCE: Well, I don't think
20 it makes much sense from a -- the standpoint of actually
21 trying these cases to have these interim proceedings and
22 then another proceeding. Frankly, I would just like to do
23 away with 740 entirely.
24 MR. ORSINGER: Second that. I second that.
25 And I might point out, Chip, that the reason I voted

1 against their language is not because it's bad. I think
2 they did the best they could with what they had to work
3 with, but in light of this, I'm now convinced we ought to
4 just pitch this all out and have the real trial on the
5 merit two days later.
6 PROFESSOR DORSANEO: My problem is with your
7 10-day trial setting idea. If you tell me that that's
8 just the way it's done in 254 counties --
9 HONORABLE TOM LAWRENCE: I can tell you
10 that. That is the way it's done.
11 PROFESSOR DORSANEO: Okay. And I'm
12 saying --
13 HONORABLE TOM LAWRENCE: I don't know that
14 every court necessarily, but that's the prevailing view in
15 the JP courts of how you do it.
16 PROFESSOR DORSANEO: Because I don't know
17 where it says that anywhere. If it's 739, that doesn't
18 say that. That's just something that the JPs and their --
19 you know, and landlords have gotten to be the practice. I
20 mean, it doesn't -- so I'm thinking if it's not really 10
21 days then I have a different view about whether there
22 ought to be a procedure for the complainant to have
23 possession. If it is 10 days and we're just talking about
24 some trivial standpoint, I would say do away with the 740,
25 but it could be -- I'll be a landlord's lawyer now. It

1 could be that the trial was going to be set for sometime
2 substantially later, and, you know, I can't believe that
3 that doesn't happen a lot. Okay. I just can't believe
4 it. You can tell me that until, you know, the world is
5 flat, and I won't be able to believe it.
6 MR. YELENOSKY: Well, I mean, I don't think
7 it happens a lot, but why don't you think 739 tells them
8 in 10 days, because it doesn't say "for trial"?
9 PROFESSOR DORSANEO: Yeah.
10 MR. ORSINGER: No. It just says what the
11 citation says. It doesn't actually require the court to
12 follow through on what the citation promises.
13 MR. YELENOSKY: Well, I agree with Judge
14 Lawrence. I think the JPs read that to mean they've got
15 to have a trial within 10 days.
16 PROFESSOR DORSANEO: It says in the last
17 paragraph, "Citation shall inform the parties upon timely
18 request and payment of the jury fee, not later than five
19 days, the case shall be heard by a jury." It doesn't say
20 it shall be heard by a jury, you know, in the next five
21 days. Where does that come from?
22 CHAIRMAN BABCOCK: But, on the other hand,
23 let's not go fixing problems that don't exist. I mean,
24 Judge Lawrence and the subcommittee report to us that this
25 is the way it's done everywhere, and there's not a problem

1 with that. Let's not go trying to fix something that we
2 don't need to.
3 MR. SOULES: This was all lobbied into this
4 committee and into the Court in 1976, and we haven't seen
5 the last of it if we just kill this possession bond and
6 counterbond. It's coming back.
7 CHAIRMAN BABCOCK: Yeah. That's the next
8 issue.
9 MR. SOULES: It may come back in the back
10 door.
11 CHAIRMAN BABCOCK: Now we're talking about
12 moving from -- Stephen, I think, as you said, you know,
13 the proposal here maybe takes the landlords to another
14 step in their favor. If we abolish 740 then they've gone,
15 you know, big time in reverse.
16 HONORABLE TOM LAWRENCE: My suspicion is, is
17 that if we do away with 740 or make it so that it's
18 unworkable that there will be a bill that will be
19 addressed in the Legislature, and it will show up in the
20 Property Code next session.
21 MR. SOULES: That's right.
22 MR. ORSINGER: And it won't work very well.
23 HONORABLE TOM LAWRENCE: Well, it will work
24 better than what's -- some of the things proposed today,
25 with all due respect, because, I mean, this is a -- it's

1 seemingly simple, but these are very complex rules, and
2 the time periods are -- have been ordained for a number of
3 years; and to try to make everything fit and make sense,
4 it's easy to just ignore stuff; and that's what we're
5 doing now.
6 Rule 740 doesn't make any sense. Parts of
7 it are ignored. People do different things because the
8 rule is not specific or concise, and what I'm trying to do
9 is to arrive at a rule that's going to make sense. And,
10 yeah, there's a problem with it on the jury trial. I
11 acknowledge that, but if the possession bond is considered
12 to be important and you want to have that expedited
13 hearing then something has got to go.
14 But this rule actually will make sense from
15 the litigants' standpoint. It will fit with all the other
16 rules, and it will only require one hearing. I am totally
17 opposed to having two trials on this. I don't want to
18 have a trial on a possession bond and come back four or
19 five days later. The JPs do not want that. I don't want
20 to try this thing twice. I only want one trial on it with
21 one date that the appeal starts and everything solved in
22 one setting.
23 CHAIRMAN BABCOCK: But under the current
24 rule have you had instances where you've had to try the
25 thing twice?

1 HONORABLE TOM LAWRENCE: I don't recall a
2 defendant ever showing up a second time for the trial on
3 the merits, but it could happen. I mean, the rules allow
4 that to happen.
5 CHAIRMAN BABCOCK: Are you aware that other
6 JPs have said, "Hey, we've got huge problems with this
7 rule because I'm having to try these things twice"?
8 HONORABLE TOM LAWRENCE: No, I can't tell
9 you anybody's ever told me that.
10 CHAIRMAN BABCOCK: You know, Judge Peeples
11 is a proponent of if it's not broke, don't fix it. Are we
12 in that situation here? Is it broke?
13 HONORABLE TOM LAWRENCE: Well, I mean, it's
14 a glaring problem in my mind. I issue a writ of
15 possession -- well, actually under the existing rule I
16 don't issue a writ of possession. I decide -- apparently,
17 the way the rule is written, I decide at the trial if the
18 landlord is entitled to possession. I don't issue a writ
19 of possession. The constable just goes out and puts them
20 in possession, and there's no appeal from that.
21 I mean, 740 as it exists just -- it can't be
22 left like that. It's either got to be fixed or done away
23 with. It just makes no sense at all.
24 CHAIRMAN BABCOCK: Well, would that then
25 argue in favor of going back to the subcommittee and

1 trying to solve what I sense is behind the 10 votes
2 against this proposal, which is the jury question?
3 HONORABLE TOM LAWRENCE: But if the solution
4 is to say if someone comes in and demands a trial within
5 six days, as (a)(2) allows, and if they say, "I want a
6 jury trial" then you do away with the six-day rule and
7 just set the jury trial as the normal trial would be under
8 the original citation, then what's the point of the
9 possession bond?
10 MR. GILSTRAP: Because you've solved the
11 problem for about the 80 percent of the people --
12 HONORABLE SARAH DUNCAN: Yeah.
13 MR. GILSTRAP: -- where they don't show up.
14 MR. YELENOSKY: Right. That's what I've
15 been saying over and over.
16 MR. GILSTRAP: It's that simple.
17 PROFESSOR DORSANEO: If you're going to have
18 the trial in 10 days, this little interim procedure for
19 three days doesn't make any sense, period. Okay. And it
20 doesn't make any sense. If you're going to have -- so if
21 the prevailing view of 739 is it sets the case for trial
22 within, you know, not longer than 10 days from now, then
23 the interprim procedure, you know, doesn't make any sense.
24 It's only when the trial takes place longer than 10 days
25 from now that the immediate possession kind of becomes of

1 some importance. That's why Judge Lawrence tells the
2 landlords that there's not much point in doing this,
3 because there isn't, and if you -- I would say if you
4 rewrite 739 and make it clearer as to what it means, and
5 if it does mean that the trial will be conducted in, you
6 know, not later than 10 days or some period of time, then
7 740 doesn't make any sense.
8 CHAIRMAN BABCOCK: Justice Hecht, or Judge
9 Patterson.
10 HONORABLE JAN PATTERSON: Judge Lawrence, is
11 the language "to appear before such justice at a time and
12 place," is that language that you also see on other
13 citations and criminal instruments? I mean, I think it's
14 so that they know to appear before the judge for trial.
15 HONORABLE TOM LAWRENCE: No.
16 HONORABLE JAN PATTERSON: I thought that
17 would be common language that you would see in other
18 contexts.
19 HONORABLE TOM LAWRENCE: No, the citation in
20 739 is different than the citation in the small claims in
21 justice court. There it's file an answer Monday next
22 following blah-blah-blah.
23 HONORABLE JAN PATTERSON: But for criminal
24 proceedings you don't -- because I think this is more akin
25 to criminal language and is clear in some courts, I think,

1 for the defendant to appear -- I mean, I was just
2 suggesting to you in a friendly way that that is language
3 that you-all have become accustomed to, but evidently it's
4 not.
5 HONORABLE TOM LAWRENCE: Well, I don't know
6 that it has a criminal origin.
7 HONORABLE JAN PATTERSON: It does. So, I
8 mean, I think that's where it comes from and makes sense
9 in that context, but if it's not clear in that context
10 then maybe its's not clear.
11 PROFESSOR DORSANEO: All citation developed
12 from the capius address spondendum and was replaced -- and
13 our civil citations said this kind of language before they
14 said "file an answer." So --
15 CHAIRMAN BABCOCK: Some of us are going
16 on --
17 MR. GILSTRAP: We need to separate the
18 question of citation from the question of possession bond
19 and compartmentalize those things. If we figure out what
20 we want to do with possession bond, we can fix the
21 citation, but I think they're confusing the two and
22 impeding our progress toward resolution on one.
23 CHAIRMAN BABCOCK: Sarah.
24 HONORABLE SARAH DUNCAN: I have to say that
25 I agree with Bill. Just in terms of a gut instinct, I

1 can't believe that every eviction of every corporate
2 headquarters in the state has been on trial within 10 days
3 of citation, and before I'm willing to accept that, being
4 the doubting Thomas that I am, I'd like a little more
5 information. I understand that the first setting may have
6 been within 10 days. That's conceivable to me, but all
7 evictions don't arise out of TAA leases and form
8 contracts.
9 CHAIRMAN BABCOCK: Well, what percentage do
10 you figure that they are?
11 HONORABLE SARAH DUNCAN: I'm not as
12 concerned about what percentage because the rule has to
13 fit all of the situations that it could be applied in, and
14 if a continuance is not only possible but probable when
15 you've got a complicated lease question, then the
16 immediate right to possession versus the ultimate right to
17 possession adds a great deal of significance.
18 CHAIRMAN BABCOCK: Justice Hecht, I was
19 going to ask you -- not to put you on the spot, but my
20 sense is that this is important enough that we shouldn't
21 just do an all or nothing. We shouldn't just say, "Oh,
22 we're going to abolish 740," but by the same token there
23 is a significant split here in the committee on this jury
24 trial issue and maybe even on whether 739 is appropriate.
25 Is it your sense that we ought to send this back to the

1 subcommittee for them to rework this, or should we just
2 allow the discussion to stand and the Court will sort it
3 out on its own?
4 JUSTICE HECHT: I would be very surprised,
5 but I frequently am, to see the Court excise the procedure
6 in 740. I would just be shocked if they did. Because
7 it -- even though I can see the problems with the rule
8 that Judge Lawrence raises, there's 185,000 -- the courts
9 of Texas disposed of 185,000 FE&D cases in the year 2000,
10 and Judge Lawrence can't remember a time when this came --
11 when this got to be a problem, other than two trials.
12 So I just can't imagine that the Court would
13 worry about it very much, so I would hope that the
14 committee and the subcommittee could come up with a fix
15 that would be agreeable, but I don't think the Court would
16 take it out of the rules.
17 HONORABLE JAN PATTERSON: But shouldn't we
18 continue and see if there are any other problems that
19 arise or that --
20 CHAIRMAN BABCOCK: Yeah. That's where I'm
21 headed, Judge. So if you are willing then the chair will
22 just make a ruling that we're not going to just ditch 740
23 and if the subcommittee would endeavor to try to come up
24 with some fix different from the one you proposed but
25 which will grab you four more votes at the next meeting --

1 MR. SOULES: Could we just eliminate (a)(2),
2 the changes in (a)(2)? The rest of the rule is -- the
3 changes are better.
4 CHAIRMAN BABCOCK: Yeah, that may be a way
5 to do it, Luke, but rather than spend the full committee's
6 time, because I think we've got a full discussion on
7 this --
8 HONORABLE TOM LAWRENCE: Could I ask one
9 question?
10 CHAIRMAN BABCOCK: You bet.
11 HONORABLE TOM LAWRENCE: If (a)(2) is
12 changed, and I don't recall who suggested it, but would it
13 be acceptable to have the bench -- under (a)(2) if the
14 defendant wants a bench trial, to have that within six
15 days, but a jury trial, to have that just whenever the
16 court can get the jury panel together? Would that be
17 acceptable and leave everything else as-is?
18 MR. SOULES: Not if they go into possession.
19 MR. ORSINGER: What are you going to do with
20 possession, immediate possession, if a jury is requested?
21 HONORABLE TOM LAWRENCE: Then there won't be
22 an immediate possession.
23 MR. ORSINGER: I will support that.
24 MR. GILSTRAP: The way you do it is you just
25 take (2), and it says, "Defendant may retain possession

1 if, (a)(2), defendant demands trial" and then the court's
2 got to give them a trial whenever the court can give it.
3 If it's going to be a bench trial, it's going to be
4 quicker. It seems like that solves the problem.
5 MR. SOULES: And if the defendant demands a
6 trial then there's no possession.
7 MR. GILSTRAP: Not until the court rules on
8 it. Not until the court gives it possession. Yeah.
9 MR. SOULES: Until the court rules on it.
10 That's okay. Don't change possession until the court
11 reaches the merits, and the merits are reached at a jury
12 trial.
13 MR. YELENOSKY: That's right. If I
14 understand, that's what I was suggesting and I agree with.
15 MR. ORSINGER: I would change my vote if
16 that was your proposal.
17 HONORABLE SARAH DUNCAN: I would, too.
18 MR. ORSINGER: And I understand that a lot
19 of apartment owners are not going to like that, but as a
20 practical matter, 95 percent of the tenants won't do
21 anything. They will just allow their stuff to move out
22 and move on, and so most of the time you're not going to
23 have to waive your immediate possession.
24 MR. SOULES: When the landlord runs into a
25 seriously contested proceeding, you're not going to get

1 immediate possession anyway, because the person will bond
2 and demand or something is going to happen. If we make
3 that change, what we just talked about here, it's going to
4 protect the landlord everywhere they're protected right
5 now.
6 CHAIRMAN BABCOCK: Well, it sounds like
7 you've picked up five votes if you do that.
8 HONORABLE TOM LAWRENCE: Well, are you
9 saying then that there's not going to be a -- you don't
10 want a six-day limit on the trial setting if they ask for
11 the bench trial?
12 PROFESSOR CARLSON: Right.
13 HONORABLE TOM LAWRENCE: Well, then what's
14 the point of the possession bond?
15 PROFESSOR CARLSON: Because the tenant might
16 not answer.
17 MR. SOULES: The possession bond puts the
18 defendant to a course of action within six days, either to
19 counterbond or demand a trial; and if they default in that
20 then the landlord gets possession; and if they don't then
21 the landlord doesn't get possession. But really what you
22 want to eliminate is the counterbond because nobody is
23 going to file a counterbond when all they've got to do is
24 ask for a hearing.
25 MR. YELENOSKY: Is ask for trial, right.

1 CHAIRMAN BABCOCK: Okay.
2 MR. SOULES: But I think you ought to leave
3 the counterbond in there for political purposes. Don't
4 take it out.
5 PROFESSOR CARLSON: Take a vote. Could we
6 have a straw vote on that, or do you prefer to move on?
7 CHAIRMAN BABCOCK: No, a straw vote will be
8 fine. You want to frame the question?
9 PROFESSOR CARLSON: I think Luke's proposal
10 was that we modify (a)(2) simply to read "or defendant
11 demands a trial" and maybe put in words "which shall be
12 held as soon as practical" or something like that.
13 CHAIRMAN BABCOCK: With that change how many
14 people would be in favor of (a)(2)? Raise your hand.
15 MR. YELENOSKY: Just one question. I think
16 I'm still -- I'm not sure I understand if we still have a
17 second trial. Suppose they say "as soon as practical" and
18 they have it on the seventh day. Then is that just on the
19 possession bond and there is yet another trial?
20 PROFESSOR CARLSON: No.
21 MR. YELENOSKY: Okay. So you'll write it so
22 that it's -- okay.
23 CHAIRMAN BABCOCK: It's a straw vote only.
24 In favor of that proposal? How about 14? Elaine?
25 PROFESSOR CARLSON: Yeah, sure.

1 CHAIRMAN BABCOCK: Okay. Against? 16 to 1
2 in favor.
3 MR. SOULES: Problem solved.
4 CHAIRMAN BABCOCK: So that's the straw vote,
5 so if you can do that, that might be helpful. Let's take
6 our morning break, which is a little later than it should
7 be. We'll be back in about 10 minutes.
8 (Recess from 11:06 a.m. to 11:20 a.m.)
9 CHAIRMAN BABCOCK: All right. We're back on
10 the record, and Elaine is going to take us to the next
11 stop in this thrilling journey through this rule.
12 PROFESSOR CARLSON: I'm going to stand up,
13 if you don't mind. I don't feel like I'm seeing Steve.
14 Last time we met we were talking about the
15 problem in our quote-unquote superseding a JP court
16 judgment and going from the justice court by trial de novo
17 to the county court-at-law; and under our current system,
18 our current rules, there's a provision for a tenant to
19 appeal by trial de novo, provided they post an appeal
20 bond; and the appeal bond is really a supersedeas bond, I
21 think. If you look at the terms of the rule, the appeal
22 bond is to secure the judgment of the trial court and also
23 allows the JP to set the appeal bond for anticipated
24 damages that would flow from the appeal, such as
25 anticipated rent.

1 An indigent, on the other hand, if they
2 establish indigency, has a right to proceed by trial de
3 novo from the justice court to the county court without
4 putting up an appeal bond, but there's a requirement that
5 the tenant post rent when due. So the indigent has to pay
6 the rent as they go along. There are -- after the de novo
7 appeal to the county court, the Property Code then has
8 provisions for mandatory supersedeas bond for the tenant
9 to appeal the issue of possession because only a tenant
10 can appeal that from the county court on to the court of
11 appeals.
12 So there's two different sort of systems in
13 place for how -- what you have to post in terms of a bond
14 to go from one level, JP to county court, as opposed to
15 county court to court of appeals. The concerns our
16 committee have with the JP court provision currently is
17 that the appeal bond is mandatory; that is, the tenant, a
18 nonindigent tenant, must secure the judgment and bond the
19 rent before they're entitled to appeal to the county
20 court.
21 Our reading of the Texas Supreme Court
22 decisions on the Open Courts provision, and in particular
23 Dillingham vs. Putnam, which is in the materials we handed
24 out last time, persuade us that that is not
25 constitutional, that it is a violation of the Open Courts

1 provision to require a litigant to have the right of
2 appeal only if they supersede the judgment, and we believe
3 that that's -- that decision which applied from court of
4 appeals -- sorry, from the trial court to the court of
5 appeals would apply at the justice court level.
6 And so we proposed a system where there
7 would be an option of the tenant to supersede a money
8 judgment if they chose to; but if they didn't, that would
9 not preclude their right to a further appeal. But we
10 didn't provide a provision that the tenant would have to
11 put up rent as it became due in the county court, and the
12 tenant would have to put up an appeal bond that covers
13 costs, the costs of court, similar to what we used to have
14 as the cost bond from going to the court of appeals.
15 We then came to this committee, and we had
16 four votes that were taken that were somewhat helpful, and
17 we also brought to the committee the concern we had at all
18 about requiring a bonding of a JP judgment at all because
19 there's a line of cases out there -- and there are Supreme
20 Court cases from the 1850's on -- that say that once a de
21 novo appeal is taken out of the county court that the
22 justice court judgment is vacated and it's a nullity and
23 the justice court -- or if the county court judgment gets
24 dismissed, you can't breathe life back into the justice
25 court judgment. Well, if the justice court judgment is

1 vacated, what is there to supersede or bond?
2 So we do recognize these conflicting areas
3 of our law, and we do have Rules 634 and 635 that we
4 didn't bother to tell you about because that just
5 generally provides for superseding JP court judgments. We
6 have general rules that provide for that. It's a
7 disconnect in our law, I think, to say that a judgment is
8 vacated and then have a separate set of rules saying "but
9 you can supersede us." It doesn't seem to be congruent,
10 and so we brought -- we took the four votes that --
11 consideration of four votes, which were 8 to 7 that a
12 justice court judgment should be given some presumptive
13 validity, which, of course, requiring the bonding of a
14 judgment gives it some validity.
15 12 to 8 thought that we should continue the
16 process of requiring perfection by the appealing party
17 bonding the filing fees. 21 to 0 felt that any tenant who
18 was appealing or is an appeal from JP court to county
19 court in an FED should be required to pay the rent when
20 due, indigent or nonindigent. And, let's see, what's our
21 last vote? 11 to 9 felt that the JP court should be
22 superseded, should have some supersedeas provision. In
23 light of those votes --
24 MR. YELENOSKY: Did we not have a vote about
25 supersedeas with regard to indigents?

1 PROFESSOR CARLSON: Yes. I think that was
2 connected within that vote of wanting -- of 11 to 9.
3 MR. YELENOSKY: Okay. You said there should
4 be some supersedeas, but just maybe it was my wishful
5 thinking retroactively --
6 PROFESSOR CARLSON: No, you're right.
7 You're right. There's a 13 to 3 vote. I apologize. I
8 see it here in my little scratches, that an indigent
9 should be able to proceed without the necessity of putting
10 up a bond but should pay rent when due.
11 MR. YELENOSKY: Without necessity of putting
12 up a supersedeas.
13 PROFESSOR CARLSON: Exactly.
14 MR. YELENOSKY: Right.
15 PROFESSOR CARLSON: So we took what we could
16 from those four votes, and in the packet of materials you
17 have our subcommittee has put together three proposals,
18 Option 1, 2, and 3. Option 1 on page 14. Option 2 begins
19 on 38, and Option 3 on 62. And if I could, I could just
20 explain generally what the options are and get the sense
21 of the committee, and we can go from there.
22 Option 1 is a system that would require
23 every litigant to post supersedeas and appeal bond as a
24 prerequisite to -- I'm sorry. Excuse me. Option 1 would
25 require every tenant, every appealing party, to post an

1 appeal bond that covers costs. Option 1 would allow any
2 party to suspend execution of a JP judgment by filing
3 supersedeas.
4 Option 2 is the same proposal but carves out
5 indigents. Indigents would not be required to put up any
6 supersedeas to suspend execution of a judgment. They
7 would, however, have to post an appeal bond to cover the
8 costs.
9 Option 3, there is no supersedeas involved.
10 MR. SOULES: And no cost bond?
11 HONORABLE TOM LAWRENCE: That are indigent.
12 PROFESSOR CARLSON: Oh, I'm sorry. The
13 indigent does not have to post the appeal bond. I'm
14 sorry. I got that wrong.
15 MR. WATSON: What are the page numbers
16 for --
17 PROFESSOR CARLSON: This is just generally.
18 14 is Option 1, Page 38 is Option 2. Page 62 starts
19 Option 3. Option 3 is no supersedeas required at all, and
20 there's just an appeal bond.
21 MR. SOULES: But they have to pay rent?
22 PROFESSOR CARLSON: But they have to pay
23 rent due under all these systems, one, two, and --
24 MR. SOULES: I move we adopt three.
25 MR. YELENOSKY: Well, that's great, but

1 based on those votes that you read, I mean, it seems like
2 once again we sort of have Goldilocks options here. One
3 is too small because the 13 to 3 vote said that we needed
4 to carve out something for indigents. Three is too big
5 based on the vote that said there needs to be some
6 expectation of supersedeas, but I'd be happy to vote for
7 that. I just don't think that's what our prior vote was.
8 And Option 2 is just right because you've carved out for
9 indigents, but you've maintained the supersedeas for
10 others. So if we're going to consider any option but two,
11 that would seem to me to be contrary to the prior vote,
12 and I'd want to do that at the risk of losing the 13 to 3
13 vote I had last time that I think eliminates one. So if
14 we'll consider two or three, I'm happy with that.
15 PROFESSOR CARLSON: The subcommittee
16 endorsed Option 2. The concern on Option 3, although it
17 may be jurisprudentially pure, is that there would be a
18 probably very large increase in the volumes -- and maybe
19 that's a good thing, maybe not -- of FE&D cases from the
20 JP court to the county court.
21 MR. SOULES: Three is indigents don't file
22 cost bonds in a supersedeas, right?
23 MR. YELENOSKY: No, that's two.
24 MR. SOULES: No, two is even an indigent has
25 to file a cost bond.

1 CHAIRMAN BABCOCK: No.
2 MR. YELENOSKY: No.
3 MR. SOULES: Yeah, it is.
4 MR. YELENOSKY: Well --
5 CHAIRMAN BABCOCK: State two again, Elaine.
6 PROFESSOR CARLSON: Two is only nonindigents
7 must supersede to suspend execution after judgment.
8 HONORABLE TOM LAWRENCE: Yeah, under two if
9 you're an indigent you get a free appeal and you don't
10 have to post a supersedeas to stay in possession, and --
11 MR. SOULES: And no cost bond?
12 HONORABLE TOM LAWRENCE: That's correct.
13 MR. YELENOSKY: Well, that would be true
14 anyway.
15 HONORABLE TOM LAWRENCE: That would be the
16 same on anything.
17 MR. YELENOSKY: Yeah. The only issue was
18 whether an indigent should have to post a supersedeas,
19 because an indigent would never have to post the cost
20 bond.
21 MR. SOULES: Well, that's not what I heard,
22 but anyway. Two is what I want. Two.
23 MR. YELENOSKY: Right.
24 MR. SOULES: The indigents are exempt from
25 cost bonds and supersedeas bonds and stay in possession as

1 long as they pay the rent.
2 MR. YELENOSKY: That's what I understood our
3 vote last time to be, to ask for, and that's why I was
4 saying two seems just right.
5 HONORABLE TOM LAWRENCE: Option 2 reflects
6 the votes taken at the last meeting.
7 MR. SOULES: I'll withdraw my motion. I
8 move that we adopt two.
9 CHAIRMAN BABCOCK: Okay. There seems to be
10 a bandwagon for two. Anybody want to speak up in support
11 of one or three?
12 MR. YELENOSKY: At your peril.
13 CHAIRMAN BABCOCK: Okay. So it looks like
14 two it is, Elaine, by unanimous sense of the committee.
15 PROFESSOR CARLSON: Okay. If two is our
16 direction, Mr. Chair, at this point do you want to go into
17 the specifics of the rule?
18 CHAIRMAN BABCOCK: Well, I want to get this
19 behind us, so at the risk of losing everybody, yeah, yes,
20 let's see if we can quickly go through the specifics.
21 HONORABLE TOM LAWRENCE: You want me to give
22 an overview?
23 CHAIRMAN BABCOCK: Yeah. That would be
24 good, Judge, if you would.
25 HONORABLE TOM LAWRENCE: All right. On page

1 38 is Version 2, Option 2. An overview is we have changed
2 up the order of some of the rules, and we've also changed
3 up the content of some of the rules, and 748 is one that
4 we've expanded somewhat.
5 Bear in mind that the form of the judgment
6 needs to change somewhat because what's in the judgment is
7 going to necessitate the amount of the appeal bond, the --
8 or not the amount of the appeal bond so much, but the
9 amount of supersedeas, how much rent is to be paid and
10 when it's to be paid, and part of what we're trying to do
11 in Rule 748 is to help the county court out so they don't
12 have to make an independent determination. So everything
13 is in the judgment when it comes to them to tell them when
14 rent is due and how much rent is to be paid into the
15 registry of the county court. So part of this is to make
16 everything fit together all throughout the process, even
17 up through appeal.
18 In 748 in the early part, we are parroting
19 here some of the -- what can be in the judgment, what the
20 judgment can include; and for the plaintiff the justice
21 can give judgment for plaintiff for back rent, contractual
22 late charges, attorneys fees, if it's all established by
23 proof. And then it talks about what the judgment can be
24 for a defendant who prevails; and they would get
25 possession, of course, attorneys fees if authorized and

1 proved; and if the judgment is for the plaintiff for
2 possession, the justice shall issue a writ of possession,
3 except that no writ may be issued until the expiration of
4 five days, which has been the traditional rule.
5 Now, in (a) we start to get into some of the
6 specifics. The judgment form, no longer will the trial
7 judge be able to say trial, "Judgment for the plaintiff.
8 $200 back rent, $67 court costs" and that be it. There's
9 going to have to be some findings of fact now in order to
10 make everything fit together. And in (a) we talk about
11 what the judgment is going to have to have in it, such
12 things as the full names of the parties, obviously, who is
13 awarded possession of the premises, back rent, contractual
14 late charges, attorneys fees, and court costs.
15 And then in (b) we talk about whether there
16 is an obligation to pay rent on the part of the defendant.
17 Not every eviction case is for nonpayment of rent. A
18 determination of a rent paying period and a determination
19 of the day rent is due. The way the system works now,
20 it's a little confusing, but particularly let's say for an
21 indigent. The obligation now is for an indigent who is
22 awarded an affidavit of indigence, pauper's affidavit is
23 approved, they have got to pay one month's rent into the
24 registry of the court within five days and then rent as it
25 becomes due in the county court. Well, it's kind of hard

1 to figure out how much rent is one month's rent unless you
2 put that in the judgment, so that's the point of putting
3 all of that in the judgment.
4 Then the determination of amount of rent
5 due, this is something that came actually from a bill in
6 the Legislature, but I thought was a pretty good idea.
7 All of these rules, we looked very carefully at all of the
8 bills that were in the Legislature this time and tried to
9 take some of the good parts of that out, because generally
10 speaking, when these bills go to Legislature there's been
11 some agreement between the plaintiffs Bar and the defense
12 Bar in a lot of this.
13 So this No. 4 provides that if there is a
14 rental agreement that government housing pays for a
15 portion of this that there is a determination as to how
16 much is paid by the government and how much the tenant has
17 to pay, because that becomes important a little bit later,
18 and the determination of the date through which the
19 judgment for back rent and contractual late charges is
20 calculated, because you don't want the tenant having to
21 pay twice. In other words, if the existing judgment is
22 for $500 rent and that goes through the end of November,
23 then you don't want them paying November's rent again into
24 the registry of the county court. That would be double
25 dipping.

1 (d), if there is no obligation to pay rent
2 then there needs to be a finding as to the fair market
3 rental of the premises, because you've got to have
4 something to base the supersedeas on. I'm sorry. That
5 should be (c). Excuse me.
6 Then (d), let me go through (d), because as
7 Elaine alluded to, there is a line of cases that talks
8 about what really is a fairly complex problem of judgments
9 in justice court, when they're perfected and when
10 jurisdiction is lost and when it's gained by the county
11 court, and we're trying to cut through all of that in this
12 rule and in some subsequent rules to make that a little
13 clearer.
14 "If the judgment of the justice court is not
15 appealed then it remains in force, and a prevailing party
16 may enforce their rights under the justice" -- "judgment
17 in the justice court." That's fairly straightforward. If
18 the appeal of the judgment of a justice court is perfected
19 but the county court's jurisdiction is not invoked, then
20 the judgment of the justice court remains in force,
21 prevailing party may enforce their rights under the
22 judgment of the justice court.
23 That's necessary because while now you
24 actually can perfect an appeal but not pay the cost of the
25 county court, and it's sent back to the JP court, so we

1 need to change that language, and we talk a little bit
2 later about what constitutes a perfection of the appeal,
3 but we've solved this problem here and in a subsequent
4 rule.
5 Now, if the appeal from the justice court is
6 perfected and the county court's jurisdiction is invoked
7 then the justice court loses jurisdiction, and that really
8 is consistent with existing case law.
9 "The county court may rely on the justice
10 court judgment in determining when and in what amount rent
11 is due to be paid by the appellant into the registry of
12 the county court during the pendency of the appeal. The
13 county court may also rely on the judgment of the justice
14 court in determining whether or not to issue a writ of
15 possession in the event rents are not timely paid into the
16 registry of the county court. Nothing in this rule
17 prohibits the county court from making an independent
18 determination as to the amounts and due dates of rents to
19 be paid into the registry of the county court during the
20 pendency of the appeal."
21 Now, that goes back to the early part of 748
22 where there's going to have to be a finding of fact as to
23 how much rent is due and when it's due. Now, the JP court
24 is making that determination. It's going to be in a
25 written judgment and a separate finding, which all of this

1 judgment, of course, would be sent up to county court on
2 the appeal. We're trying to prevent the county court from
3 having to have a separate hearing on the issue of rent to
4 determine how much is due and when it's due, and they can
5 rely on the justice court judgment if they choose to do
6 so. If they want to hold an independent determination,
7 they can do that; but what will happen, if the tenant
8 doesn't pay the rent into the registry of the county court
9 as it becomes due then there will probably be a motion
10 made by the plaintiff for a writ of possession and for the
11 tenant to be evicted.
12 So we're just trying to make it easier to
13 let the county court understand what the finding was as to
14 rent at the trial court so if they want to rely on that
15 they can. And that's 748.
16 CHAIRMAN BABCOCK: Carl, let's let him get
17 through the whole thing, if that's okay.
18 HONORABLE TOM LAWRENCE: Okay. There is a
19 note and comment, which the subcommittee proposes to be
20 put into the rule, and that simply explains what has been
21 set forth, and I won't read that at this point unless
22 somebody wants it.
23 Rule 749, in Rule 749 we're talking about
24 what you have to do to appeal, and also, there is -- in
25 the existing law we have a problem now because the way the

1 existing rule is written it would appear that if you as a
2 landlord show up 30 minutes late for the hearing and your
3 case has been dismissed for want of prosecution or you as
4 the tenant show up 30 minutes and you've had a default
5 judgment rendered against you, there's no mechanism in the
6 rule now to allow you to ask the court to set that default
7 or set that dismissal for want of prosecution aside and
8 have a trial on the merits. The only remedy is to appeal,
9 and that seems to be kind of harsh, particularly under the
10 existing rule. So we've got a provision that within one
11 day a motion may be filed to set aside a judgment or for a
12 new trial in the justice court, but that does not extend
13 the deadline to perfect an appeal, and there's a case, RCJ
14 Liquidating versus someone out of Fort Worth or Dallas, I
15 think, a Supreme Court case, that that follows.
16 (b), "A defendant may appeal from a final
17 judgment in a forcible entry and detainer to the county
18 court of the county in which the judgment is signed by
19 filing with the justice, not more than five days after the
20 judgment is signed, an appeal bond, deposit, or security
21 to be approved by said justice. The appeal from a judment
22 for court costs, back rent, late charges, attorneys fees,
23 and possession may be made by posting an appeal bond,
24 deposit, or security equal to the amount of court costs
25 incurred in the justice court."

1 (c), "A plaintiff may appeal from a final
2 judgment in a forcible entry and detainer to the county
3 court of the county in which the judgment is signed by
4 filing a written notice of appeal with the justice not
5 more than five days after the day the judgment is signed.
6 "Notice of appeal must identify the trial
7 court, plaintiff, defendant, cause number, state that
8 plaintiff desires to appeal. The notice of appeal must be
9 signed by the plaintiff or the plaintiff's authorized
10 agent."
11 (d), "The party appealing the judgment must
12 also pay to the justice court the filing fee required by
13 that county to appeal a case to county court. The court
14 will forward the filing fee to the county clerk along with
15 all other papers in the case. The filing fee must be made
16 payable to the county clerk of the county in which the
17 case was heard." And this will help, according to Andy --
18 Andy is on the subcommittee. This will help the county
19 clerks out because the fee will be paid not to the justice
20 court and then have to be transmitted up, but it will be
21 made out to the county clerk so it will be easier for them
22 to deposit and process it.
23 (e), "If an appeal bond is posted, it must
24 meet the following criteria: It must be in an amount
25 required by this rule. It must be made payable to the

1 county clerk of the county in which the case was heard.
2 It must be signed by the judgment debtor or the debtor's
3 authorized agent. It must be signed by a sufficient
4 surety or sureties as approved by the court. If an appeal
5 bond is signed by a surety or sureties then the court may
6 in its discretion require evidence of the sufficiency of
7 the surety or sureties prior to approving the appeal
8 bond."
9 A deposit in lieu of an appeal bond.
10 "Instead of filing a surety appeal bond" -- and this is
11 from the TRAP rules -- "a party may deposit with the trial
12 court cash, a cashier's check payable to the county clerk
13 of the county where the case was heard, drawn on any
14 federally insured and federally or state chartered bank or
15 savings and loan association; or with leave of court, a
16 negotiable obligation of the federal government or of any
17 federally insured and federally or state chartered bank or
18 savings and loan association."
19 "Any motions challenging the sufficiency of
20 the appeal bond or deposit in lieu of the appeal bond may
21 be filed with the county court," and that's because the
22 time period is so short. Someone comes in at 4:45 p.m. on
23 the fifth day and files the appeal bond, there may not be
24 the opportunity check out the sureties. Case law seems to
25 indicate that whenever a JP court receives an appeal bond,

1 that if it's in sufficient form and it's identifiable as
2 an appeal bond it's supposed to be forwarded up, but it's
3 up to the county court to check the sufficiency. So we're
4 just -- this really is in accordance with existing case
5 law.
6 (h), "Within five days following the appeal
7 of an appeal bond by a defendant or the filing of notice
8 of appeal by a plaintiff the party appealing shall give
9 notice in accordance with Rule 21a of the filing of the
10 appeal bond or the filing of the notice of appeal to the
11 adverse party. No judgment shall be taken by default
12 against the adverse party in the county court to which the
13 cause has been appealed without first showing substantial
14 compliance with this subsection." This rule requires a
15 notice. There's another rule that requires the county
16 clerk to provide a notice, so there's several different
17 provisions that require the notice of appeal to be given.
18 749a is the affidavit of indigence, which
19 used to be called a -- page 45, used to be called a
20 pauper's affidavit.
21 CHAIRMAN BABCOCK: Page 45 or 43?
22 HONORABLE TOM LAWRENCE: Page 45.
23 PROFESSOR CARLSON: The other one should be
24 struck.
25 HONORABLE TOM LAWRENCE: Yeah, that should

1 be struck. The typist, again, screwed that up.
2 CHAIRMAN BABCOCK: On Page 43?
3 HONORABLE TOM LAWRENCE: 43 should be
4 struck. That's old 749. New 749a is what was called
5 pauper's affidavit, affidavit of indigence, and we have
6 tried to follow TRAP rule -- I think it's 20, I believe,
7 as much as possible with this. The idea is that we wanted
8 to try to make the appeal from a justice court forcible as
9 much like other appeals as possible so it's consistent
10 within the rules.
11 (a) is establishing indigence. Do you want
12 me to read every line of this?
13 CHAIRMAN BABCOCK: No.
14 HONORABLE TOM LAWRENCE: Okay. Good.
15 CHAIRMAN BABCOCK: Just give us an overview.
16 HONORABLE TOM LAWRENCE: All right. (a),
17 you have to file an affidavit, of course. It talks about
18 when and where it's filed. The duty of the clerk and the
19 justice of the peace in (d), and that's consistent with
20 the existing rule. We've tried to leave things as
21 consistent with the existing rules as much as possible.
22 It talks about it being approved under (e)
23 if no contest is filed. (f) is if there's a contest to
24 the affidavit it talks about the procedures, the burden of
25 proof if the contest is filed. This is consistent both

1 with TRAP 20 and the existing pauper's affidavit.
2 Then the hearing and decision of the trial
3 court and in the county court if it's appealed to the
4 trial court, which is in (i). (j) defines the costs that
5 have to be paid. The filing fee in justice court, any
6 other costs in the justice court, and the filing fee paid
7 to appeal the case to county court.
8 Now, 749b, which is on page 49, this defines
9 what it means to perfect an appeal. The rule now that
10 talks about perfecting appeals really does not necessarily
11 mean the appeal is perfected, because there's another
12 stage after that that can cause it not to be perfected.
13 So 749b now clarifies what it means to perfect an appeal,
14 and that's important because if the appeal is perfected
15 and the justice court loses jurisdiction, and everything
16 from that point on has to happen in the county court.
17 There are all sorts of cases where it's not clear whether
18 it's been perfected, and we are trying to resolve all of
19 those issues that have been found in those cases so that
20 it's now clear and there's not going to be any
21 misunderstanding.
22 To perfect the appeal the defendant would
23 have to either pay the filing fee or get an affidavit of
24 indigence approved. The plaintiff would either have to
25 post his notice of appeal; and each to appeal, to perfect

1 the appeal, would have to pay the filing fee for county
2 court and a check or funds made payable to the county
3 clerk in that particular county. When it's perfected it
4 tells that the JP court has to make out a transcript and
5 file it. The county clerk shall docket the case.
6 Trial shall be de novo, and then, once
7 again, here, "The county clerk shall immediately notify
8 both appellant and appellee of the date of receipt of the
9 transcript and the docket number of the cause. Such
10 notice shall advise the defendant of the necessity of
11 filing a written answer in the county court when there is
12 no written answer on file in the justice court." That's
13 the second of three notices that they're going to receive.
14 "The perfection of an appeal in a forcible
15 entry and detainer case does not suspend enforcement of
16 the judgment. Enforcement of the judgment may proceed
17 unless the enforcement is suspended in accordance with
18 Rule 750. If the appeal is based on a judgment for
19 possession and court costs only then the tenant's failure
20 to post a supersedeas will allow the appellee to seek a
21 writ of possession. Issuance of a writ of possession will
22 cause the appeal to be moot and allow the county court in
23 which the court is pending to dismiss the appeal."
24 Now, we'll talk about the issue of an
25 indigent in Rule 750, but in the comment here in the last

1 sentence we're also explaining that if a defendant
2 perfects the appeal by approval of affidavit of indigence
3 it is not necessary for the defendant to post a
4 supersedeas deposit or security to remain in possession
5 and suspend the enforcement of the judgment, so that's one
6 comment we make there, and then when we get to Rule 750
7 it's even clearer.
8 Now, Rule 749c on page 51 is the form of the
9 appeal bond. We have changed that up somewhat. And then
10 Rule 750 on page 53 is the supersedeas. And basically the
11 supersedeas follows as much as possible TRAP 24.1 and
12 requires to suspend the enforcement of the judgment, the
13 posting of a supersedeas, or it has provisions just like
14 24.1 does that the offer of security, deposit in lieu of a
15 supersedeas, or a written agreement of the appellee for
16 suspending -- appellant appellee for not posting a
17 supersedeas.
18 It talks about what the supersedeas -- the
19 form of it in (b), and then (c), the deposit in lieu of
20 supersedeas. Conditions of liability in (d). (e), the
21 effect of the supersedeas, saying basically that if you
22 perfect the appeal that you get to appeal it, but you
23 don't suspend the enforcement of judgment, and we explain
24 that in 750. What happens, basically that a writ of
25 execution, abstract of judgment, or most importantly, a

1 writ of possession could issue if the judgment is not
2 superseded.
3 (g), we talk about the effect of appellants
4 not paying rent or the amount of fair market value into
5 the registry of the county court. This was something that
6 all the interested parties in the eviction process, the
7 plaintiff's Bar, the defense talked about this. Nobody
8 really had a problem with paying rent into the registry of
9 the court as it becomes due. You are not requiring any
10 additional obligation on them because their existing lease
11 or oral agreement requires that they pay rent into the
12 registry of the court. So there's no particular burden on
13 them; and now if you don't pay it, of course, the county
14 court can render a writ of possession.
15 (h), talks about when it's been suspended
16 that you stay all further proceedings on the judgment.
17 (k) is kind of the heart of this as far as indigent, and
18 I've got a change on this. There is a a typo in this.
19 "If the appeal is perfected by the approval
20 of an affidavit of indigence, the defendant does not have
21 to post a supersedeas bond, deposit, or security with the
22 justice court in order to remain in possession or to
23 suspend the enforcement of the judgment." Now, the next
24 sentence, "If the affidavit of indigence was" -- should be
25 "denied," not "approved." "Was denied in the justice

1 court, the supersedeas bond, deposit, or security must be
2 posted within one day after the affidavit of indigence is"
3 -- and, again, that should be "denied."
4 "If the affidavit of indigence is denied" --
5 strike "approved" -- "in the county court, supersedeas
6 bond, deposit, or security must be posted in county court
7 within five days after the affidavit is denied," and then
8 a note and comment explaining that.
9 751 is a form of supersedeas bond. 752 is
10 damages, and the only change we made on that -- Page 58.
11 I'm sorry. Page 58. The only change we made on that was
12 to say "trial de novo" instead of "trial of the cause."
13 753, and I'm on page 59, and that really
14 should not have a line through it. "753. Duty of Clerk
15 to Notify Parties." That is a new rule. It should be an
16 underline. It should not have a line through it. That
17 was a typo. The clerk -- and this is the third time that
18 the notice is required. "The clerk shall immediately
19 notify both appellant and adverse party of the date of
20 receipt of the transcript, docket number of the cause.
21 Such notice shall advise the defendant of the necessity
22 for filing a written answer in the county court when the
23 defendant has pleaded orally in the justice court." We're
24 not actually requiring any additional burden on the county
25 clerk. They have to do this now. We're just -- this is

1 in a different rule, which is why we have to restate it.
2 "753a, Judgment by Default." Once again,
3 that should be underlined, not interlined, so if you would
4 make that note. "If the defendant has filed a written
5 answer in the justice court, the same shall be taken to
6 constitute the defendant's appearance and answer in the
7 county court and such answer may be amended as in other
8 cases." We're changing the -- from 8 to 10 full days in
9 which if you fail to file a written answer the allegation
10 complaint may be taken as admitted and judgment by default
11 entered accordingly.
12 754 is really instructions for the trial of
13 the case in county court. In talking to county court
14 judges, there are a lot of problems in trying to figure
15 out what are the time limits, the deadlines, and although
16 we can -- we will get into it in a second. On page one of
17 the handout are changes to Rule 4, 143a, 216, 190, and
18 245. Now, all of those changes presume that the committee
19 is going to adopt what has been done in the proposed rules
20 here. Particularly 754.
21 (a) talks about the county court giving
22 precedence to hearings and motions on these appeals. (b)
23 talks about a jury trial. The county courts are not sure
24 which rule to follow on jury trials. So "No jury trial
25 shall be had in any appeal of a forcible entry and

1 detainer, unless a written request is filed with the clerk
2 of the court a reasonable time before the date set for
3 trial of the cause on the nonjury docket, but not less
4 than five days in advance."
5 The fee talks about the fee being the same,
6 and the clerk shall promptly enter a notation. That says
7 "(e)," but that should be "(c)" there. Sorry about that.
8 Generally this follows a rule that we talked about in June
9 on the trial of the justice court about the problems of
10 discovery and Rule 190 and about how that's going to apply
11 when you've got expedited proceedings. And there's really
12 not anything in the rules now that deals with forcibles
13 and talks about discovery at all, and if you presume that
14 you follow Rule 190 -- and county court judges are really
15 kind of mixed on this -- then that would require the time
16 limits for that, which obviously means you don't have an
17 expedited trial at the county court.
18 So what we're saying here is "Generally
19 discovery is not appropriate in forcible entry and
20 detainer appeals; however, the county has discretion to
21 allow reasonable discovery"; and that's what we had done
22 at the trial court and the justice the court level also.
23 (f) is really a (d), should be (d), not (f).
24 Talks about the appeal should be subject to trial de novo
25 at any time after the expiration of 10 full days from the

1 date the transcript is filed in county court.
2 (e) the -- a motion contesting the
3 sufficiency of the appeal bond or the supersedeas, it
4 talks about how that's going to be handled in the county
5 court. (f), when the appellant fails to prosecute the
6 appeal with effect, the county court renders a judgment,
7 and we're also saying that they would have to render
8 judgment and take care of the sureties on the appeal bond
9 or supersedeas at the same time.
10 755 is the writ of possession. There is a
11 conflict between Texas Property Code, Section 24.007, and
12 Rule 755. We have changed 755 to be consistent with the
13 Property Code, and the conflict is that it talks about the
14 appeal from the county court. The language in the Rule
15 755 now says that "shall not be suspended or superseded in
16 any case by appeal from such final judgment in the county
17 court unless the premises in question are being used as
18 the principal residence of a party." That's what the
19 rules say.
20 Now, the Property Code says "judgment may
21 not be under any circumstances paid unless the appellant"
22 -- I'm sorry. "Unless it's being used for residential
23 purposes only." So the Property Code says "for
24 residential purposes only." The rule says "principal
25 residence." So there's a difference between those, and

1 that's why we changed that. And that's the changes.
2 CHAIRMAN BABCOCK: Okay.
3 HONORABLE TOM LAWRENCE: And then Rule 4,
4 143a, 216, 190, and 245 would make the changes in those
5 rules so that in 754, the trial in the case, and also some
6 of the time limits in Rule 4 and the five-day rule would
7 be consistent with the new changes here, if everything
8 fits together.
9 CHAIRMAN BABCOCK: Okay. I know Carl had
10 his hand up a minute ago. What I'd like to do now is I
11 know you've just been given this this morning, so nobody
12 has had an opportunity to study it carefully or maybe not
13 even at all, so I think we should try to talk about big
14 issues, any big issues that we see in this Option No. 2
15 that spans from page 38 through 62 and give you guys a
16 sense of the committee about big issues and then between
17 now and the next meeting everybody will have the
18 opportunity to study this, and if we have specific detail
19 problems, we can address that at the next meeting, but for
20 now let's talk about big issues. Carl, you had your hand
21 up quite some time ago.
22 MR. HAMILTON: Is there a provision in here
23 that deals with preventing the appellee in county court
24 from dismissing the appeal? That's what happens now. A
25 defendant appeals from the JP court and goes to the county

1 court. The JP court loses jurisdiction because the appeal
2 is perfected, and then he dismisses the appeal and then
3 everything is back to status quo.
4 HONORABLE TOM LAWRENCE: Well, no. There's
5 nothing that prevents the trial court from allowing the
6 case to be dismissed, and if it does then obviously the
7 parties aren't status quo.
8 MR. HAMILTON: But the appellee ought not to
9 have that power, because if it's a de novo trial in the
10 county court, the parties are back in the posture they
11 were below, plaintiff and defendant, so it ought to only
12 be the plaintiff, the landlord, in effect, that can
13 dismiss.
14 HONORABLE TOM LAWRENCE: Well, then I would
15 think the plaintiff should be in there already against
16 that motion and asking that the case go to judgment.
17 MR. HAMILTON: I know, but I'm saying that
18 in the past some county courts have taken the position
19 that this is the appellee's appeal and, therefore, if he
20 wants to dismiss it, he can.
21 PROFESSOR CARLSON: But the tenant can
22 dismiss the landlord's appeal?
23 MR. HAMILTON: It's not the landlord's
24 appeal. It's the tenant's appeal.
25 PROFESSOR CARLSON: So the tenant brings an

1 appeal, and the tenant can nonsuit the appeal?
2 MR. HAMILTON: Right.
3 PROFESSOR CARLSON: I see, and what's the
4 status of the possession?
5 MR. HAMILTON: Then if jurisdiction has
6 already passed then we're back to square one with no court
7 having jurisdiction.
8 MR. SOULES: Carl, has that been fixed by
9 giving the JP's judgment some validity pending appeal?
10 MR. HAMILTON: No, because in here they
11 specifically provided if the appellee does everything
12 right to perfect the appeal, it's perfected, and then the
13 JP court loses jurisdiction.
14 MR. ORSINGER: Well, and not only that, but
15 the judgment becomes void at that point, doesn't it?
16 HONORABLE SARAH DUNCAN: No. No.
17 MR. ORSINGER: It doesn't?
18 MR. SOULES: No, it's superseded. It's got
19 to be there for some reason or you wouldn't have to
20 supersede it.
21 HONORABLE TOM LAWRENCE: If the tenant
22 appeals and then tries to -- and the appeal under this
23 rule, the appeal is going to be perfected, so the county
24 court is going to have jurisdiction over the case, and the
25 original plaintiff is still the plaintiff, and the

1 original defendant is the appellant and still defendant,
2 so you're saying the defendant comes in with a motion to
3 dismiss the case?
4 MR. HAMILTON: That's what they're doing
5 now, yes.
6 HONORABLE TOM LAWRENCE: Well, I mean,
7 wouldn't the plaintiff be there arguing against that
8 motion? There's going to be a hearing on that, I presume.
9 The plaintiff is going to say, "No, I don't want this
10 dismissed. We want to go forward."
11 MR. SOULES: They have a right to a nonsuit.
12 MR. HAMILTON: I'm just telling you what's
13 happening now is that the appellees, the tenant, is coming
14 into the county court after it gets perfected saying, "I
15 want to dismiss my appeal."
16 HONORABLE TOM LAWRENCE: Well, I don't know
17 how to tell a county court to not do that which they
18 should not do. I mean, there should be a hearing on that,
19 and the plaintiff should be in there.
20 MR. HAMILTON: Then provide it in the rule.
21 Say that the appellee can't dismiss the appeal.
22 MR. SOULES: Isn't that the appellant?
23 MR. GILSTRAP: Appellant, yeah.
24 HONORABLE SARAH DUNCAN: As long as you're
25 giving presumptive validity to the JP court's judgment,

1 the only thing that happens when the plaintiff dismisses
2 the appeal is the county court loses jurisdiction. It's
3 expressly stated in the rule that the JP court judgment
4 survives the appeal.
5 HONORABLE TOM LAWRENCE: Well, no. The
6 county court --
7 HONORABLE SARAH DUNCAN: Well, that's what
8 it says.
9 HONORABLE TOM LAWRENCE: Well, no, it
10 doesn't. 748 says that the county court is allowed to
11 rely on the JP court judgment for the purposes of
12 determining when rent is to be paid and how much is to be
13 paid, but all the case law is pretty clear that once the
14 appeal is perfected from the JP court, that judgment is a
15 nullity. It doesn't exist anymore. So the county court
16 then has -- on the trial de novo has a case that there's
17 no valid judgment on as far as issues of possession and
18 back rent and late charges and all of that, and that
19 county court law judge then has to go forward on it.
20 Now, if the plaintiff wants to dismiss the
21 case, the plaintiff can dismiss it, but I don't know how
22 the county court could dismiss -- I don't know how the
23 appellant, who is the tenant, can dismiss the appeal and
24 have the case thrown out, because the plaintiff is the
25 only one that can take a nonsuit. I mean, anything that

1 the defendant tenant may file is going to have to have a
2 hearing on it, and the plaintiff is going to have the
3 opportunity to oppose that.
4 PROFESSOR CARLSON: But if that's a problem,
5 that can be written into the rule.
6 HONORABLE TOM LAWRENCE: I mean, how
7 would -- what would you want to say on that?
8 MR. HAMILTON: "The appellee cannot not
9 dismiss the appeal."
10 MR. GILSTRAP: You mean the appellant.
11 MR. HAMILTON: Yeah, appellant.
12 MR. SOULES: Appellant.
13 MR. YELENOSKY: The appellant cannot.
14 MR. HAMILTON: The appellant cannot dismiss
15 the appeal.
16 MR. ORSINGER: Well, wouldn't it be smarter
17 to say that if the appellant dismisses the appeal that the
18 judgment of the justice court becomes valid in the trial
19 court?
20 HONORABLE TOM LAWRENCE: Well, no.
21 MR. ORSINGER: Why?
22 HONORABLE TOM LAWRENCE: Because we've got
23 all of this case law out there that says once the appeal
24 is perfected then the existing JP court judgment is a
25 nullity.

1 MR. ORSINGER: Okay. That's what I read
2 here. Why are we even talking about supersedeas? There's
3 no judgment to supersede.
4 PROFESSOR CARLSON: Well, that's what I told
5 you. That's why I said Option 3 was the jurisprudentially
6 pure approach, if we continue that notion. By going with
7 Option 2 we are giving presumptive validity to the justice
8 court judgment to some regard.
9 HONORABLE TOM LAWRENCE: But if you want to
10 say that the justice court judgment -- that if the county
11 court dismisses the case for any reason and does a nonsuit
12 or some motion by the defendant, dismisses the case,
13 therefore, there's no final judgment at the county court
14 with regards to possession, that the JP court judgment
15 would then be revived, that's an entirely different
16 matter. I mean, that's something very different from what
17 the law is now.
18 MR. SOULES: Well, we could just say the JP
19 judgment exists until it's superseded by a judgment in the
20 county court. This committee makes jurisdictional law all
21 the time. Every time we change plenary power in the trial
22 court -- and that's been done by a rule time and again --
23 that changes the jurisdiction of the trial court. And so
24 there's no reason why it can't be done, unless it
25 conflicts with a statute.

1 So the fact that previous case law says it's
2 a nullity is not something that ties our hands. We may
3 want to leave it that way. We may want to change it, or
4 the Supreme Court, but we could say that it exists until
5 it's superseded by a judgment. The smart thing obviously
6 to do is for the appellee, the landlord, to file a
7 counterclaim immediately whenever the appeal is perfected,
8 and that piece of it can't be gone.
9 HONORABLE TOM LAWRENCE: Well, there's no
10 counterclaim.
11 MR. SOULES: Can't file a counterclaim?
12 Well, that's another way. Make it where you can file a
13 counterclaim and bar the whole case from being dismissed
14 de novo, but certainly this is something that needs to be
15 fixed. A smart tenant or tenant with a smart lawyer knows
16 he can perfect an appeal and dismiss it and stay in the
17 property. That's --
18 HONORABLE SAMUEL MEDINA: Why can't the
19 county court say, "Fine"? You know, but why can't he,
20 again, not enter the -- what happened at the justice of
21 the peace court? I mean, you're not reviving it. You're
22 just entering something new. I mean, you know what
23 happened there. Why can't you just enter it?
24 MR. HAMILTON: I think all you have to do is
25 provide that the county court dockets the case with the

1 original plaintiff as plaintiff and original defendant as
2 defendant, and the defendant then can't dismiss the
3 plaintiff's case, but if they're in the posture of an
4 appellant and an appellee there then normally the
5 appellant can dismiss the appeal if they want to.
6 CHAIRMAN BABCOCK: Sarah.
7 MR. SOULES: There's an answer.
8 HONORABLE SARAH DUNCAN: I'm all ready to
9 vote against these rules because as I understand it they
10 are premised on what I voted against last time, and that
11 is that there is going to be presumptive validity to the
12 JP court judgment, and the first sentence of (d) on page
13 39 says, "If the judgment of the justice court is not
14 appealed then it remains in force and a prevailing party
15 may enforce their rights under the judgment in the justice
16 court. If it is perfected, but the jurisdiction isn't
17 invoked, it remains in force."
18 It may just be a scrivener's error, but the
19 whole premise of these rules is that the JP court judgment
20 is going to remain in force until it's superseded by the
21 mandate of a higher court. So I don't --
22 PROFESSOR CARLSON: That's right.
23 HONORABLE SARAH DUNCAN: We talked about
24 Carl's problem last time and this particular problem, and
25 I think it was one of the arguments that persuaded a

1 majority of the committee that there should be presumptive
2 validity to the JP court judgment. I disagree with that.
3 I lost that vote, but that's still the premise of these
4 rules, and if it's not written clearly enough in these
5 rules now, then that's just a scrivening problem.
6 CHAIRMAN BABCOCK: Okay. Steve.
7 MR. YELENOSKY: I think I characterized your
8 position last time as even more radical than me and would
9 have liked to have seen it prevail, but it didn't.
10 HONORABLE SARAH DUNCAN: Right.
11 MR. YELENOSKY: And so I think at this point
12 there are a couple of options, and one would be somehow,
13 unless there's some constitutional objection to it,
14 preventing the tenant from being able to dismiss the
15 appeal would solve that problem, but I mean, I think we
16 fought that battle last time and shouldn't go back over it
17 again.
18 CHAIRMAN BABCOCK: Carl.
19 MR. HAMILTON: Well, the next sentence,
20 though, Sarah, says if the appeal from the justice court
21 is perfected and the county court jurisdiction is invoked
22 then the justice court loses jurisdiction over the case.
23 HONORABLE SARAH DUNCAN: Right. But just
24 because the JP court loses jurisdiction over the case
25 doesn't mean that its judgment evaporates, and that's what

1 I'm saying. Maybe this isn't written clearly enough to
2 resolve your concern, but --
3 MR. HAMILTON: How would a JP enforce it
4 then?
5 MR. YELENOSKY: That's no different than a
6 trial court.
7 MR. HAMILTON: How would the JP enforce that
8 judgment if it loses jurisdiction?
9 HONORABLE SARAH DUNCAN: Well, I think an
10 actual corollary of these rules is that if the county
11 court loses jurisdiction because the appeal is dismissed,
12 there's only one court that can enforce that judgment, and
13 that's the JP court, and that's what I'm saying, and I'm
14 not disagreeing with you. I'm just saying if this
15 language isn't clear enough to say what a majority of the
16 committee agreed upon, and that is that the JP court
17 judgment survives an appeal, then that's just a --
18 MR. YELENOSKY: Right. That's the --
19 HONORABLE SARAH DUNCAN: -- problem of
20 language.
21 MR. YELENOSKY: Don't we just want to ask
22 for language that makes that clearer and move on to other
23 big issues?
24 MR. SOULES: Right, and what we're really
25 talking about is loses plenary jurisdiction.

1 MR. YELENOSKY: Right. Just like a trial.
2 MR. SOULES: The district court doesn't lose
3 jurisdiction to enforce the judgment.
4 HONORABLE SARAH DUNCAN: Right.
5 MR. SOULES: It loses plenary jurisdiction,
6 and whatever that is.
7 CHAIRMAN BABCOCK: Steve.
8 MR. SOULES: We kind of know it when we see
9 it, don't we?
10 MR. YELENOSKY: Well, assuming that we can
11 do that with that issue, this may be another big issue.
12 It isn't one for me or at least for --
13 HONORABLE TOM LAWRENCE: Can I interrupt?
14 MR. YELENOSKY: But I did want to point it
15 out because I think based on what Bill Dorsaneo said
16 earlier, for his clients it may be a big issue, and that's
17 the last couple of sentences of 749b on page 49, right
18 above the notes and comments, because what it says in --
19 there's a drafting issue there, too, even if this is what
20 we want to do, but the drafting issue aside, what it says
21 is that if you just -- if the landlord just got a judgment
22 for possession and costs and you don't file a supersedeas
23 then the county court can simply dismiss the action
24 because it's moot.
25 That is -- my point all along has been for

1 residential tenants it reallly is moot. Once they're out,
2 they're out, and there really isn't anything else to do.
3 So I didn't really raise a fuss about that, but I heard
4 Bill Dorsaneo say that even if his Lone Stara Cycles were
5 out, they might want to get back in, so I don't think he
6 would like that the failure to post a supersedeas makes
7 his whole appeal dismissed. Am I right about that?
8 PROFESSOR DORSANEO: Well, that supersedeas
9 part and mootness issue, when I heard Tom mention that
10 that did strike a cord with me, but perhaps because of
11 missing last time, perhaps for other reasons, I feel
12 sufficiently behind the curve on -- I feel sufficiently
13 behind the curve on that issue and several others to, you
14 know, really be unable to comment on it.
15 MR. YELENOSKY: Well, I guess, isn't it true
16 that -- let's say you were representing a commercial
17 tenant. They lose possession. They appeal but don't post
18 a supersedeas because they can't get it together or
19 whatever. A writ of possession is issued against them.
20 Your client may still want to go to court --
21 PROFESSOR DORSANEO: Sure.
22 MR. YELENOSKY: -- and argue that
23 they're --
24 PROFESSOR DORSANEO: I don't know why that
25 isn't a Dillingham problem in another guise.

1 MR. YELENOSKY: Right. And it is, and the
2 way this is written, just the mere fact that you didn't
3 post a supersedeas ends the case. Isn't that right?
4 MR. ORSINGER: It ends possession, but it
5 doesn't end the monetary part of the case.
6 HONORABLE TOM LAWRENCE: If there is a
7 monetary part.
8 MR. YELENOSKY: But it ends the possession,
9 which is what he wants to fight about.
10 MR. ORSINGER: I know. That's not right.
11 MR. YELENOSKY: So that's another big
12 problem, perhaps, at least for some people here.
13 HONORABLE TOM LAWRENCE: Well, sometimes
14 they want to appeal just the issue of back rent and not
15 possession.
16 MR. YELENOSKY: Right. But the concern we
17 have is where they have appealed possession but not posted
18 supersedeas. This is the converse of the problem I had
19 for residential, is if they lose possession, whatever you
20 call that, temporary possession bond or whatever, that's
21 really the end of the story for practical matters. The
22 converse of that is for commercial tenants it isn't the
23 end, and this rule makes it the end. Isn't that right?
24 HONORABLE TOM LAWRENCE: Well, the
25 subcommittee went over this last part of 749b. We spent

1 an awful lot of time on this and a lot of drafts, and
2 Elaine may want to add something. Elaine did some search
3 of some of the case law, but if you don't supersede the
4 judgment for possession and a writ of possession is
5 entered by the court and you're evicted, the view of the
6 subcommittee is that appealing the question of possession
7 became moot because nobody could put that tenant back into
8 possession. Once he's evicted, he's evicted, and there's
9 no mechanism anywhere in the rules or anywhere in the case
10 law or any statute to allow that tenant to be put back in.
11 MR. YELENOSKY: If they --
12 HONORABLE TOM LAWRENCE: If the tenant is
13 evicted, they're evicted, and that's the end of it.
14 MR. YELENOSKY: As a matter of law?
15 HONORABLE TOM LAWRENCE: Well, yeah, I would
16 say so. I mean, there's nothing anywhere that allows the
17 tenant to keep going on the issue and to be given a
18 judgment for possession when he's out. He can't be put
19 back in.
20 PROFESSOR DORSANEO: It's like a Humpty
21 Dumpty problem.
22 HONORABLE TOM LAWRENCE: When the egg
23 breaks, that's it.
24 PROFESSOR DORSANEO: Huh. See, that makes
25 no sense at all to me.

1 HONORABLE TOM LAWRENCE: Well...
2 CHAIRMAN BABCOCK: Richard.
3 MR. ORSINGER: I'm really troubled by that,
4 because what you're saying is, is that if you don't post a
5 supersedeas bond you lose your appeal on the fundamental
6 issue of whether you could be dispossessed.
7 PROFESSOR CARLSON: Yeah, we didn't make
8 that up. That's an intermediate court decision.
9 MR. ORSINGER: You can write this rule any
10 way you want. You don't have to write it so that it says
11 that. You can write it so that it says the opposite of
12 that. And let me point out that, particularly in the
13 context of a long-term lease, if the landlord doesn't like
14 the rent rate but has found some purported breach in order
15 to get the tenant out so he can release it, there may
16 still be another year or two or three years on that lease
17 at a market -- at a tenant-favorable market rate, and it
18 may be the tenant would want to move back in, even if it's
19 three months later. They get to live out the rest of
20 their lease, even though they were dispossessed for a
21 while. To automatically say that if you don't post a
22 supersedeas bond that you can't appeal possession, to me
23 is unconstitutional, and it's not fair, and it shouldn't
24 be what we write.
25 HONORABLE TOM LAWRENCE: Well, let me ask

1 you, what do you think would happen if I render a writ of
2 possession because the supersedeas has not posted and the
3 constable goes out and puts the landlord back into
4 possession?
5 MR. ORSINGER: Right.
6 HONORABLE TOM LAWRENCE: And you're saying
7 don't let that be the final issue in the appeal. So the
8 appeal goes forward in that case to county court. What's
9 going to happen if the county court-at-law renders a
10 judgment that says "judgment for the tenant for
11 possession."
12 MR. ORSINGER: Then the tenant is entitled
13 to move back in. Now, you may not be able to sign a writ
14 that allows him to move in, but he got a judgment that
15 allows him to move in, and if the landlord won't let him
16 move in, he's got a lawsuit for wrongful eviction or
17 whatever the tort is.
18 HONORABLE TOM LAWRENCE: He's got the
19 lawsuit for wrongful eviction whether the appeal goes
20 forward or not, doesn't he?
21 PROFESSOR DORSANEO: He would be able to get
22 a writ of possession under common law principles, without
23 regard to what anything else says.
24 HONORABLE TOM LAWRENCE: But who's going to
25 put him back into possession? That's my question.

1 MR. YELENOSKY: Well, if he gets a writ of
2 possession, I guess the constable is.
3 MR. ORSINGER: I don't know. I mean, can
4 you not issue a writ of possession to the tenant?
5 PROFESSOR DORSANEO: He'll file a forcible
6 detainer action in your court to get the landlord out.
7 MR. ORSINGER: I mean, why can't you issue a
8 writ of possession to him?
9 MR. SOULES: There you go.
10 MR. ORSINGER: To the tenant.
11 PROFESSOR DORSANEO: That's what would --
12 that's what would be done, I think.
13 HONORABLE TOM LAWRENCE: Well, but you've
14 got an -- I'd have to think about that.
15 PROFESSOR CARLSON: That's a fundamental
16 question we struggled with, and that is --
17 MR. GILSTRAP: Maybe he's relet the
18 premises.
19 PROFESSOR CARLSON: -- should you allow the
20 court --
21 MR. ORSINGER: That's tough.
22 PROFESSOR DORSANEO: Tough.
23 CHAIRMAN BABCOCK: You have to put the genie
24 back in the bottle.
25 HONORABLE SARAH DUNCAN: Even if the tenant

1 can't re-assume possession, you've established the basis
2 for the tenant's wrongful eviction suit by that judgment,
3 and how can you say that the tenant can't go forward and
4 get the judgment saying that the tenant is entitled to
5 possession that establishes the factual basis for the
6 wrongful eviction suit?
7 PROFESSOR CARLSON: I guess that tells the
8 landlord you better not relet these premises until the
9 appeal is over.
10 MR. ORSINGER: Isn't that true in every
11 case, Elaine? Even if you enforce a judgment but it gets
12 reversed on appeal and you've executed, you have to give
13 them the fair market value for what you --
14 PROFESSOR CARLSON: Yeah.
15 MR. ORSINGER: Every time you try to enforce
16 a judgment that's subject to being reversed on appeal
17 you're at risk if it's reversed.
18 CHAIRMAN BABCOCK: Carl.
19 MR. HAMILTON: We started off with the
20 proposition that because of the Open Courts rule you
21 couldn't make a supersedeas a condition to appeal, but in
22 749b we say if the appeal is based on judgment for
23 possession then the failure to post a supersedeas bond
24 allows the appellee to seek a writ of possession. Then
25 you say issuance of a writ of possession will cause the

1 appeal to be moot. So in effect you're taking away the
2 appeal if they don't post a supersedeas bond, which is
3 what we started off saying we couldn't do to start with.
4 PROFESSOR CARLSON: Yeah. And that reflects
5 the current case law that says you can go forward on the
6 money damages but if you don't post now the appeal bond
7 then possession will be mooted.
8 MR. ORSINGER: But, Elaine, would you agree
9 that we can write the rule differently and then that makes
10 the case law irrelevant?
11 PROFESSOR CARLSON: Yes. Yes, but I think
12 there are huge practical problems in taking the opposite
13 approach.
14 MR. YELENOSKY: Well, we could just
15 eliminate the rule language that parodies the court cases.
16 If we're not going to write a rule that contradicts them,
17 we don't have to reinforce the case law.
18 CHAIRMAN BABCOCK: Stephen.
19 MR. TIPPS: Does the case law come to that
20 conclusion for practical reasons, or are there other
21 reasons that it comes to that conclusion?
22 PROFESSOR CARLSON: Our subcommittee relied
23 heavily on Judge Lawrence telling us that this is a huge
24 practical problem for landlords not reletting, that if you
25 give possession and they're subject to a later, different

1 writ of possession, that effectively you've got to hold
2 the property open.
3 HONORABLE TOM LAWRENCE: There's nothing
4 interlocutory about a writ of possession. That's as final
5 as it gets, because there's no appeal from a writ of
6 possession. I mean, the constables go out, and they take
7 their stuff, and they either move it in storage or they
8 put it on the sidewalk, and I don't know what the county
9 court-at-law judge is going to do when the tenant is out
10 and the landlord has released that property. What's the
11 county court going to do if they enter a judgment for the
12 tenant for possession? As a practical matter, what's
13 going to be the effect of that?
14 MR. YELENOSKY: Well, it sounds like the
15 landlord when he released it would have had to put the new
16 tenant on notice that there's essentially a lien that
17 hasn't been resolved.
18 HONORABLE TOM LAWRENCE: I mean, that would
19 be nice, but there's nothing that would require that.
20 PROFESSOR CARLSON: And let me just add --
21 MR. YELENOSKY: Well, other than a suit from
22 the new tenant who gets kicked out later.
23 MR. GILSTRAP: If we change -- if we change
24 this and suddenly, you know, alter the balance between
25 landlord and tenant, we are raising a political firestorm,

1 and we are going to have the Legislature on this. I mean,
2 let's be mindful of that.
3 HONORABLE SARAH DUNCAN: Well, but we also
4 have to be mindful of Dillingham vs. Putnam and --
5 PROFESSOR CARLSON: But the appeal can go
6 forward on the money damages, and there -- before the
7 Property Code was enacted dealing with appeals -- forcible
8 appeals from the county court to the court of appeals, the
9 law, statutory law, was that you could only appeal damages
10 on to the court of appeals. You could not appeal --
11 anyone could not appeal possession. The current Property
12 Code says once you go to county court only a tenant who
13 uses the property for residential purposes can further
14 appeal possession. So a commercial tenant could not
15 further appeal. You know, that's what it says. They can
16 only appeal money damages.
17 MR. ORSINGER: Can I ask, if your writ of
18 possession issue is mooted, would you still have the right
19 to litigate whether the eviction was wrongful --
20 PROFESSOR CARLSON: Absolutely. Absolutely.
21 MR. ORSINGER: -- so you could come back and
22 sue in county or district court for money damages?
23 HONORABLE TOM LAWRENCE: That's right. In a
24 separate cause of action, not the eviction.
25 MR. ORSINGER: And not the appeal.

1 HONORABLE TOM LAWRENCE: Yeah. The Property
2 Code has got all sorts of provisions in there for damages
3 that the tenant can sue the landlord for wrongful
4 evictions and all sorts of statutory provisions.
5 MR. ORSINGER: Is it wrongful that the JP
6 adjudicates that it's a valid eviction and then later on
7 the JP's determination is -- you can't overdo the writ of
8 possession, but would the county court say, "No, the JP
9 was wrong. The JP shouldn't have evicted."
10 HONORABLE TOM LAWRENCE: Well, that's the
11 good thing about a trial de novo. We may not always be
12 right, but we're never wrong. So, no, I don't think that
13 would be a wrongful eviction. That's just part of the
14 appeal process. Now, the underlying allegations by the
15 landlord against the tenant could constitute a wrongful
16 eviction.
17 MR. ORSINGER: So let's say that the
18 landlord wins in the JP court, and the tenant appeals but
19 doesn't post a supersedeas bond. The writ of possession
20 is issued, so the tenant is out, and under this rule and
21 under the case law, that's it. Never gets possession back
22 again.
23 HONORABLE TOM LAWRENCE: That's it for
24 possession, but not for maybe money damages, back rent.
25 That could still go forth.

1 MR. ORSINGER: Sure, but what about the
2 tenant's right to say, "I should have never been evicted.
3 The JP was wrong to throw me out and make me lease a new
4 place at $3,000 more a month is going to cost $50,000 in
5 damages"? Do you litigate the rightness or wrongness of
6 the eviction in the appeal, even though the writ of
7 possession is now -- the possession is moot, or do you
8 litigate that in some other county or district court, or
9 are you unable to litigate that?
10 MR. YELENOSKY: I don't think you can
11 litigate that.
12 HONORABLE SARAH DUNCAN: I was going to say,
13 once the appeal has been dismissed --
14 MR. YELENOSKY: Right. Because they --
15 HONORABLE SARAH DUNCAN: -- you've got a JP
16 court judgment that --
17 MR. ORSINGER: No, I'm not talking about a
18 dismissed appeal. I'm talking about where they just --
19 HONORABLE SARAH DUNCAN: No.
20 MR. ORSINGER: -- moot the writ of
21 possession. I'm trying to find out if the rightfulness or
22 the wrongfulness is still subject to judicial review.
23 HONORABLE SARAH DUNCAN: That's what I'm
24 trying to say, because under this sentence, "Issuance of a
25 writ of possession will cause the appeal to be moot and

1 allow the county court in which the case is pending to
2 dismiss the appeal."
3 MR. ORSINGER: I know, but they're telling
4 me that that's only moot as to the possession.
5 HONORABLE SARAH DUNCAN: Right, and what I'm
6 questioning, and I think what you are questioning, is if
7 the appeal is dismissed, the JP court judgment is given
8 validity under this rule, so there is a judgment that the
9 tenant is not entitled to possession. How does the tenant
10 then go in a separate lawsuit for wrongful eviction --
11 MR. YELENOSKY: He can't.
12 HONORABLE SARAH DUNCAN: -- and relitigate
13 an issue that's already been decided in a JP court
14 judgment?
15 MR. GILSTRAP: I'm not sure that the JP
16 court judgment has preclusive effect.
17 PROFESSOR DORSANEO: It doesn't.
18 MR. GILSTRAP: I don't think it does.
19 MR. ORSINGER: It doesn't?
20 MR. GILSTRAP: I think you can retry the
21 whole thing.
22 HONORABLE TOM LAWRENCE: It does not.
23 HONORABLE SCOTT BRISTER: My recollection is
24 sometimes it does and sometimes it doesn't, so that -- we
25 had a case. I just can't remember what it was, but I

1 remember it was long because the answer is maybe yes,
2 maybe no. If the, for instance, eviction was because your
3 title was no good, you could still evict them, but what a
4 JP court does on land titles is not binding in the
5 subsequent law case.
6 MR. GILSTRAP: That's right.
7 HONORABLE SCOTT BRISTER: If it was you got
8 kicked out because you didn't pay the rent, I believe you
9 can't revisit that.
10 MR. YELENOSKY: Right.
11 HONORABLE SCOTT BRISTER: So that one you
12 can't come out the opposite on that, but if it's based on
13 construing the lease or a land title, something like that,
14 that's not binding. So I think it's a complicated answer.
15 HONORABLE SARAH DUNCAN: That might be
16 because the JP court doesn't have trespass to try title
17 jurisdiction.
18 MR. YELENOSKY: But it has jurisdiction to
19 construe the lease.
20 CHAIRMAN BABCOCK: Richard.
21 MR. ORSINGER: Can I ask another question?
22 This business about litigating rent in the JP court, can
23 you get a judgment for anticipatory breach and the present
24 value of all the future paid rent under the lease?
25 PROFESSOR CARLSON: Up to 5,000 bucks.

1 MR. ORSINGER: Up to $5,000?
2 HONORABLE TOM LAWRENCE: Well, the
3 jurisdictional limit is 5,000, and that's governed by the
4 petition, as Justice Hecht pointed out, but jurisdiction
5 is taken from the petition. So if you allege less than
6 5,000, and it goes up solely because of the passage of
7 time then the judgment can be for more than 5,000, but
8 typically it's for back rent. It's not for anticipatory
9 rent.
10 MR. ORSINGER: I know.
11 HONORABLE TOM LAWRENCE: That's got to be a
12 separate trial.
13 MR. ORSINGER: I can see in a commercial
14 situation here where a landlord is trying to get out of an
15 uneconomic rent on some pretext, which the JP accepts but
16 which we know would get overturned if you could get to a
17 higher court, but I'm starting to see now you can never
18 get to a higher court, and since the JP has already given
19 you the judgment based on your rights under the lease, I'm
20 concerned that it has preclusive effect if you went into a
21 county court or a district court to sue for the damages.
22 And now I'm thinking we have a justice of the peace here
23 who's adjudicating potentially significant rights with no
24 appellate review of any kind unless a supersedeas bond is
25 posted.

1 HONORABLE TOM LAWRENCE: Well, if it's
2 commercial, they probably are not going to ask for back
3 rent, so the supersedeas, there's not going to be much of
4 a supersedeas in that situation.
5 PROFESSOR CARLSON: There's a statute,
6 though, that says that the JP court judgments are not to
7 be given preclusive effect for res judicata and collateral
8 purposes in actions brought in a district court. So I
9 guess --
10 HONORABLE TOM LAWRENCE: Here it is, 92.061,
11 Property Code. Yeah. In 92.061 of the Property Code,
12 effect on other rights, and it's a long paragraph, but
13 basically the duties of the landlord and remedies of a
14 tenant under the subchapter in lieu of existing common law
15 or other statutory law warranties and duties of landlords
16 for maintenance, repairs, security, habitability, and
17 nonretaliation, and remedies of tenants for a violation of
18 those warranties and duties. Otherwise, this subchapter
19 does not affect any other right of the landlord or tenant
20 under contract, statutory law, or common law that is
21 consistent with the purposes of this subchapter. Any
22 right of a landlord or tenant may have to bring an action
23 for personal jury or property damage under the law. This
24 subchapter does not impose obligations on the landlord or
25 tenant other than those expressly stated in this

1 subchapter.
2 MR. ORSINGER: You just talked about
3 property damage --
4 MR. YELENOSKY: Yeah.
5 MR. ORSINGER: -- and personal injury. You
6 didn't talk about damages for breach of the lease
7 agreement itself. So it sounds like the JP judgment is
8 preclusive on the lease and whether it was breached.
9 MR. YELENOSKY: Yep.
10 PROFESSOR DORSANEO: There's a Federal
11 statute that may be pertinent that says the lower courts'
12 determinations are not preclusive except with respect to
13 the thing decided in the lower courts, meaning, you know,
14 the relief rather than the determination the wrong way to
15 the --
16 MR. GILSTRAP: Sounds like we don't know.
17 MR. ORSINGER: So what you're saying is res
18 judicata, but not collateral estoppel.
19 PROFESSOR DORSANEO: Res judicata in the
20 sense of with respect to what was actually litigated.
21 CHAIRMAN BABCOCK: Steve.
22 MR. ORSINGER: But the findings.
23 CHAIRMAN BABCOCK: As soon as they're done.
24 PROFESSOR DORSANEO: But not the findings
25 and not what should have been litigated.

1 CHAIRMAN BABCOCK: Steve.
2 MR. YELENOSKY: Judge Lawrence, do I
3 understand that the current state of the rules is that
4 they're silent as to this, but I understand the case law
5 is not, but the current state of the rules?
6 HONORABLE TOM LAWRENCE: Well, currently
7 you'd have to post an appeal bond. There's no
8 supersedeas, but the appeal bond is really kind of a
9 combination appeal bond and supersedeas.
10 MR. YELENOSKY: Right.
11 HONORABLE TOM LAWRENCE: If you post it then
12 everything goes up. If you don't post it then there's no
13 appeal.
14 PROFESSOR CARLSON: On anything.
15 HONORABLE TOM LAWRENCE: On anything.
16 PROFESSOR CARLSON: Possession or damages.
17 MR. YELENOSKY: Right. Okay. So if they
18 posted the appeal bond under the current rules then
19 obviously the case is going to continue.
20 HONORABLE TOM LAWRENCE: Right.
21 MR. YELENOSKY: And so this problem has been
22 created by separating out the supersedeas from the cost
23 bond.
24 PROFESSOR CARLSON: And it actually gives
25 you a greater right of appeal.

1 CHAIRMAN BABCOCK: Okay. How many --
2 MR. YELENOSKY: I guess I was just going to
3 conclude by saying if this is such a hot political issue
4 for the landlords that it's going to go to the Legislature
5 if we make any substantive change, what can we do within
6 the framework you've proposed that doesn't make any
7 substantive changes, but doesn't necessarily reinforce the
8 case law? Is that possible?
9 MR. ORSINGER: We could write a
10 nonpreclusive little add-on to the end of the sentence
11 saying "but the judgment shall not be preclusive of any
12 issues" --
13 MR. YELENOSKY: Well, if we just drop those
14 last two sentences and we just don't say anything about
15 it, can we leave it like that?
16 HONORABLE TOM LAWRENCE: So the appeal on
17 the issue of possession would not be moot, and the court
18 issues a writ of possession, and the tenant is evicted. I
19 mean, if you leave that out, that's what's going to
20 happen.
21 MR. ORSINGER: The case law does that for
22 you already without this new language.
23 MR. YELENOSKY: Well, yeah. Somebody would
24 come in and argue -- I guess would argue the case law,
25 that --

1 MR. ORSINGER: Well, you've got 150 years of
2 case law that says that it's moot, correct?
3 MR. YELENOSKY: Right. Okay. Well, that's
4 my proposal.
5 CHAIRMAN BABCOCK: Why would you drop that?
6 Anyway, let's get a sense of our committee of people who
7 are in favor of changing in some fashion Rule 749b, either
8 by adopting language or writing something different. In
9 other words, you're not satisfied with the way it is.
10 HONORABLE TOM LAWRENCE: You're talking
11 about the last two sentences only, right?
12 HONORABLE SARAH DUNCAN: Just the last two
13 sentences.
14 CHAIRMAN BABCOCK: Last two sentences.
15 That's what we've been discussing, isn't it? Frank
16 Gilstrap's position is, I think, that, hey, we can't fix
17 this. If we do, it's going to be a huge problem. Steve's
18 point is, well, at least let's not reinforce all this case
19 law that's a problem. Richard and Bill think that
20 there's -- there are real practical problems, particularly
21 in the commercial setting. So those are kind of the three
22 general thoughts about this rule, right?
23 So I'm trying to frame how we get a sense of
24 the committee on this. I guess maybe we ought to vote on
25 people who are generally satisfied with the proposed rule

1 as drafted on this issue. Does that make sense for people
2 to --
3 MR. ORSINGER: Sure.
4 CHAIRMAN BABCOCK: -- raise your hand on
5 that?
6 MR. ORSINGER: Sure.
7 CHAIRMAN BABCOCK: So people who are
8 generally satisfied with the rule as drafted on this
9 issue, raise your hands.
10 MR. GRIESEL: We had two late ones.
11 CHAIRMAN BABCOCK: Huh? Two late ones?
12 MS. SWEENEY: We were napping.
13 CHAIRMAN BABCOCK: Okay. And people who are
14 not happy with it?
15 MR. WATSON: Can we have a vote on people
16 who still have a pulse?
17 CHAIRMAN BABCOCK: Well, we have got some
18 people not voting on it. By a vote of 8 to 6 the people
19 who are generally happy with this prevail. So there you
20 have it, Richard.
21 MR. ORSINGER: Okay.
22 MR. SOULES: Can an indigent stay in
23 possession? Does this sentence imply that if --
24 MR. YELENOSKY: No, because they don't post
25 a supersedeas.

1 MR. SOULES: What?
2 MR. YELENOSKY: They don't have to post a
3 supersedeas, so it wouldn't affect them.
4 MR. SOULES: So if the appeal is based on
5 judgment for possession and court costs only and the
6 affidavit of indigency is filed, that person stays in
7 possession.
8 MR. YELENOSKY: Right, because they wouldn't
9 be able to issue a writ of possession because the landlord
10 could say, "I want a writ of possession"; and the court,
11 if acting appropriately would say, "You can't. There's an
12 affidavit of indigence," which allows them to remain in
13 possession without posting a supersedeas, right, Judge
14 Lawrence?
15 HONORABLE TOM LAWRENCE: That's correct.
16 MR. SOULES: I don't think -- I realize that
17 your comment says that, but I don't think the rule says
18 that. And it may be because it says "failure to post a
19 supersedeas bond" rather than "failure to supersede."
20 Maybe that welcomes the inference.
21 MR. YELENOSKY: Oh, I see what you're --
22 HONORABLE TOM LAWRENCE: You've got to look
23 at 750(k) on page 55.
24 MR. SOULES: 55?
25 HONORABLE TOM LAWRENCE: (k) on page 55, the

1 first sentence.

2 MR. YELENOSKY: You could put "failure to

3 post a supersedeas where a supersedeas is required" --

4 PROFESSOR CARLSON: Right.

5 MR. YELENOSKY: -- "to remain in

6 possession," blah-blah-blah, but I think right now we're

7 debating whether this language needs to be changed for

8 another reason.

9 MR. SOULES: Okay.

10 MR. YELENOSKY: But if we kept this language

11 in, yeah, that could be clearer.

12 CHAIRMAN BABCOCK: We're all going to get a

13 shot at the specific language. We're trying to deal with

14 big issues now, and that certainly would qualify. Do we

15 have any other big issues? Richard, you had a big issue?

16 MR. ORSINGER: Yeah, I'd like to suggest

17 under the affidavit of indigence rule, 749a, page 45, that

18 we just skip the step of contesting the affidavit at the

19 JP court and go directly to the county court. It looks to

20 me like the county court is going to have to review a

21 denial of whatever decision they make on the affidavit of

22 indigence, that the JP makes, and that will have to be

23 subject to review of the county court, and I notice

24 there's problems here because we don't provide for notice

25 to be given to the county clerk and all that. Why don't

1 we just have the affidavit and the contest filed in the
2 county clerk's office and skip the JP step?
3 HONORABLE TOM LAWRENCE: Well, how does the
4 county clerk have jurisdiction over it?
5 MR. ORSINGER: I think by -- as I
6 understand, they get jurisdiction because the notice of
7 appeal is given to the JP and then a filing fee is paid in
8 the county court, and if you can't pay the filing fee in
9 the county court then you file an affidavit of indigence
10 in the county court saying, "Hey, I filed a notice of
11 appeal in JP court. I can't afford to pay my county court
12 filing fees, so I'm filing my affidavit of indigence in
13 the county court," and then the county clerk immediately
14 has five days to contest that.
15 Notice goes out from the county clerk to the
16 opposing party, and they have five days or however long
17 you provide for them, and this is one contest, and it's in
18 the county court, and that's where it's going to be
19 litigated ultimately anyway, because the contest in the JP
20 court just gets repeated in the county court if anybody
21 wants it reviewed, which somebody is going to want it
22 reviewed, whoever lost that is going to want it reviewed;
23 isn't that right?
24 HONORABLE TOM LAWRENCE: Well, not
25 necessarily. Sometimes they do. The tenants that -- a

1 lot of landlords will not contest affidavit of indigence
2 because it gets to the county court quicker if they don't,
3 but some do. And if tenants lose, sometimes they do take
4 it up to the county court and have it reviewed, but my
5 question is how does the county court have any
6 jurisdiction to do anything with it?
7 MR. ORSINGER: Well, you know, the way an
8 appeal normally works in the other part of the legal
9 system, in the old days the appellate bond was filed, and
10 that gave jurisdiction to the court of appeals. Now we
11 have a notice of appeal that's filed in the trial court
12 and sent to the court of appeals, and that gives
13 jurisdiction to the appellate court.
14 As I understand, this is a two-step
15 procedure in JP court. You have to file a notice of
16 appeal in JP court, but you don't yet have jurisdiction in
17 county court. You have to pay the filing fee in county
18 court, and if you have your notice of appeal in JP court
19 and you pay your filing fee in county court then the
20 county court gets jurisdiction, right?
21 HONORABLE TOM LAWRENCE: Well, the appeal is
22 perfected -- if it's a tenant defendant, they're going to
23 have to post an appeal bond and pay the filing fee in
24 county court or get an affidavit of indigence. If it's
25 the plaintiff, they've got to file a notice of appeal and

1 pay the court costs to the county court to appeal, to
2 perfect the appeal. But I just -- I am not clear as to
3 how the county court is going to have any jurisdiction to
4 do anything with this if the matter is still pending in
5 the JP court.

6 MR. ORSINGER: It isn't. That's my point.
7 The matter isn't pending in the JP court. Once there's a
8 notice of appeal in the JP court and you either pay your
9 filing fee or file your affidavit of indigence in the
10 county court, the JP court has no more jurisdiction. The
11 county court has all the jurisdiction it needs to do
12 anything, including evaluating the legitimacy of the
13 affidvait of indigency.

14 HONORABLE TOM LAWRENCE: Well, you're going
15 to mess up the timetables a little bit, because if the
16 appeal is not perfected in the JP court within five days
17 then on the sixth day a writ of possession would issue.
18 Now, what's going to prevent the JP from issuing a writ of
19 possession?

20 MR. ORSINGER: Nothing.

21 HONORABLE TOM LAWRENCE: He doesn't know
22 anything's been filed in the county court, so he's going
23 to issue a writ of possession. That's why I think
24 everything needs to be in the JP court initially until you
25 figure out if there is a perfected appeal or not.

1 PROFESSOR CARLSON: Richard, if you look at
2 page 41, while the check is made out to the county court,
3 the filing fee is actually filed with the justice court.
4 MR. ORSINGER: Well, at what point, Elaine,
5 you tell me, at what point does the county court have
6 jurisdiction in this process?
7 PROFESSOR CARLSON: When those two things
8 take place.
9 HONORABLE TOM LAWRENCE: Or an affidavit of
10 indigence.
11 MR. ORSINGER: Okay. Now, if I can't write
12 a check to the county clerk, what do I do? I file an
13 affidavit of indigence --
14 PROFESSOR CARLSON: Right.
15 MR. ORSINGER: -- with the JP, right? Okay.
16 Now, why don't you have county court jurisdiction at that
17 moment? You do. You just told me you do.
18 HONORABLE TOM LAWRENCE: The appeal's not
19 been perfected yet.
20 PROFESSOR CARLSON: He says upon the mere
21 filing of the affidavit.
22 MR. ORSINGER: No. No. You file two
23 things. I didn't make this up, but I'm just reading it.
24 You know, you file a notice of appeal in the JP court, and
25 you file a filing fee for the county clerk, but you file

1 that in the JP court, too.

2 PROFESSOR CARLSON: Right.

3 MR. ORSINGER: And when you file those two

4 things, not one of them, but both of them, then the county

5 court now has jurisdiction. Even though they haven't seen

6 a scrap of paper or they don't know these people exist,

7 they have jurisdiction now.

8 PROFESSOR CARLSON: That's right. So what

9 do you do with your affidavit of indigency for them?

10 MR. ORSINGER: What I'm saying is you guys

11 have set it up or it's currently set up that you have an

12 indigency challenge in the JP court at a time when the JP

13 court doesn't even have jurisdiction anymore, but the

14 county court does, but it doesn't even know that.

15 HONORABLE TOM LAWRENCE: That's not true.

16 MR. ORSINGER: What?

17 HONORABLE TOM LAWRENCE: The JP court does

18 still have jurisdiction.

19 MR. ORSINGER: When does the JP court lose

20 jurisdiction? If the county court acquires jurisdiction

21 upon the filing of those two documents, when does the JP

22 court lose jurisdiction?

23 HONORABLE TOM LAWRENCE: Well, if those two

24 documents are filed then you don't need an affidavit of

25 indigency. You only need an affidavit of indigency if you

1 can't file those fees.

2 MR. ORSINGER: I know. Isn't the affidavit

3 of indigency the substitute for the check? I can't --

4 HONORABLE TOM LAWRENCE: Yes.

5 MR. ORSINGER: I'm too poor to sign the

6 check, so I'm going to file an affidavit of indigency. So

7 when I file the notice of appeal and the affidavit of

8 indigency in the JP court, I now have jurisdiction in the

9 county court.

10 HONORABLE TOM LAWRENCE: Well, if it's

11 approved in the JP court. If the affidavit is approved,

12 it would be sent up to the county court and then when they

13 get it all they would take jurisdiction; but there's this

14 interim period between five days after the judgment when

15 the appeal has to be perfected and when it is perfected in

16 the JP court and the county court gets the documents that

17 you have jurisdiction.

18 What I'm saying is that if you take the

19 affidavit of indigence and you don't have that filed in

20 the JP court and you have it filed directly in the county

21 court, the JP court is not going to know about that, so

22 they're going to get to five days after the judgment, and

23 the plaintiff is going to come in and ask for writ of

24 possession, and since there's nothing that's been filed in

25 the JP court, the writ of possession is going to be

1 entered, and that defendant is going to be evicted.
2 MR. GILSTRAP: But the issue shouldn't be
3 jurisdiction. We can make jurisdiction attach when we
4 want to. The issue ought to be how it works practically.
5 Why can't we just say file the affidavit of indigence in
6 the justice court and then have it heard in the county
7 court? Doesn't that solve the problem?
8 PROFESSOR CARLSON: We could do that a lot
9 of ways.
10 MR. ORSINGER: That eliminates the second
11 hearing, doesn't it?
12 MR. GILSTRAP: Yeah. That eliminates the
13 first hearing.
14 MR. ORSINGER: I mean it eliminates the
15 first hearing.
16 MR. GILSTRAP: Yeah. Yeah.
17 CHAIRMAN BABCOCK: It makes the second
18 hearing the first hearing.
19 HONORABLE TOM LAWRENCE: What do you gain by
20 doing that?
21 MR. ORSINGER: You eliminate a hearing,
22 because anybody that loses is going to ask it to be
23 reviewed. That's the whole point of litigation, isn't it?
24 HONORABLE TOM LAWRENCE: All right. So
25 you're going to have -- you're going to have the appeal --

1 a final judgment -- or the judgment in the JP court. Five
2 days for the defendant to appeal. He doesn't appeal it in
3 the JP court. He goes to county court and files the --
4 MR. ORSINGER: No, no. File everything in
5 the JP court. Just have it ruled on in the county court.
6 HONORABLE TOM LAWRENCE: So you're going to
7 file this affidavit of indigence in the JP, even if it's
8 totally without merit, even if you don't follow any of the
9 rules provided for, it's just going to be rubber-stamped
10 and sent up?
11 MR. ORSINGER: You know, it's going to be in
12 the county court being re-evaluated anyway, even if you do
13 hear it in JP court. All I'm trying to say is why have
14 two hearings when the final say-so is the county court?
15 Why don't you just have one hearing in the county court?
16 That's all. If that's a real big problem, I don't care.
17 CHAIRMAN BABCOCK: This discussion proves
18 that Richard is a man of passion. Who else?
19 MR. ORSINGER: Yeah, well, I've made my
20 point. It just doesn't make a lot of sense to me.
21 CHAIRMAN BABCOCK: What about -- any other
22 big issues? Sarah.
23 HONORABLE SARAH DUNCAN: Is the JP court
24 subject to the regular Rules of Procedure on notice of
25 judgment?

1 CHAIRMAN BABCOCK: The question was, is the
2 JP court subject to the regular Rules of Procedure on
3 notice?
4 HONORABLE SARAH DUNCAN: Is there a rule in
5 here that requires the JP court to give notice of judgment
6 to the parties?
7 HONORABLE TOM LAWRENCE: Yeah. Let me find
8 that.
9 HONORABLE SARAH DUNCAN: There is one?
10 HONORABLE TOM LAWRENCE: There is.
11 HONORABLE SARAH DUNCAN: That's all my
12 question was.
13 CHAIRMAN BABCOCK: The answer is yes.
14 That's all of her question. How about any other big
15 issues?
16 PROFESSOR DORSANEO: Well, I don't know how
17 big this issue is, but --
18 CHAIRMAN BABCOCK: Let's make it a big one.
19 PROFESSOR DORSANEO: -- going back to page
20 39, 748(d), but it's kind of a big issue to me when I read
21 these rules together and I can't understand what they
22 mean.
23 HONORABLE SARAH DUNCAN: Yeah.
24 PROFESSOR DORSANEO: Okay. We're talking
25 about like the justice court, the appeal being perfected,

1 but the county court's jurisdiction does not invoke, and I
2 heard Judge Lawrence say that that had to do with filing
3 fees. Then I'm back over here reading "appeal perfected,"
4 and it says, "When the defendant timely files an appeal
5 bond," 749b, "deposit or security and the filing fee
6 required to appeal the case to the county court is paid."
7 So I'm saying -- you know, I go back to
8 748(d), and I say, well, why isn't that -- how can those
9 things match, and maybe I'm just not following. Maybe I
10 would just like it to say, you know, something more clear.
11 "If the appeal of the judgment in the justice court is
12 perfected in accordance with Rule 749b, but the county
13 court's jurisdiction is not invoked because," you know,
14 why isn't it invoked? What the hell is going on here?
15 And otherwise I just kind of have to take this on faith,
16 and there's a lot of this that I find absolutely
17 remarkable.
18 CHAIRMAN BABCOCK: Is that a good thing
19 or --
20 MR. ORSINGER: Remarkably good or remarkably
21 bad?
22 CHAIRMAN BABCOCK: I noticed that, too. I
23 think that's something you-all ought to think about. Any
24 other big issues?
25 HONORABLE TOM LAWRENCE: That's no problem.

1 CHAIRMAN BABCOCK: In a second we're going
2 to have lunch. Here's what we're going to do with these
3 rules. You're going to buff them up, and including
4 working on Rule 740 that we talked about earlier today,
5 and then if we could have these at least two or three
6 weeks before the next meeting so people have the
7 opportunity to look at it, and we'll schedule the
8 discussion for the final wrap-up on these JP rules for
9 Saturday morning, the 26th.
10 PROFESSOR CARLSON: Can I make one comment?
11 We lost several members of our committee. Christina Crain
12 got reappointed --
13 CHAIRMAN BABCOCK: Right.
14 PROFESSOR CARLSON: -- and, of course,
15 Wallace Jefferson got appointed to the Court, and we would
16 welcome any input from the committee on something that
17 appears remarkable or appears frightful from your
18 prospective. I am not being disingenuous at all. This is
19 to me a very complicated area of trying to fit the
20 statutes together with the rules; and, as you know, there
21 are four sets of procedural rules that are in place. So
22 we welcome any input that we can get from the full
23 committee, and we welcome any walk-on subcommittee
24 members.
25 CHAIRMAN BABCOCK: A walk-on. You don't

1 even have to be recruited, Bill.

2 PROFESSOR DORSANEO: How about Mary Spector

3 -- Mary Spector Rose's daughter, who runs our legal

4 clinic, and knows it all about all of this.

5 MR. ORSINGER: There we go.

6 CHAIRMAN BABCOCK: Okay. Let's break for

7 lunch for about an hour.

8 (A recess was taken at 12:45 p.m., after

9 which the meeting continued as reflected in

10 the next volume.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 *

2 CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

3

4 *

5

6

7 I, D'LOIS L. JONES, Certified Shorthand

8 Reporter, State of Texas, hereby certify that I reported

9 the above meeting of the Supreme Court Advisory Committee

10 on the 2nd day of November, 2001, Morning Session, and the

11 same was thereafter reduced to computer transcription by

12 me.

13 I further certify that the costs for my

14 services in the matter are $ 1,248.00.

15 Charged to: Jackson Walker, L.L.P.

16 Given under my hand and seal of office on

17 this the 16th day of November, 2001.

18

19 ANNA RENKEN & ASSOCIATES
1702 West 30th Street

20 Austin, Texas 78703
(512)323-0626

21

22 D'Lois L. Jones
D'LOIS L. JONES, CSR

23 Certification No. 4546
Certificate Expires 12/31/2002

24

25 #005,073DJ/PG