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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

January 26, 2002

(SATURDAY SESSION)

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COPY

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 26th
day of January, 2002, between the hours of 8:35 a.m. and
11:15 a.m., at the Texas Law Center, 1414 Colorado, Room
101, Austin, Texas 78701.

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1
2 CHAIRMAN BABCOCK: All right. Let's get
3 going again. Somebody who is not as perky as I am,
4 Mr. Orsinger, is up with Rule 103 and Rule 536.

5 HONORABLE JAN PATTERSON: Is that why you
6 set him for 8:30 on Saturday morning, so he would be here?

7 CHAIRMAN BABCOCK: Richard insisted.

8 MR. ORSINGER: The proposal that we are
9 considering has to do with private process serving. The
10 problem, if you remember -- oh, first of all, the paper
11 work. There's a March 28th, 2001, letter that were
12 probably in your materials or you got online from Justice
13 Hecht asking the committee to look into it. Then we had a
14 report on this very same subject, which has been carried
15 forward in the packet that has a report date of January
16 20th, 2002, but associated with that was a report from
17 November of 2001.

18 And then in the packet that's dated January
19 20th, 2002, there is a proposed amendment to Rule 103
20 called Appendix A, which was the process servers industry
21 proposal; and then behind that is a Rule 103 that's broken
22 out in indented paragraphs. It's on the first page and a
23 half and then equivalent changes to Rule 536, which
24 relates to justice courts, is behind that, and then behind
25 that Appendix C is the current Rule 103 and Rule 536.

1 Now, the principal problem is that although
2 private process serving is authorized in the Rules of
3 Procedure without motion and without charge, the practice
4 varies locally, and a lot of locales are just simply not
5 in compliance with the existing rule of procedure. As a
6 practical matter, another problem is that private process
7 servers have to be authorized by the court that issues the
8 process, and that's not the locale that they necessarily
9 live in and serve a lot of process in.

10 For example, if a process server lives or
11 works here in Travis County, he or she is serving process
12 from all over Texas, certain kinds of lawsuits that have
13 to be filed in Travis County. Well, that means they have
14 to have the authority of each court where the lawsuit was
15 initiated. It doesn't make much sense, but it would make
16 better sense if somebody in Travis County licensed or
17 authorized people to serve process in Travis County. Then
18 if you lived here you could comply and you could handle
19 it, but, no, you have to be authorized in all of the
20 issuing courts.

21 So what we've tried to do here with this
22 committee proposal is two things. We've tried to look at
23 all of the local rules that are in place and the
24 requirements that they have and amalgamate them into one
25 place, but to take the most stringent of these standards

1 and gather them together, which is what we've done in Rule
2 103, subdivision (5), which is a proposed language -- and
3 it's all underlined there -- in Appendix B; and you'll
4 notice that (b) basically has these requirements, 18 years
5 or older, United States citizen, not convicted of a felony
6 or a misdemeanor involving moral turpitude, a DPS
7 fingerprint/criminal history check within 12 months, seven
8 or more hours of continuing education, and proof of two
9 kinds of insurance, errors and omissions and general
10 liability insurance.

11 The errors and omissions would protect the
12 lawyer who hires the private process server, and the
13 general liability insurance would protect anyone who was
14 injured by this person in the process of doing what
15 they're doing. Now, there's a 300,000-dollar level here.
16 Some counties don't require insurance. Some counties
17 require insurance of a hundred thousand. Bexar County,
18 for example, requires insurance of 300,000. This is a
19 bigger number than is anywhere else in the state that I'm
20 aware of, but here's the theory, that we'll take an
21 amalgamation of the highest, most exacting standards that
22 exist anywhere in the state and put them under (b).

23 (a), on the other hand, permits a judge of a
24 court to authorize someone to serve process on any basis
25 that judge wants, whether they meet the criteria in (b) or

1 not. So basically (a) gives the judge the power to waiver
2 (b), waiver the requirements in (b). And the theory is
3 this, that counties can't complain if someone meets (b)
4 because that will meet or exceed the standards that they
5 currently have; and if a judge feels that these standards
6 are excessive or has someone that he has particular
7 confidence in but that is unable to meet one or more of
8 these, that judge for process out of that court can waiver
9 the (b) requirement by giving authorization under (a).

10 Having made this differentiation then, it's
11 a proposal, although this is not -- the committee proposal
12 is not written this way, there is a proposal that instead
13 of the (b) the way it is written we provide that if you
14 are a private process server and you can meet the criteria
15 of (b), you go prove that to some county clerk, district
16 clerk, or district judge, get an authorization from that
17 person that you have met the criteria here in (b), and
18 they give you a little identity card or a court order that
19 says you've met the criteria in (b). And then we would
20 provide that if you have met the criteria in (b) and you
21 have your order from the court saying you have, then you
22 are authorized to serve process in all counties in Texas,
23 process from all state courts. So, if you will, we have a
24 kind of a passport for people to serve process from courts
25 anywhere in Texas, and we feel like people wouldn't object

1 to that because the only people with that kind of passport
2 will have met the criteria of (b), which meets or exceeds
3 every requirement that is presently existing.

4 Now, what we're really trying to do is we're
5 trying to create a statewide licensing system without a
6 statewide licensing authority, and we're trying to get
7 local judges to feel comfortable with this plan because it
8 assures them of all of the reliability and ethical
9 standards and protection of the public that anyone has
10 conceived of; but if they feel that's excessive for their
11 court, they can waiver it down to whatever level they
12 want; and so if -- anyway, if you look at this committee
13 proposal, the (5), the (a), and the (b), with the
14 understanding that the language would need to be changed
15 so that if you meet (b) and you have a court order that
16 authorizes that then you can serve process out of any
17 court in Texas or serve process anywhere around Texas.
18 Now then, the next page --

19 PROFESSOR DORSANEO: Richard?

20 CHAIRMAN BABCOCK: You have a question,
21 Bill?

22 PROFESSOR DORSANEO: Anybody -- any county
23 or district court judge can issue this passport?

24 MR. ORSINGER: That's right.

25 PROFESSOR DORSANEO: Or clerk?

1 MR. ORSINGER: That's the thought. And, you
2 know, we're open. I mean, is it supposed to be a clerk,
3 which is what it is now, but it's backed up by a court
4 order -- and correct me if I'm wrong, Rick -- but I think
5 that the clerks will handle the so-called certification
6 process, but it has to be backed up by a court order
7 signed by a judge; is that right?

8 MR. KEENEY: Yeah. The order would actually
9 have to be signed by a judge; but across the state the
10 judges have put the responsibility on the clerks offices
11 of the actual registering or license of or keeping track
12 of us; but this particular order would require an actual
13 judge to make sure that that person has met this
14 qualification; and once that qualification is met they
15 would sign a written order.

16 The other thing that this would do is allow
17 -- once we obtain the copy of that written order, well,
18 then according to the way this is written we would attach
19 that copy of that order to every paper that we serve and
20 we send that back with the court. That way if a paper
21 comes from Nueces County to us here in Travis County and I
22 serve that paper, well, then I would send my -- a copy of
23 that written order that I have obtained from Travis County
24 district judge back with that court, and that judge would
25 see not only who served the paper but that I was

1 authorized and would have information on me that he could
2 call me if he questioned the validity of the service.

3 So --

4 MR. ORSINGER: Okay. Thank you. Those were
5 comments from Rick Keeney, who is the president of
6 Professional Civil Process, located here in Austin, Texas,
7 and who has been working with the committee on this
8 language for over a year. Yes, Tom.

9 HONORABLE TOM LAWRENCE: Now, part (6), that
10 would allow a court manager's office to really handle the
11 processing of this, correct? You wouldn't have to have
12 individual judges do it. They could delegate it to a
13 court manager's office and have them do all of this?

14 MR. KEENEY: Yes.

15 MR. ORSINGER: Well, the issuance of the
16 card per se or whatever we use as the passport you could
17 do, but I think it still has to be backed up by a judge's
18 order that this particular person is authorized.

19 HONORABLE TOM LAWRENCE: But the presiding
20 judge of that county or whatever could do that?

21 MR. ORSINGER: Yes.

22 HONORABLE TOM LAWRENCE: Could sign it. All
23 right.

24 MR. ORSINGER: Absolutely.

25 HONORABLE TOM LAWRENCE: Okay.

1 MR. ORSINGER: And the proposal here you see
2 under paragraph (7) -- pardon me. Well, let's see, where
3 is it, that when they return the process they ought to
4 attach to the return their evidence of their authority,
5 which would be a copy of their passport, or if we decide,
6 it would be a copy of the order saying that they meet the
7 criteria. Now --

8 HONORABLE JAN PATTERSON: Richard, I have a
9 question.

10 MR. ORSINGER: Yeah. Go ahead.

11 HONORABLE JAN PATTERSON: I gather paragraph
12 (5) does not refer to sheriff or constable. It speaks
13 only to the private civil process.

14 MR. ORSINGER: Right. We don't need any
15 intervention for the authority of sheriff or constable to
16 serve process because they have that authority under law.

17 HONORABLE JAN PATTERSON: Okay.

18 MR. ORSINGER: Yes.

19 CHAIRMAN BABCOCK: Paula.

20 MR. ORSINGER: Paula.

21 MS. SWEENEY: These rules look like they
22 have been well thought out by people who know much more
23 about this than I. Really I just have a couple of
24 background questions. One is this requirement that these
25 folks all have liability insurance, is that -- you

1 mentioned something about counties currently differ. Is
2 that something that is a rule right now in most places --

3 MR. ORSINGER: No.

4 MS. SWEENEY: -- some places, no places?

5 MR. ORSINGER: I don't think it -- Rick,
6 tell her.

7 MR. KEENEY: Basically there is three
8 counties right now that currently require the insurance.
9 Bexar County district clerk requires a 300,000-dollar
10 insurance policy. Galveston County also requires
11 insurance, and Tarrant County also requires insurance.

12 The amounts of the actual insurance vary.
13 Some counties require a hundred thousand. Some counties
14 require 300,000.

15 I also want to let you know, I'm actually
16 representing the Texas Process Servers Association. We
17 have currently 350 companies that are a part of our
18 association. After getting the revised order from the
19 Chairman Orsinger yesterday this was e-mailed to our
20 board. Our board looked this over and basically said that
21 the committee got this, I mean, perfect. This is exactly
22 what we were after. It accommodates everybody from our
23 smallest member up in Laredo for just a one man operation.
24 It allows the judge there to still, if they know that
25 person, to appoint that person to serve the process

1 without having to go through the hardships of obtaining
2 this insurance. It also allows standard requirements
3 allowing the ability for us to serve papers out of Bexar
4 County without Bexar County getting upset because we
5 haven't met the requirements.

6 So the order has been masterly done. I
7 commend the committee, and we are all supporting this
8 legislation.

9 MS. SWEENEY: Thank you. Can I --

10 CHAIRMAN BABCOCK: Rick -- hang on for a
11 second. Rick, before you leave today, will you be sure
12 the court reporter has your name?

13 MR. KEENEY: Yes.

14 CHAIRMAN BABCOCK: Great. I think Stephen
15 had his hand up first.

16 MS. SWEENEY: Yeah, but can I finish my
17 question?

18 CHAIRMAN BABCOCK: Yeah, sure.

19 MS. SWEENEY: What I'm trying to sort out
20 here is, if I'm understanding, this is one of the
21 alternatives under which somebody can be accredited, is to
22 come under (b); is that right?

23 MR. ORSINGER: Right.

24 MR. KEENEY: That would just give them the
25 statewide authority to be able to serve. If they met the

1 criteria in (b) then we could serve process issued out of
2 any courts in the state of Texas, but (b) would have to be
3 met.

4 MR. YELENOSKY: That was going to be my
5 question. Because (7) says if you get a written order
6 under (1)(b) then you could serve anywhere in the state.
7 Is that supposed to be (5)(b)?

8 MR. KEENEY: It should be (5).

9 MR. ORSINGER: Yes.

10 MR. KEENEY: It should be (5)(b).

11 MR. YELENOSKY: Did you already say that?
12 I'm sorry.

13 MR. ORSINGER: No, we didn't say that, and
14 you're right, it should say (5)(b).

15 MR. KEENEY: It should be (5)(b).

16 MS. SWEENEY: Okay. So given that, my
17 question is this. This to me, starting to legislate the
18 amount of insurance somebody can have, strikes me as, a,
19 substantive law, not procedural, and, b, a change to
20 existing law and certainly not something that I think is
21 within the Court's rule-making authority; and this state
22 has been loathe for years to impose insurance requirements
23 on doctors, lawyers, accountants, or anybody else. I
24 really question whether this committee or even the Court
25 by rule-making authority can impose those kind of

1 requirements on folks.

2 MR. ORSINGER: But, but, see, that's the
3 beauty of this. We're not imposing it on anybody. What
4 we're saying is if you choose to meet these standards
5 which meet or exceed local standards around the state of
6 Texas, then you could have the advantage of the passport.
7 If you don't choose to or are unable then you can go to
8 the specific courts and get authority from them if you can
9 talk them into it.

10 MR. YELENOSKY: Which is what you have to do
11 now.

12 MR. ORSINGER: Which is what you have to do
13 now.

14 CHAIRMAN BABCOCK: How is Bexar County --

15 MS. SWEENEY: I think this is legislation.

16 CHAIRMAN BABCOCK: How is Bexar County doing
17 it? Are they doing it by local rule?

18 MR. ORSINGER: Yeah. Everybody is doing it
19 by local rule. Some people require that you attend a
20 course in their county. Some people require you pay a
21 25-dollar fee. Some people require that you have a
22 background check.

23 CHAIRMAN BABCOCK: But addressing Paula's
24 point, I mean, they're doing it by rule. They haven't got
25 some act of the Legislature to --

1 MR. ORSINGER: They do not have an act of
2 the Legislature, and they don't probably even have the
3 Supreme Court's approval on a lot of these things. I
4 think it's just kind of the de facto law of the land on a
5 county by county basis.

6 MR. KEENEY: Actually, Bexar County did
7 actually send their local rules to the Supreme Court and
8 the Supreme Court did sign off on Bexar County's local
9 rules.

10 MR. ORSINGER: Is that the only county that
11 has Supreme Court --

12 MR. KEENEY: That's the only county to my
13 knowledge that's actually forwarded their rules to the
14 Supreme Court to get the Supreme Court to sign off on
15 their rules.

16 MR. ORSINGER: So, Paula, the point is, is
17 that it's kind of a de facto thing on some local bases,
18 and we're not saying you must meet these criteria to have
19 this job because right now there are lots of people in
20 this state that don't meet this criteria that judges are
21 authorizing them to serve process, and this really
22 wouldn't tie anyone's hands.

23 CHAIRMAN BABCOCK: Judge Lawrence had his
24 hand up. Do you still want to talk?

25 HONORABLE TOM LAWRENCE: Should we just as a

1 matter of style on (5) should we make sure that we put the
2 language "(1)(b)," "under (1)(b)," in there to make sure
3 that (5) is clear that it applies only to (1)(b), not
4 (1)(a).

5 MR. KEENEY: You're talking about --

6 HONORABLE TOM LAWRENCE: In other words,
7 "The court shall issue a written order of the court under
8 (1)(b) allowing a person to serve citation of the
9 notices."

10 MR. GILSTRAP: Yeah. I find (1)(a) and
11 (1)(b) to be kind of overlapping and unclear, especially
12 when you read them with (1)(5).

13 MR. ORSINGER: All right.

14 HONORABLE TOM LAWRENCE: See, (6), (7), (8),
15 and (4), all relate to (1)(b), but (5) doesn't
16 specifically relate to (1)(b).

17 CHAIRMAN BABCOCK: Yeah, Linda.

18 MS. EADS: I am not sure why, but I have a
19 sense of disquiet about putting in the insurance
20 requirement in the rules, even though I understand
21 Richard's point, which is it's not a requirement, it's if
22 you want to do this then you can have a benefit; but I'm
23 always reluctant to say -- when someone gives me a benefit
24 in that form I am not sure it's benefit or a requirement
25 in disguise or end up being a requirement or not a

1 requirement but a pressure to have that kind of insurance
2 so that they can have this passport; and I just -- I'm
3 just -- and I can't really articulate it any better than
4 that; but there's a sense of disquiet I have about having
5 that codified in the rules when we don't do it for other
6 professions.

7 MR. ORSINGER: Well, let me say that if we
8 don't, we're presented with the political problem of
9 creating a passport. If you create a passport that
10 deviates below the standards in some of the counties that
11 they have decided is important for the integrity of their
12 judicial process, then we're forcing a degradation of
13 their protection on them through this passport program.

14 The idea of this passport is we'll take the
15 collective standards and we'll take the highest standard
16 of every locale; but we'll permit every judge to deviate
17 downward; and, therefore, no locale is going to object,
18 saying, "I don't like your passport program because we
19 feel like there ought to be \$300,000 worth of insurance
20 and you have no insurance requirement." I really think
21 this is designed to avoid rejection at the local level and
22 that you have to weigh that, because if you say there will
23 be no insurance requirement, and we have three counties
24 right now that require insurance? How many do we have,
25 Rick?

1 MR. KEENEY: Three.

2 MR. ORSINGER: Three counties that require
3 insurance. Then we have to go to them and justify why
4 we're forcing them to allow private process servers to
5 serve with less protection in the public than they feel is
6 appropriate.

7 MS. SWEENEY: Well, I think that may
8 highlight part of the problem with this idea, but, you
9 know, the Court when it makes rules doesn't go to Dallas
10 County and say, "You-all have some inconsistent local
11 rules. Would you please accept our rules anyway?" If the
12 Court has rule-making authority then it has it, and if it
13 doesn't then it doesn't, and if the Court has the
14 authority to write this rule, it does not need to kowtow
15 to local requirements. It can supersede them by rule.

16 If it has the authority to do this, which I
17 think if we start putting in substantive law requirements,
18 things like you have to have insurance, we are potentially
19 getting outside of the scope of the Court's rule-making
20 authority. But I disagree with the premise that in order
21 for the counties to permit the Court to exercise its
22 rule-making authority, the Court has to comply with the
23 counties' requirements, so I go back to the underlying
24 question, which is, is this something that by Court
25 rule-making should be part of a rule, and I don't think it

1 is.

2 CHAIRMAN BABCOCK: Richard's point I think
3 was not a matter of power. It was a matter of comity. I
4 mean, he did -- Richard, aren't you just saying that
5 politically Bexar County would be irritated with the Court
6 if they deviated from their standard?

7 MR. ORSINGER: Yes.

8 CHAIRMAN BABCOCK: Not that the Court can't
9 do it.

10 MR. ORSINGER: I think the Supreme Court has
11 the authority to completely eliminate private process.
12 They're the ones who gave it to us anyway. It's just a
13 question of, you know, why should we take a local practice
14 that the judges think is important to the integrity of the
15 judicial process and degrade it?

16 CHAIRMAN BABCOCK: Yeah. That's really the
17 issue that Paula is raising, is whether or not Bexar
18 County is right about that, whether insurance is important
19 to the integrity.

20 MR. ORSINGER: And Bexar County is not alone
21 in that, but there's only 3 out of 200 something that want
22 it, and they don't -- you know, if you're a judge and you
23 don't think it's appropriate or you don't care whether
24 there's insurance then you can sign orders all day long
25 for people to serve process out of your court with no

1 insurance.

2 CHAIRMAN BABCOCK: Bill.

3 PROFESSOR DORSANEO: How does the insurance
4 requirement contribute to the integrity of the process?

5 MR. ORSINGER: Well, you know, first of all,
6 if somebody has a really bad liability record, they're
7 going to have trouble getting insurance; and, secondly, if
8 there is insurance then if there's an injury that's caused
9 in the serving of process, when they're sued there's a
10 prospect that there will be some compensation for the
11 wrong.

12 PROFESSOR DORSANEO: Well, your first reason
13 is it serves as kind of a secondhand screening mechanism.

14 MR. ORSINGER: As a practical matter, it's
15 like having a fidelity bond on an employee. You know, a
16 bad employee can't get a fidelity bond, but even a good
17 employee who makes a mistake, there's a fidelity bond to
18 protect you if you're damaged.

19 PROFESSOR DORSANEO: What mistake would you
20 be talking about the process server making? Throwing it
21 away and then thereby harming the claimant who gets a
22 default judgment that's subsequently set aside?

23 MR. ORSINGER: You know, that's my biggest
24 fear, is that someone will not be able to effect private
25 service and will just leave it on the front step and then

1 sign a return saying that they have personal service.
2 Then there's a default judgment and then you're in there
3 on a motion for new trial, trying to set aside a default
4 judgment where you really didn't get personal service,
5 but --

6 PROFESSOR DORSANEO: Has there ever been any
7 kind of a claim against a process server on that basis
8 that's been filed?

9 MR. ORSINGER: Rick might know. He's with a
10 statewide organization.

11 MR. KEENEY: To my knowledge at this point
12 there has, not to my knowledge, been a claim, because I
13 think it has happened on several occasions with companies
14 or individuals that I know of, but they didn't have any
15 insurance, so there was no protection there.

16 PROFESSOR DORSANEO: How much would the
17 insurance cost?

18 MR. KEENEY: The insurance for the 300,000
19 costs around 500, about \$500 a year, which we're paying
20 about \$750 a year right now just to go through all these
21 administrative hoops that we're having to go through, plus
22 we have no insurance. So this is actually -- would be
23 cheaper on us to even afford the insurance and not have to
24 go through all the administrative expenses that we're
25 going through right now.

1 And we represent -- our association
2 represents individual companies and individual people that
3 are just one person process servers. They're one person,
4 so they know that in their county, like Lubbock and
5 Amarillo, they know in their county they can still -- with
6 this rule the way it is, they can still go to -- their
7 judge is not going to require them necessarily to have to
8 have the insurance because they know them. They know this
9 person. They know that he, you know, maybe is an
10 ex-constable or whatever, but they're going to go ahead
11 and sign that order for them allowing them only to serve
12 process issued there; and the insurance to me is something
13 only because of that the counties that do require the
14 insurance, if the papers are sent up here, they want to
15 make sure that whoever is serving their papers out of
16 Bexar County, Galveston, and Tarrant, whoever is serving
17 their papers, that if something does happen then there's
18 some protection; and that's why this insurance is in
19 there.

20 CHAIRMAN BABCOCK: Frank, Carl, Judge
21 Patterson, and then Linda.

22 MR. GILSTRAP: Richard, just a point of
23 clarification. Up in (1)(b) and in (5) and -- the first
24 line of (5) in (5)(a) you talk about "the court," and I
25 presume that's the court from which the process issues.

1 MR. ORSINGER: Exactly.

2 MR. GILSTRAP: Now, then later down in
3 (5) (b), Roman V, and (5) (b) Roman VI, you talk about the
4 continuing education course and the insurance policy being
5 approved by the -- a presiding district or county judge,
6 and that means anywhere in the state, right?

7 MR. ORSINGER: Yes.

8 MR. GILSTRAP: Okay. And I think -- you
9 might want to clarify that. I could see a judge saying,
10 "Well, (b) (V) and (b) (VI) means my court, and I've got to
11 approve the continuing education and approve the insurance
12 policy," and I could see how the intent of the policy
13 might -- the rule might be thwarted --

14 MR. ORSINGER: Yeah. I agree.

15 MR. GILSTRAP: -- by that kind of
16 construction.

17 MR. ORSINGER: This language is not finely
18 polished, and so these comments are very helpful. Let me
19 also say that under (VI), the last clause, which actually
20 comes out of some local language, the policies would be
21 directed to the presiding district or county judge. I
22 think that ought to be deleted, and we ought to just
23 provide for insurance, and the insurance should be paid to
24 whoever is entitled to receive it under law. So the
25 object here is to have the injured party be the

1 beneficiary of the insurance.

2 Now, I would like to ask this. Rick, when
3 you were talking about the cost of insurance, were you
4 talking about just the cost of liability insurance or the
5 cost of liability and errors and omissions or what?

6 MR. KEENEY: That's about the average cost
7 of both.

8 MR. ORSINGER: For both?

9 MR. KEENEY: Yeah, errors and general
10 liability.

11 MR. ORSINGER: And when you get insured in a
12 county do you get insured for both, or do some counties
13 just require liability and not error and omissions?

14 MR. KEENEY: Some counties do just require
15 general liabilities.

16 MR. ORSINGER: The error and omissions
17 policy -- and someone who knows insurance law better than
18 me correct me, but I think that that protects the lawyer
19 who hires the process server if there is some kind of harm
20 and the lawyer is sued for having hired the process
21 server.

22 MR. GILSTRAP: One follow-up on that, and
23 that you might continue over on the next page on (6)
24 you've got "a court" and then in (7) you've got "the
25 court," and again, it looks to me like all that -- you

1 need to clarify between the court issuing the process and
2 the court that's approving the process server, which are
3 two -- obviously intended to be two different courts or
4 could be two different courts.

5 MR. ORSINGER: Absolutely. I see what
6 you're saying.

7 CHAIRMAN BABCOCK: Carl, did you have a
8 comment?

9 MR. HAMILTON: Well, Richard may have
10 answered it. I was concerned about that "directed to the
11 presiding judge," and normally when someone requires
12 someone else to carry insurance they want to be a named
13 insured on the policy, but I don't know that that fits
14 here. We're not going to have the state as a named
15 insured, I wouldn't think, on the policy. It's just the
16 process server, and then I suppose that if he has a car
17 wreck serving it, that his general liability takes care of
18 that, too.

19 MR. ORSINGER: You know, we need to have
20 somebody that understands insurance law real well look
21 closely at this sentence because the object of the
22 sentence is to make this insurance coverage available to
23 the people who may be injured or to the lawyer who hires
24 the private process server. We want to be sure it does
25 that, and I am not confident totally myself that it does.

1 CHAIRMAN BABCOCK: Judge Patterson had her
2 hand up.

3 HONORABLE JAN PATTERSON: Well, that was one
4 of my questions, is whether the E&O would cover the lawyer
5 and whether we want to do that or the lawyer should do
6 that otherwise, but the other question is I gather this
7 contemplates annual recertification?

8 CHAIRMAN BABCOCK: Yeah. I wondered when
9 the passport expired.

10 HONORABLE JAN PATTERSON: Well, it
11 contemplates verification for the last 12 months, and I
12 presume that you would have to have some showing of
13 current insurance if you do this. So it implicitly, I
14 think, contemplates an annual recertification, but I don't
15 think it speaks to that.

16 CHAIRMAN BABCOCK: Doesn't say that.

17 MR. ORSINGER: Sure doesn't.

18 MR. KEENEY: If I could make a comment,
19 Bexar County, they're sort of the lead right now in this
20 licensing. Their judges issue the orders based on your
21 insurance, so when your insurance expires your order
22 expires, and then that way it's easy for the process
23 servers to know their orders expire on the day of their
24 insurance. So when they renew their insurance policy then
25 they have to renew their order. SO just to simplify

1 things, that way the judges are making sure that the
2 server actually currently has a policy in effect.

3 HONORABLE JAN PATTERSON: Right, but then do
4 you have to have some proof of fingerprinting by the DPS
5 also with that?

6 MR. KEENEY: Yeah. What we have to do in
7 Bexar County currently is every year that we renew we have
8 to submit a new criminal history checks every year. So
9 when our policy is renewed, our license expired, we have
10 to submit them our new insurance policy as well as another
11 criminal history check.

12 CHAIRMAN BABCOCK: Yeah, Richard, that makes
13 some sense to me.

14 MR. ORSINGER: Sure it does.

15 CHAIRMAN BABCOCK: Paula, Linda had her hand
16 up a long time go, and then you.

17 MS. EADS: Let me ask you, sir, if you have
18 this passport requirement so that you could -- if
19 everything was in there except the insurance provision --

20 MR. KEENEY: Yes.

21 MS. EADS: -- and let's assume there's no
22 county who is going to cause you a problem with that.

23 MR. KEENEY: Okay.

24 MS. EADS: Would you prefer that system, or
25 would you still want an insurance requirement?

1 MR. KEENEY: Well, as business practice, as
2 me being a businessperson, I'm going to carry the
3 insurance anyway because I'm liable, so to answer your
4 question --

5 MS. EADS: But I'm talking now in your role
6 as a representative of the organization.

7 MR. KEENEY: Well, I went and met with the
8 Texas Department of Licensing when we were trying to get
9 this through legislation, and they suggested that -- you
10 know, they're looking out after the public. So they said
11 if you're out there serving papers, what could happen
12 while you're out there serving papers and we looked and
13 they compared us to the air-conditioning people because
14 air-conditioning people were out in people's houses. And
15 they said after intense studies or this we require the
16 air-conditioning people to carry \$300,000 worth of
17 insurance, and that's currently what they compared us to
18 and use us as an example.

19 And they said, "If we license you, we would
20 want you-all to carry \$300,000, a, because the worst thing
21 we could think of is you're driving up to go serve
22 somebody, you pull in the driveway, and your process
23 server runs in the driveway and possibly injures a child
24 or hits somebody," and the current automobile policy I
25 think is \$50,000, and that would not be enough money. So

1 they were looking at, you know, what they felt to protect
2 the public, and this is what they come up with.

3 So somehow -- this was several years ago,
4 three or four years ago. I don't know where Bexar County
5 came up with the 300,000, but to us we think it's fair
6 based on the information that we've been given.

7 CHAIRMAN BABCOCK: Paula. I'm sorry, Rick.
8 Were you done?

9 MS. SWEENEY: And did you say that you-all
10 tried to reach this result through the legislative process
11 and were unsuccessful?

12 MR. KEENEY: We've tried for -- I've
13 personally tried for 15 years to get this through the
14 legislative process.

15 MS. SWEENEY: And I think that makes my
16 point, and I appreciate what you're trying to do, and this
17 is not in any way a personal comment, but something that's
18 been tried for 15 years in the Legislature to then come to
19 the Court Rules Committee and ask the Supreme Court to do
20 it by rule-making authority is exactly the kind of thing
21 that we have to be wary of and not do on this committee,
22 and I suggest that the Court ought not to be in the
23 business of legislating and of passing statutes that the
24 Legislature itself is unwilling to pass. That is not the
25 purview of the Court rule-making authority and nor would

1 it be for the Court to determine by rule-making authority
2 that the minimum limits that the Legislature has set for
3 automobile liability insurance are too low and should be
4 raised.

5 The Court cannot or has not by rule-making
6 authority mandated that lawyers have E&O coverage. If
7 we're going to do this, I'd like to amend some statutes to
8 require some specific limits for physicians. There are a
9 lot of uninsured doctors in this state that can hurt
10 people a lot worse than a process server can, and I think
11 that we are running into a situation where we've had a
12 failure in the Legislature for whatever reason -- I don't
13 know what that reason is, but I don't think that the
14 purview of the Court's rule-making authority extends to
15 writing these kinds of already rejected legislative
16 packages.

17 CHAIRMAN BABCOCK: Of course, if the
18 Legislature rejected it because they thought it was more
19 appropriately done by the Supreme Court by rule then that
20 would be --

21 MS. SWEENEY: I'll bet we'll find that if we
22 go look.

23 CHAIRMAN BABCOCK: Judge Lawrence.

24 HONORABLE TOM LAWRENCE: There's no
25 exception in this. In other words, either the constable

1 or sheriff signs it or somebody with this passport signs
2 it. The judge can't let someone else do it, correct?

3 MR. ORSINGER: Yes. No. Under (5)(a) the
4 judge can let anybody do it on whatever terms that judge
5 sees fit.

6 HONORABLE TOM LAWRENCE: Okay.

7 MR. ORSINGER: They could meet none of these
8 requirements. They probably have to be at least 18.

9 MR. YELENOSKY: In that judge's
10 jurisdiction, though.

11 MR. ORSINGER: For process issued out of
12 that court. If the process is from Houston -- if that
13 judge is, say, in El Paso and the process comes in from
14 Houston for service in El Paso County, the El Paso judge
15 can't give this person the authority to serve that
16 process.

17 HONORABLE TOM LAWRENCE: Yeah.

18 MR. ORSINGER: It's the court that issued
19 the process who reaches out across the state and decides
20 what standards apply to service.

21 HONORABLE TOM LAWRENCE: Because it may not
22 be a big problem with 103, but when we get to 536 there
23 may be some smaller counties that there might not be very
24 many people in that county that would have this passport.

25 MR. ORSINGER: That's why I think this is

1 such a good compromise because under (5) (a), I mean,
2 probably 18 years of age is probably something that may be
3 required. I don't know. Maybe, maybe not, but the rest
4 of these are probably waivable. Maybe you have to be a
5 U.S. citizen, maybe not.

6 MR. LOW: Chip, I see this as issuing a
7 license, just like certain groups are issued license to do
8 certain things, and I agree with Paula, because to say
9 that the court may give you an identification card showing
10 these things, I mean, for how long, under what all
11 requirements. I think this is -- when the court gives an
12 order for a specific case, that's one thing, to have
13 somebody served; but when a court gives a license, I think
14 that should come from the Legislature.

15 MR. GILSTRAP: We've all got a license from
16 the Court.

17 MR. LOW: Well, we've got one, but --

18 MR. GILSTRAP: And we're officers of the
19 court, just like these guys are officers of the court. I
20 mean, I don't know that that concept really flies, Buddy.

21 MR. LOW: Well, I didn't ask that you agree.
22 I just --

23 MR. GILSTRAP: I know.

24 CHAIRMAN BABCOCK: Alex and then Stephen and
25 then John and then Rick.

1 PROFESSOR ALBRIGHT: But it's true that now
2 each court gives a license to certain people to serve
3 their process, so we now have 254 licensing entities; and
4 then the Supreme Court through local rules okays all the
5 rules that they have, the local rules they have for each
6 of their different licensing requirements; and so all
7 we're doing is just saying, you know, the Supreme Court is
8 going to have one blanket license that if you're
9 interested you can do that; but the Supreme Court doesn't
10 want to be the one to sign off on it.

11 But one question I have, okay, if I'm in
12 Brewster County, and I say I want to let anybody who's
13 just over 18 serve any process in the state of Texas, I
14 mean, the way I read (7) is that then by letting any
15 person who's over 18, assign everybody in the county over
16 18 who wants to be a process server, and they can then
17 serve process for any court anywhere in the state?

18 MR. KEENEY: No.

19 JUSTICE HECHT: That court.

20 MR. KEENEY: That was a change. (7) should
21 be (5) (b).

22 MR. YELENOSKY: (7) reads -- earlier is
23 wrong.

24 PROFESSOR ALBRIGHT: Oh, okay.

25 MR. YELENOSKY: (1) (b) is an error on all of

1 these. Where it says (1)(b) in (7) it should be (5).

2 CHAIRMAN BABCOCK: Stephen.

3 MR. YELENOSKY: I'm wondering, the thing
4 that makes this licensing and arguably makes it
5 legislation is the provision in (7) that says a person
6 who's complied with (5)(b) gets to serve anywhere in the
7 state and that regardless of what the court where they're
8 serving might think, and I'm wondering if you-all had
9 attempted to do this through some voluntary system that
10 basically allows you to explain to an unfamiliar judge
11 that you have certain qualifications that would then cause
12 that judge to issue an order allowing you to serve process
13 there. You would still have to go through the order
14 process, but you would have something that judges
15 throughout the state could if they choose recognize as an
16 indication of reliability.

17 MR. KEENEY: Well, currently that system
18 does exist, and that's what this would do. Currently
19 there's nothing in the current law that allows a specific
20 judge to look at certain requirements because there's no
21 standard requirements to allow us to say, "We're going to
22 give you a blanket order." In terms of licensing we are
23 being licensed in essence right now through Rule 103.
24 I've got four I brought with me, but I have four ID cards
25 from four different counties.

1 To get these four ID cards and the many
2 others I have, I had to go and submit a criminal history
3 check four different times. I had to drive down to
4 Houston and go through their seminar. Then I had to go to
5 Dallas and go through their seminar. Then I had to go to
6 Bexar County and provide the insurance, so I basically had
7 to do this already. So what we're wanting to do is
8 standardize this and only have to do it once instead of
9 having to do it in every county.

10 MR. YELENOSKY: And it seems to me it would
11 be in everybody's interest to do it -- to agree to some
12 standards.

13 MR. KEENEY: Exactly. That's exactly right.

14 MR. YELENOSKY: But, but, the concern here
15 is that we're dictating what that standard is, and
16 apparently the judges across the state either haven't
17 attempted or it can't easily be done that you-all agree to
18 some standard for what would lead to approval of service
19 in those counties.

20 MR. KEENEY: To my knowledge, what happened,
21 I believe Chris did send out a letter to all the top 20
22 counties, and that's where these requirements had come
23 from. So that's already been done. But what happened,
24 the letter went out. All the counties said, "This is what
25 we require." They came up with the max requirement.

1 So, number one, there's a max requirement,
2 and that's what you're looking at.

3 MR. YELENOSKY: Okay.

4 MR. KEENEY: So as long as we have the max
5 requirements of all the counties, that was step one. The
6 second step then basically would be in situations where
7 you have a small county where someone would not have to
8 meet those qualifications, the judges still wanted the
9 authority to be able --

10 MR. YELENOSKY: No, I understand that.

11 MR. KEENEY: So that was accomplished also
12 in this rule. The second thing the judges wanted was a
13 way of verification under Rule 103. They wanted to know
14 that somebody was actually authorized to serve this, and
15 by attaching a copy of the written order to that return of
16 service, that would be prove that they were actually
17 authorized to serve. So all three of those have been met.

18 MR. ORSINGER: Chip, excuse me.

19 MR. LOW: Has anybody identified a problem
20 of people having getting things served? I mean, has it
21 been a problem for the lawyers? I have heard problems of
22 a group that are interested in a business situation, but
23 what about problems of the litigants getting their papers
24 served?

25 CHAIRMAN BABCOCK: At what point in time are

1 you talking about, Buddy?

2 MR. LOW: I'm talking about any time.

3 CHAIRMAN BABCOCK: Well, at the time that
4 this industry of private process servers was created there
5 was lots of problems getting served.

6 MR. LOW: No, I'm talking about any time
7 since the rules have been amended. I'm talking about not
8 just the last several years. I don't know. Maybe I just
9 don't have a lot of problem.

10 CHAIRMAN BABCOCK: Well, you're such a big
11 deal in Beaumont that of course they get them served for
12 you.

13 HONORABLE JAN PATTERSON: Well, we examine
14 rules that are onerous for lawyers and other users of the
15 system, so if the rules are onerous I think there's a good
16 reason to examine it.

17 CHAIRMAN BABCOCK: Yeah. Linda.

18 MS. EADS: Going back to this question of
19 insurance and the Legislature, you know, as I understand
20 what you told me, is that you talked to some people and
21 they said air-conditioning people have to have \$300,000 of
22 insurance; but, you know, that's exactly what the
23 legislative process is about. My first reaction is that
24 you're not in the same risk as an air-conditioning
25 service. You're not in the home as long. You're not

1 bringing in heavy equipment. I mean, I might be wrong,
2 though. Maybe you have -- I am not not an actuarial, and
3 so I don't know what the standard is.

4 I'm real suspicious when insurance companies
5 set the standard, and, I mean, that's why we have the
6 Department of Insurance. That's why we have legislation,
7 and we have committee hearings, and we have fact-finding
8 in the Legislature. So, I mean, this 300,000-dollar limit
9 may be really unfair to your group, and we have no way as
10 a body sitting here to know that or not. You know, I
11 mean, you say it's only \$500, but I'm sure in a small
12 county out in West Texas that's a lot of money for a
13 process server to have to come up with for that insurance.

14 So, I mean, I just -- I feel really
15 uninformed on this issue. I mean, I don't know how I get
16 that information here. That's not what we're constituted
17 to do.

18 CHAIRMAN BABCOCK: Richard.

19 MR. ORSINGER: I think this mechanism is not
20 sufficiently clear because these problems are not any
21 greater under this rule than they are under the current
22 practice. In fact, the problems are less. If somebody
23 can't afford insurance then they can't serve process
24 issued out of three counties today. If we put this rule
25 in place they have the same problem. They're not going to

1 get process out of Tarrant County and Galveston County and
2 Bexar County without insurance.

3 MS. EADS: Let me ask you this, Richard --

4 MR. ORSINGER: It won't make it any harder
5 or any easier for them.

6 MS. EADS: Can we recommend to the Court
7 that they review the local rules of these three counties
8 to decide whether or not that is a requirement that the
9 Court wants to impose?

10 MR. ORSINGER: Sure we can, but I think this
11 whole issue of judicial authority is a false issue. If
12 somebody is saying -- sitting here saying this is a
13 legislative issue and it's not for the courts, well, let
14 me just tell you something. The courts are doing it right
15 now.

16 MR. KEENEY: Piecemeal.

17 MR. ORSINGER: On the local basis, on a
18 vulcanized basis. Every court has its own idea. The
19 courts have stepped into the breach, and they are
20 monitoring the integrity of their legal process issued out
21 of their court, and under separation of powers, as far as
22 I'm concerned, I think the Legislature doesn't have the
23 authority to regulate this and the Supreme Court does.

24 But whether we're right or wrong at the
25 theoretical level, at a practical level we do have

1 proactive courts that are putting licensing in place on a
2 county by county basis; and the question is, can we get
3 some uniformity here? Steve is saying we can get
4 uniformity by getting a consensus among 256 counties. I
5 don't know how many years that would take.

6 PROFESSOR DORSANEO: Some from New Mexico.

7 MR. ORSINGER: But it seems to me that what
8 we're saying is, okay, we're going to have to do something
9 because the Court has to protect the integrity of their
10 process; and instead of having every court do it
11 differently we're going to have a standard that a person
12 can meet which meets or exceeds every local standard; and
13 so no locale can complain that it's too low, but if some
14 locale thinks it's too high, they can issue an order that
15 doesn't require insurance and process can be served all
16 over the state from those courts without insurance. Who's
17 harmed?

18 CHAIRMAN BABCOCK: Let me say, too -- Alex,
19 could I just say something? On this issue of whether the
20 Court has rule-making authority, I think it's an important
21 discussion. I think it's good to inform the Court what
22 the various members of this committee feel, but the Court
23 has asked us for a rule, so, you know, we can have a vote
24 on whether or not we think the rule ought to be
25 implemented because they don't have rule-making authority,

1 but it does seem to me we're pretty far down the road in
2 having created the industry and now having approved -- the
3 Court having approved local rules that require insurance
4 and other things.

5 So we're going to do a rule, but I think
6 it's an important discussion to have whether or not some
7 people or maybe a majority of our group thinks it exceeds
8 the Court's rule-making authority. I don't happen to
9 believe so, but other people do. Paula.

10 MS. SWEENEY: I am not suggesting the Court
11 doesn't have the authority to regulate process servers,
12 but I think once you start getting over into the
13 substantive area of law of requiring insurance coverage
14 that that's where you've stepped across the line; and, you
15 know, they don't even require lawyers to have insurance,
16 for crying out loud, who I do think they have the
17 authority to regulate.

18 CHAIRMAN BABCOCK: Gotcha. Alex and then
19 John. Sorry for going out of order.

20 PROFESSOR ALBRIGHT: The way I heard Linda's
21 comment and I think maybe Paula's issue as well, it seems
22 like it's the Supreme Court and we can recommend to the
23 Supreme Court just because two, three counties have
24 decided to impose insurance requirements doesn't mean we
25 have to. I mean, those counties could continue to do

1 that, but for us to impose it on all the other counties,
2 we may say that's just not a good idea.

3 CHAIRMAN BABCOCK: Oh, that's totally
4 legitimate for us to talk about, for sure.

5 MR. ORSINGER: But we aren't imposing it.
6 Somebody explain to me how this rule imposes anything.

7 PROFESSOR ALBRIGHT: Yeah. Because what it
8 does is we're saying if you want this passport, which
9 we're saying is a good thing to have, you have to have
10 \$300,000 of insurance. We can say, we think, you know,
11 you should -- to get a passport you have to do all of
12 these things, but we don't think you need \$300,000 of
13 insurance.

14 MR. ORSINGER: Well, then you are imposing
15 something. You're imposing the passport on the three
16 counties that require insurance.

17 MR. YELENOSKY: Right. And she's saying
18 that's fine, though.

19 PROFESSOR ALBRIGHT: Right. Yeah. I'm
20 saying, so what?

21 MR. YELENOSKY: So what?

22 MR. ORSINGER: Well, wait a minute. I
23 thought you were trying to stop imposing requirements on
24 these people.

25 MR. YELENOSKY: No.

1 CHAIRMAN BABCOCK: John's had his hand up
2 for a long time. John.

3 MR. MARTIN: Well, I'm not sure whether the
4 insurance ought to be required or not, but if you're going
5 to require it, the way this is written somebody could
6 apply, show their insurance that day, and then cancel it
7 the next day and be in compliance with the rule. So you
8 need to make it a continuing requirement that they
9 maintain it in effect for as long as they hold the license
10 or passport if you're going to have it in there.

11 CHAIRMAN BABCOCK: Yeah, Bill, and then --
12 Bill Dorsaneo and then Bill Edwards.

13 PROFESSOR DORSANEO: It seems to me that the
14 insurance requirement could be made a local option. I
15 don't see anything wrong with that, and I don't see
16 anything wrong with a rule saying that, and that might
17 help some of the counties that don't have any requirements
18 to develop whatever requirements are suitable locally.

19 With respect to the other things in our
20 current rule, 103 is really not a very good rule. I mean,
21 this part of the rule book was -- last time we worked on
22 it was not given the kind of treatment it probably
23 deserved. We're talking about in terms of what the rule
24 says now, not less than 18 years of age and no person who
25 is a party to or interested in the outcome of the suit

1 shall serve the process. I guess we probably more or less
2 know who a party is, although that could be a term of art.
3 Who's interested in the outcome of the suit is a very
4 debatable point as to what the rule means.

5 I think what we should do, if we're
6 concerned about imposing clearer requirements, is to go
7 down the list of (1), (2), (3), (4), (5), and (5)(b) and
8 to see if we can agree that those are good requirements.
9 I think that they probably are good requirements, and I
10 don't have any problem having them imposed. You know, at
11 least (1), (2), (3), (4) generally.

12 I don't really like the idea of saying that
13 we have a set of requirements, but if a district or county
14 level judge doesn't want to go by the requirements and
15 wants to appoint, you know, his brother-in-law to do that,
16 I mean, I don't like that exactly. I just don't -- there
17 ought to be more requirements than 103 now provides. I
18 don't think the insurance requirement is one that ought to
19 be mandatory, but that's for local conditions and local
20 people to say, so it seems to me. So that's what I'd like
21 to do, is say what can we agree on instead of what can we
22 not agree on?

23 CHAIRMAN BABCOCK: Bill Edwards, you had
24 your hand up.

25 MR. EDWARDS: Well, I was going to raise

1 what Alexandra raised, that, you know, for us to be driven
2 by what one county decides is good for a statewide process
3 doesn't sound good to me. I think if the Supreme Court is
4 going to put some kind of requirement, it ought to be one
5 that they determine is appropriate, not what Bexar County
6 makes appropriate, and this imposes on everybody that
7 wants a statewide, quote, "passport," end quote, the Bexar
8 County requirement.

9 CHAIRMAN BABCOCK: Yeah, Richard, that's a
10 good point. I mean, you're putting this in here because
11 you're trying to avoid Bexar County or Galveston County
12 being irritated at the Court for providing a lower
13 standard, lower threshold than what they currently
14 require. Are they really going to be all that bent out of
15 shape?

16 MR. ORSINGER: I don't have any idea. I
17 mean, this is a theoretical solution to a possible -- let
18 me point out also that I don't think Bexar County has a
19 CLE requirement, but Dallas County does. I mean
20 continuing education requirement. So it's not just the
21 insurance in here. We're also picking up the counties who
22 require that you attend a course, so what we're trying to
23 do is pick up all the ideas of all the counties; and, yes,
24 we don't have to do it this way; but the nice thing about
25 this solution is, is that if -- nobody is forced to take

1 process on lesser standards than they feel is appropriate,
2 but they are permitted to establish lesser standards if
3 they want to, so that's -- but, you know, if that's not
4 going to fly then it doesn't fly.

5 MR. EDWARDS: They can't establish lesser
6 standards and issue a statewide passport.

7 MR. ORSINGER: That's right, but their only
8 concern really is the process in their court. If they
9 don't like this passport then to heck with the passport.

10 MR. EDWARDS: This imposes on the process
11 server that's going to serve in Iraan and the five
12 surrounding counties the necessity of carrying \$300,000 of
13 insurance. Is that necessary?

14 MR. GILSTRAP: No. He can get it from the
15 county. He can get approval from those counties.

16 MR. EDWARDS: Each one, each one. And how
17 many process servers are there? I hear there are 350
18 companies that are pushing this. How many process servers
19 are there? Thousands? That are not members of that
20 association that are going to have to go out and -- who
21 are apparently doing an adequate job and are going to have
22 to go out and pay \$500 a year for \$300,000 worth of
23 insurance.

24 MR. GILSTRAP: No, Bill. They can go out
25 and do what they have been doing. They can go out and go

1 to the courts and get approval from those courts.

2 MR. KEENEY: Right.

3 MR. EDWARDS: Well, I understand that, but
4 you're giving an advantage to 350 companies who go out and
5 get the insurance. They can go anywhere and then you've
6 got a group that are disadvantaged, to my way of thinking.

7 PROFESSOR ALBRIGHT: But see, but, Bill, in
8 Iraan right now, the guy in Iraan who only has the
9 permission from that county can only serve that county's
10 process.

11 MR. EDWARDS: I understand that, but I'm not
12 suggesting -- I am not suggesting that there's anything
13 wrong with a statewide passport, so to speak, but I am not
14 sure that we can sit here and decide that \$300,000 is the
15 proper amount --

16 PROFESSOR ALBRIGHT: Right.

17 MR. EDWARDS: -- just because Bexar County
18 says \$300,000.

19 PROFESSOR ALBRIGHT: Yeah. I agree with
20 that.

21 MR. EDWARDS: And I'm saying that we
22 shouldn't deny a statewide passport on a 300,000-dollar
23 deal.

24 CHAIRMAN BABCOCK: Skip.

25 MR. WATSON: I agree with Bill and I agree

1 with Richard. It's obvious we're hung up on the
2 insurance. It's obvious that Bexar County could decide to
3 raise theirs to 500,000 and our 300,000 is then out of the
4 loop. I would suggest on the insurance that we just back
5 up and say -- punt it back to the Legislature and the
6 counties and say "and such insurance as may be required by
7 law" and move on.

8 CHAIRMAN BABCOCK: Well, if you do that then
9 what about the local rules that the Court has already
10 approved?

11 MR. EDWARDS: They can disapprove them.

12 MR. WATSON: They can either disapprove them
13 or if you want to go into Bexar County you better get your
14 300,000. I mean, I think the de facto law of it is people
15 will get 300,000, if they want a statewide practice, and
16 it will be 300,000 statewide, but for us to pick a number
17 and put that in a rule to me seems short-sided because
18 that number itself is going to be a moving target. It is
19 going to change.

20 MR. YELENOSKY: So the passport would be
21 good except where those counties have an additional
22 requirement of insurance.

23 MR. WATSON: Yeah, or unless they wanted to
24 go out and get the additional insurance that's required by
25 law in some other county.

1 MR. GILSTRAP: No, no. No. Once this rule
2 is enacted and Bexar County raises it to 500,000, it's too
3 bad. You can still go under your passport and your
4 300,000 -- based on \$300,000 and serve process in Bexar
5 County, am I correct?

6 MR. YELENOSKY: But not under what he's
7 proposing.

8 HONORABLE JAN PATTERSON: Not in his
9 proposal.

10 MR. WATSON: Not under what I'm proposing.
11 I mean, your argument goes back with what Paula was
12 saying, is that that's fine, but are we really in the
13 business of setting the amounts based on freon escaping
14 into the air, and that's -- you know, I agree with that.
15 What we need to do is just say, you know, if there's an
16 insurance requirement, make that insurance as set by law;
17 and if people want to go into those counties that have
18 that, I'm sure the folks of this association will figure
19 out that 300,000 is the number, that if they want to do it
20 buy 300,000. That's good statewide, but we haven't
21 written a number into the rule.

22 CHAIRMAN BABCOCK: Ralph.

23 MR. DUGGINS: I like Alex's idea of just
24 going through this (5) -- what is it (5)(b), these six
25 items and determining --

1 MR. ORSINGER: That's Bill's idea.

2 PROFESSOR DORSANEO: That's my idea. It may
3 also be Alex's idea.

4 MR. DUGGINS: Well, I like Alex's idea.
5 Just because one county --

6 PROFESSOR ALBRIGHT: I started the concept.

7 CHAIRMAN BABCOCK: She was thinking hard
8 about it.

9 MR. DUGGINS: That because one county
10 believes that insurance is necessary doesn't mean that
11 that should be required, and simplify it, eliminate the
12 insurance requirement. I mean, Bexar County may not think
13 that's wise, but it may be that the Court and this group
14 thinks it is, and so why couldn't we just go through that
15 list and determine which are really fundamental and
16 important to the integrity of the process and say, "That's
17 the passport requirement, and even though you don't like
18 it, that's the requirement."

19 CHAIRMAN BABCOCK: Bobby. I'm sorry.

20 MR. DUGGINS: One other thing I wanted to
21 ask, and I wanted to ask Richard is it -- did the
22 committee give any consideration to the Federal equivalent
23 that allows attorneys to serve a summons and complaint?

24 MR. ORSINGER: No.

25 MR. DUGGINS: I think we ought to do that.

1 MS. SWEENEY: I'm not sure we can meet these
2 requirements.

3 CHAIRMAN BABCOCK: Some of us anyway. Frank
4 and then Bobby had his hand up.

5 MR. GILSTRAP: First of all, insofar as the
6 Court's power, if the Court passed a rule saying that to
7 be a lawyer you've got to be 18 years of age, you've got
8 to attend continuing legal education classes, and you've
9 got to have insurance, I think it would probably be within
10 their power; and I sure don't see why they can't also do
11 the same thing for people that serve processes out of
12 court.

13 In so far as the legislative process, in
14 theory they may have more fact-finding powers, but in fact
15 if these people had succeeded in front of the Legislature
16 they would have simply gotten the political muscle to come
17 in in front of some committee, have this same discussion,
18 the committee would say "fine," and they wouldn't do any
19 more than that. It would go on to the Legislature and get
20 passed, and so this is really a politically astute way to
21 deal with the problem. It's not going to ruffle anybody's
22 feathers. Nobody can complain that the standards are too
23 low. Once it's done, it's in place, it's going to work,
24 it's going to allow these people to do business statewide,
25 and at the same time the people who are already in

1 business locally won't be able to complain. I just don't
2 see what the problem is. It seems like it solves the
3 problem and doesn't create any.

4 CHAIRMAN BABCOCK: Bobby.

5 MR. MEADOWS: Well, I think it's advisable
6 to have this passport, this uniform process, and the
7 insurance does seem to be the pick-up on it, but it seems
8 to me the way we're looking at it now is we're going to
9 have -- we're talking about a statewide process passport
10 that we're going to permit counties to hop out of if they
11 want to impose something that's more strict, and right now
12 -- is that what you're saying, is that we're going to
13 establish something that we think is appropriate, probably
14 with no insurance, but we're going to allow counties to
15 impose stricter standards --

16 MR. YELENOSKY: But only with respect to
17 insurance.

18 MR. MEADOWS: Well, I mean, that may be
19 where we end up, but I suppose you could impose it a
20 different way.

21 PROFESSOR ALBRIGHT: You're talking about
22 (5) (a). So I could go -- I think they could impose less
23 restrictive --

24 CHAIRMAN BABCOCK: Right. (5) (b) is the --

25 MR. YELENOSKY: No, he's not talking about

1 (5) (a) because he's talking about the passport. (5) (a) is
2 the current system. What you're saying is that under
3 (7) (a) the person would be able to serve in any state
4 court, provided that they have met the requirements of
5 (5) (b) and any insurance requirement of the court --

6 MR. MEADOWS: Right.

7 MR. YELENOSKY: -- where they're serving
8 citation, and if we said that, it would limit the opt out
9 to a higher insurance requirement.

10 MR. MEADOWS: Right.

11 PROFESSOR ALBRIGHT: Well, that's Skip's
12 idea.

13 MR. YELENOSKY: Right.

14 PROFESSOR ALBRIGHT: I think some of us are
15 saying just throw out the insurance altogether.

16 CHAIRMAN BABCOCK: Well, let me just -- let
17 me have a sense of the committee because we're not going
18 to finish this rule today, and, in fact, we're about to
19 move on to FED. Let me just have a sense of the
20 committee. How many people want the insurance provision
21 of (5) (b), Roman numeral (VI), six, I guess, either
22 deleted or modified in some way? Raise your hands.

23 MR. EDWARDS: What was the question? I'm
24 sorry.

25 MS. SWEENEY: Raise your hand.

1 MR. WATSON: Raise your hand, Bill.

2 CHAIRMAN BABCOCK: Yeah, you'd probably
3 prefer --

4 MR. YELENOSKY: He's his own man.

5 CHAIRMAN BABCOCK: How many like it the way
6 it is?

7 PROFESSOR DORSANEO: Could you do that
8 again, please? We were talking and --

9 CHAIRMAN BABCOCK: Well, you were bad.

10 MR. ORSINGER: Bad boys. Go sit in the
11 corner.

12 PROFESSOR DORSANEO: I still would like to
13 know what the vote was on.

14 CHAIRMAN BABCOCK: I will repeat it in a
15 second. The people that liked it the way it is?

16 12 to 4 is what the sense is, and what we
17 were voting on, Bill, was --

18 MR. EDWARDS: I voted on the first one, so
19 13.

20 CHAIRMAN BABCOCK: Yeah, you voted for the
21 first one.

22 PROFESSOR DORSANEO: 14. I think I got the
23 sense of it.

24 CHAIRMAN BABCOCK: So I counted Bill's, so
25 you're now -- so it's 13 to 4 have some problem with the

1 insurance. So you're going to have to go back and figure
2 out a different way to do the insurance.

3 MR. LOW: I might have more problems than
4 just that.

5 MR. ORSINGER: Do we feel the same way about
6 the continuing education requirement, which is equally --

7 CHAIRMAN BABCOCK: Yeah, let's talk a little
8 bit about that.

9 MR. ORSINGER: -- spotty around the state?

10 CHAIRMAN BABCOCK: Yeah, Ralph.

11 MR. DUGGINS: I thought you were going to
12 take a vote. I was going to say I would vote the same
13 way, to drop that. I don't like it.

14 CHAIRMAN BABCOCK: Well, let's talk about
15 that a little bit. We haven't talked about the CLE part.

16 MS. SWEENEY: CLE? CPSE. You know, the
17 analogy that someone made a minute ago, that Bobby made a
18 minute go, that the Court can regulate lawyers; therefore,
19 it can regulate process servers, I am just not willing to
20 sit here and accept. I think the Bar is different than
21 the brotherhood of process servers, and I think we
22 historically have been different, and we are under the
23 authority of the Supreme Court as lawyers, but I don't
24 think that you can say just because the Court can require
25 lawyers to X, Y, or Z, that it can, therefore, write this

1 kind of statewide legislation for the process servers, and
2 I have the same problem with CLE or CPSE as I do with
3 insurance.

4 MR. YELENOSKY: But insurance aside, private
5 civil process servers would not exist but for Supreme
6 Court rule; therefore, I think they can impose a CLE
7 requirement on process servers.

8 CHAIRMAN BABCOCK: Aren't they regulating
9 them now under Rule 103?

10 MR. KEENEY: Yes.

11 MS. SWEENEY: Do they make you do continuing
12 ed. now?

13 CHAIRMAN BABCOCK: No, but --

14 MR. KEENEY: Just certain counties. Here we
15 go again with certain counties, same way.

16 MS. SWEENEY: Same deal?

17 CHAIRMAN BABCOCK: Yeah, but I'm talking
18 about the Supreme Court rule. I mean, we're just talking
19 the degree to which they regulate them, not the fact that
20 they can't regulate them, because I'm reading the current
21 rule, and it's got certain requirements they've got to
22 meet. They've got to be over 18.

23 MR. KEENEY: Yeah.

24 CHAIRMAN BABCOCK: Can't be related. That's
25 regulation. Not much regulation, but it's some.

1 MR. ORSINGER: The trial courts are
2 regulating them now already. So we're doing nothing but
3 regulating on a local basis.

4 CHAIRMAN BABCOCK: It seems to me that once
5 you accept the proposition that you're going to have
6 private process servers, somebody other than a state or
7 government employee, then you've got to have some
8 standards because you can't have a bunch of thugs going
9 out to people's house under the authority of the court,
10 you know, breaking in to hand process or beating somebody
11 up.

12 I mean, that's where I see a lot of the
13 problems, because if you have somebody who is evading
14 service and so you have somebody who has got to be real
15 aggressive trying to find them and they get in a fight or
16 the process server, you know, runs him down, or is alleged
17 to have run them down, and you've got to have some
18 standards or you've got to be sure your people serving
19 your court papers aren't inappropriate people, and just
20 being over 18 strikes me as somewhat of a minimum
21 standard.

22 MR. EDWARDS: It's good enough for the
23 Federal government.

24 CHAIRMAN BABCOCK: Huh?

25 MR. EDWARDS: That's good enough for the

1 Federal government. Rule 4 says -- 4(c) of the Federal
2 rules says "a summons shall be served" -- I'm sorry,
3 4(c)(2), "Service may be effected by any person who is not
4 a party and who is at least 18 years of age," period.

5 MR. LOW: Right.

6 MR. EDWARDS: It's the Federal rule. Has
7 anybody heard of any great problems in the Federal system
8 about the use of that rule? I've never heard of a single
9 problem in the Federal system as a result of that rule.

10 MR. GILSTRAP: That would solve a lot of the
11 problem, just impose a statewide standard like that, and
12 to heck with the Bexar County rules.

13 MR. DUGGINS: That's what I was --

14 MR. EDWARDS: I mean, that's what theirs is.

15 MR. ORSINGER: So anybody that's 18 can
16 serve process?

17 MR. EDWARDS: In Federal court. There it
18 says.

19 MR. ORSINGER: Well, I know, but let me tell
20 you something. There's a big difference between the kind
21 of cases you get filed in Federal court and the kind of
22 cases that get filed in state court.

23 MR. LOW: They don't serve them different,
24 do they?

25 MR. DUGGINS: Yeah, they do.

1 MR. ORSINGER: They do serve them different,
2 and Ralph was suggesting lawyers should be able to serve
3 them.

4 CHAIRMAN BABCOCK: You've got these consent
5 deals in Federal.

6 PROFESSOR DORSANEO: Yeah. Federal system
7 has a whole different mechanism for doing service in the
8 ordinary course of events, so it's ordinarily done by --
9 not done by somebody going and physically serving process.

10 CHAIRMAN BABCOCK: Yeah. Yes, sir? Could
11 you identify yourself so that the court reporter gets your
12 name?

13 MR. FRENCH: I'm Kirk French out of Dallas,
14 Texas. I own Lawyers Civil Process. The bottomline on
15 this is what the problem is, just like me, for instance, I
16 have got a lot of groups in Dallas, Houston, and Austin;
17 and in order for me to comply to do their process I've got
18 to be registered in all three counties. Now, what the
19 problem with -- another problem is each order runs out at
20 a different time, and if you don't comply with Harris
21 County, for example, they only hold a school one certain
22 time for that whole year in order to get on that order, so
23 it's all messed up.

24 HONORABLE JAN PATTERSON: And the other
25 problem with --

1 MR. ORSINGER: That's for sure.

2 HONORABLE JAN PATTERSON: The other
3 inconsistency is that if you have a county, without naming
4 any particular counties, with more onerous requirements,
5 that operates to some extent as a protection for its own
6 process servers within the county.

7 MR. FRENCH: See, Dallas County all you have
8 to do is have continuing education and background check
9 and you can get on a standing order, but the theory behind
10 this was that --

11 HONORABLE JAN PATTERSON: But you can't
12 serve in Bexar County.

13 MR. FRENCH: No, you have to meet their
14 requirements. The theory behind this was that the county
15 puts you out there and those judges know who you are, and
16 they've got the authority to pull that order any time they
17 want to. So a judge in Bexar County doesn't know who I
18 am, but -- well, they know who I am, but basically they
19 can't say what kind of work I do, so if this presiding
20 judge in Dallas County can approve me for Dallas County he
21 knows who I am and he's got authority to approve my order
22 any time he wants to. Why can't he do it for the whole
23 state? They can visit in any court in the state.

24 CHAIRMAN BABCOCK: Linda.

25 MS. EADS: Well, it seems to me that's

1 exactly the issue about all of this. It seems to me,
2 hearing this man's plight is that what we want to do is we
3 want to let process servers not have to go through -- jump
4 through all these hoops; and I'm not sure we're
5 accomplishing that; and, in fact, if there is a process
6 server who shouldn't be serving process then that's where
7 the local option should come in, where those judges -- or
8 if there's a problem in Houston, the Houston judges
9 communicate to Dallas judges who know this person saying
10 "No more service by this guy." Give the local option to
11 reject, to pull the requirement, rather than making them
12 go through requirements to be able to serve in the first
13 place when there is no reason that we have any reason to
14 believe they are not competent to do so.

15 MR. KEENEY: One comment here. To give you
16 an example of our position, we received a letter from
17 Nueces County about two weeks ago. As of effective
18 January 31st, which is in four or five days now, for us to
19 be able to serve any more process out of Nueces County,
20 I've got to now go out and I've got to run -- I have 90
21 people currently in this state that serve process for me.
22 I have to now go and have all 90 of those people go down
23 to the DPS and have a criminal history check run on all 90
24 people. It's going to cost me \$15 a person.

25 Then I have to submit an application on each

1 one of them, and I have to pay a 20-dollar fee for each
2 one of those persons, and I have to pay a 10-dollar ID
3 card so now we can have another ID card. So it's going to
4 cost me about \$3,500 that I'm going to have to pay just to
5 allow us to be able to serve any process coming from
6 Nueces County into Travis County.

7 MS. EADS: I think the Court should pass a
8 rule that --

9 MR. KEENEY: This is an ongoing, every month
10 a new county, I have to meet these exact same
11 requirements, and we have to do on -- and it's getting
12 ridiculous.

13 MR. ORSINGER: By the way, we should
14 recognize that Rule 103 makes these fees improper. The
15 current language in Rule 103 says "and no fee shall be
16 imposed for the issuance of such order."

17 MR. KEENEY: And I also would like to make
18 the comment, not only do we have to pay this for Nueces
19 County, but that county is charging us \$2 for every paper
20 we serve. They're adding a two-dollar fee. Just because
21 we're a private process server we're having to pay \$2 to
22 them. They bill us monthly just because of that.

23 MR. GILSTRAP: There's the real deal right
24 there.

25 MR. YELENOSKY: Then maybe you need to hire

1 a lawyer.

2 HONORABLE JAN PATTERSON: What county is
3 that happening in?

4 MR. KEENEY: Nueces County.

5 CHAIRMAN BABCOCK: Paula.

6 MS. SWEENEY: In all seriousness, sir, have
7 you-all challenged any of those rules?

8 MR. KEENEY: If we challenge the rule in
9 Nueces County, the county can revoke our license and we
10 can't serve any process.

11 MR. EDWARDS: Who put that license in
12 effect? I never even heard of it. Whoever put that in
13 effect? Where did it come from?

14 MR. KEENEY: To my knowledge it came from
15 the district clerk.

16 MR. EDWARDS: Well, the district clerk
17 doesn't have any right to do that.

18 MR. ORSINGER: Who here is going to file the
19 mandamus for this man?

20 PROFESSOR DORSANEO: Well, he's serious. He
21 probably would.

22 MR. ORSINGER: Okay. And then are you going
23 to guarantee his revenue while you're litigating it?

24 MR. EDWARDS: I'm not going to guarantee him
25 anything.

1 MR. KEENEY: We're currently spending
2 approximately \$67,000, is what I'm spending a year right
3 now to have to meet all the hoops and administrative.
4 Plus in addition to that I had to have my programmer
5 design a specific program so we can keep track of when all
6 of our 900 orders expire. It's a nightmare. It is a
7 nightmare.

8 CHAIRMAN BABCOCK: Paula.

9 MS. SWEENEY: What I was kind of getting to,
10 obviously this is a disaster.

11 MR. KEENEY: Yes.

12 MS. SWEENEY: You've got a total -- it's all
13 messed up. But when the Legislature wouldn't help you the
14 last 15 years, what did they say? "Go to the Supreme
15 Court" or what?

16 MR. KEENEY: No, no, no.

17 MR. FRENCH: We've had the thing passed
18 twice through legislation.

19 MS. SWEENEY: And the --

20 MR. FRENCH: The governor vetoed it once and
21 then somebody in the senate got it kicked back to a
22 committee after it passed.

23 MR. KEENEY: And the calendar chairman has
24 held it up ever since. It's all politics.

25 MS. SWEENEY: Well, who's blocking it?

1 MR. KEENEY: The constables and JPs
2 associations are blocking us.

3 MS. EADS: Yeah.

4 MR. KEENEY: And their political machine has
5 kept us from getting this through the Legislature.

6 MR. GILSTRAP: There's the deal.

7 MR. MARTIN: That's what they have been
8 looking for.

9 CHAIRMAN BABCOCK: Okay.

10 MS. SWEENEY: Thank you. I appreciate it.

11 CHAIRMAN BABCOCK: Last comment from Judge
12 Patterson and then I'm going to suggest to Richard what
13 his charge is.

14 HONORABLE JAN PATTERSON: I was going to
15 move the concept minus the insurance.

16 CHAIRMAN BABCOCK: Well, I think the Court
17 has already moved the concept.

18 HONORABLE JAN PATTERSON: And I second.

19 MR. YELENOSKY: I guess you could start the
20 discussion.

21 CHAIRMAN BABCOCK: So, listen, here's
22 Richard -- let me see if everybody thinks this is a good
23 way to proceed. Richard, will you take the various
24 comments -- and there have been more than just insurance.
25 There has been a lot of good feedback about language here.

1 Would you take those, polish up the rule, as you say?

2 Would you come up with two or three alternatives on
3 insurance? I mean, you know, including this one.

4 We'll --

5 PROFESSOR ALBRIGHT: Haven't we rejected
6 insurance?

7 CHAIRMAN BABCOCK: We'll think about that,
8 but come up with different ways, including no insurance.

9 MR. ORSINGER: Right.

10 CHAIRMAN BABCOCK: All right. And would you
11 do one other thing? Bill Edwards makes a good point about
12 how come the feds can do it without all these bells and
13 whistles? Will you do a little investigation as to if
14 they're different and if there are any problems with the
15 Federal system?

16 HONORABLE JAN PATTERSON: And one other bit
17 of research, Richard, since you're in San Antonio. I
18 mean, why do we hold up Bexar County as an example? Is it
19 a well thought out program to have insurance or, I mean,
20 if we're --

21 MR. ORSINGER: Well, I mean, we're holding
22 up Bexar County --

23 HONORABLE JAN PATTERSON: I understand.

24 MR. ORSINGER: -- on the issue of the
25 maximum amount of insurance. We could hold up Dallas

1 County on a hundred thousand or we could hold up Harris
2 County on seven hours of continuing education.

3 HONORABLE JAN PATTERSON: I understand, but
4 if you had a county that said all process servers must be
5 male, we wouldn't incorporate that, so I just want to make
6 sure that there is a rationale for it.

7 MR. ORSINGER: The only rationale is that
8 we've tried in this rule to adopt a standard that met
9 every requirement known in Texas. That was the only
10 rationale.

11 CHAIRMAN BABCOCK: We know that. Buddy.

12 MR. LOW: Richard, we need some provision in
13 there that counties can't make their local rule
14 requirements, or otherwise, we can still have the same
15 thing. In other words, if that is a problem then we need
16 to take care of that and make it clear that they can't.

17 CHAIRMAN BABCOCK: Yeah.

18 MR. LOW: So we need some provision like
19 that.

20 CHAIRMAN BABCOCK: Skip, then Bill Dorsaneo,
21 and then Alex and then we're going to take a break, unless
22 Anne McNamara has something to say.

23 MR. WATSON: It would be helpful for me to
24 know the committee's sense on the issue of insurance, how
25 many people favor just eliminating the insurance

1 requirement altogether versus how many prefer the
2 suggestion of just letting it be insurance as may be
3 required by law. In other words, leaving it to a local
4 option.

5 CHAIRMAN BABCOCK: Skip, the sense of this
6 committee is 13 to 4 against this proposal.

7 MR. WATSON: That's what I -- I'm trying to
8 move it on to the next step.

9 CHAIRMAN BABCOCK: Yeah. We have 17 people
10 here and voting. It's kind of a light turnout, so --
11 yeah, Bill.

12 PROFESSOR DORSANEO: Well, with respect to
13 the other requirements, I don't know whether being a
14 United States citizen ought to be a requirement.

15 MR. YELENOSKY: Yeah.

16 PROFESSOR DORSANEO: There may be
17 something -- you know, some other alternative that would
18 be as satisfactory. I don't guess that's a big issue.

19 MR. GILSTRAP: Just say you can't belong to
20 the Taliban.

21 MR. ORSINGER: Yeah. You could be --

22 PROFESSOR DORSANEO: There are a lot of
23 people who have green cards and are perfectly eligible to
24 do everything else.

25 CHAIRMAN BABCOCK: Alex. I'm sorry.

1 PROFESSOR DORSANEO: The other two
2 requirements through, you know, (3) and (4) here, you
3 know, need to be looked at, too. They look fine to me. I
4 don't see why a criminal history check that costs \$15 a
5 year is a particularly onerous requirement. That makes
6 sense to me. It would seem that you could get that done
7 without traveling around the state. That's a sensible
8 requirement.

9 "Has not been convicted in any jurisdiction
10 of a felony or misdemeanor involving moral turpitude,"
11 that's probably okay, but that requires a separate look,
12 too. What I'm saying is we're focused on when only one of
13 these requirements is probably not going to make it
14 through the process, the other requirements are things
15 that need to be looked at as well, and that was my only
16 comment.

17 CHAIRMAN BABCOCK: Okay. Alex.

18 PROFESSOR ALBRIGHT: I have a question about
19 the continuing education. You know, sometimes I think
20 requirements like this are merely to spur an industry in
21 continuing education and make things onerous.

22 CHAIRMAN BABCOCK: What do you do?

23 PROFESSOR ALBRIGHT: And I was wondering
24 what do you-all do for seven hours of continuing education
25 on process serving? Do you think it's something worth

1 doing?

2 MR. FRENCH: Basically what it was, it was
3 set up for, is the rules change every two years, and so it
4 was to make everybody familiar with the way they change.

5 PROFESSOR ALBRIGHT: The rules --

6 MR. FRENCH: Of Civil Procedure.

7 PROFESSOR ALBRIGHT: Oh, but the only one
8 you-all really need to know about is the process rules,
9 right?

10 MR. FRENCH: Well, yes and no.

11 PROFESSOR ALBRIGHT: So you-all learn about
12 the discovery rules and --

13 MR. FRENCH: Well, when you have attorneys
14 phone and ask you the question, you know, "When do I have
15 the deadline on this subpoena when I've got to have it
16 issued," I need to know how long it's going to take.

17 PROFESSOR ALBRIGHT: So you-all think it's
18 worthwhile?

19 MR. KEENEY: To answer your question, yes,
20 there's only specific rules actually that actually affect
21 our industry. Those rules are the rules that we have to
22 be aware of. Do I think a private process server should
23 have to go through the seven hours of continuing education
24 every year? No, I don't. I think our association
25 provides a seven-hour course of civil process that clearly

1 thoroughly goes through everything we should know. The
2 question is periodically we have to monitor the
3 legislative process, the Supreme Court's rule-making
4 authority, and as changes affect our business we want to
5 be able to pass that on to our people. So I don't have an
6 answer for you in terms of how much continuing education.
7 It depends on how often you-all continue to change the
8 rules that affect our industry.

9 CHAIRMAN BABCOCK: Anne McNamara.

10 MS. McNAMARA: Just a thought, and that is
11 to the extent we do insurance or CLE or anything else that
12 imposes ongoing performance by the process servers, we
13 ought to think through the impact on the validity of the
14 service if the individual's insurance lapsed or they
15 didn't get to the CLE between 12 months or whatever,
16 because the last thing you want to do is sort of set up
17 this subsidiary bunch of discussions as to whether or not
18 Harvey was qualified on December 12th to serve process.

19 CHAIRMAN BABCOCK: Are you getting that,
20 Richard?

21 MR. ORSINGER: Yes. I don't know what to do
22 on that.

23 MR. FRENCH: Every time we've gone through
24 legislation, about the second time that particular E&O and
25 insurance is being kicked out, and they admitted it, so we

1 never put it back in there from that point on.

2 CHAIRMAN BABCOCK: Okay. Let's take a
3 morning break and then we will do FED for the balance of
4 the morning.

5 (Recess from 9:55 a.m. to 10:08 a.m.)

6 CHAIRMAN BABCOCK: All right. We are back
7 on the record for FED, and for everybody's planning
8 purposes, we're going to go 'til about 11:20.

9 MR. GILSTRAP: Unless we finish it quicker.

10 CHAIRMAN BABCOCK: Unless we finish quicker.
11 We're doing FED, Buddy. All right. Elaine or Judge
12 Lawrence or whoever wants to speak on that side of the
13 table.

14 PROFESSOR CARLSON: I'll kick it off. Just
15 to -- for your recollection today, what our votes were
16 thus far and why we've structured the proposals you have
17 before you is that we as a full committee voted to give
18 some presumptive validity to the justice court judgment
19 during the appeal to the county court. We voted to
20 continue the process of requiring perfection by an
21 appealing party from JP court to county court by putting
22 up an appeal bond securing the county court filing fees.
23 We voted that any tenant appealing a
24 forcible judgment, whether indigent or not, should be
25 required to pay rent during the appeal to the county

1 court. We voted in general a JP court judgment must be
2 superseded to suspend enforcement in a county court, but
3 we excuse that requirement for indigents, as well as the
4 cost bond. So we voted that an indigent should be able to
5 proceed without putting up either a cost bond or the
6 supersedeas to the county court but would have to pay rent
7 when due.

8 Last meeting there was a rejection of the
9 subcommittee's proposal to eliminate the possession bond.
10 The full committee also rejected the notion of a
11 possession bond hearing proceeding by bench trial only.
12 There was a sentiment -- I think the vote was to maintain
13 a jury trial proceeding 10 to 7. There was a straw vote
14 of 16 to 1 in favor of what we propose in the possession
15 bond if we retain the jury trial with the trial to be held
16 as soon as practical, and we have incorporated that
17 approach in what you have in proposed Rule 740.

18 We also voted eight to six, to show you how
19 riveting these votes are to endorse that failure to
20 supersede a forcible judgment would moot the issue of
21 appeal; however, concerns were voiced by Carl Hamilton,
22 Justice Duncan, Professor Dorsaneo, that we needed to
23 preserve the tenant's right to review possession in some
24 way. Their concerns, as I understood them, on the record
25 were it would be a reverse open courts problem, I think is

1 the way you put it, Bill, if we totally mooted the ability
2 of the tenant to further seek some type of review on
3 possession. But yet the committee continues -- our
4 subcommittee continues to struggle with the reality that
5 once a tenant is dispossessed and a landlord relets how
6 can you effectively then put the tenant back into
7 possession. Under ordinary circumstances it just isn't
8 feasible.

9 Luke suggested that we might look at the
10 parallel two-part approach that's taken in the interim
11 proceedings of attachment, garnishment, sequestration;
12 however, in those proceedings the property is taken into
13 custody of the court, at least theoretically, pending
14 disposition on the final merits. So you don't have a
15 dispossession, a resell of the property, and a try and get
16 it back kind of thing, the problem we have in a
17 landlord/tenant situation.

18 Another corollary that was suggested that
19 our committee considered is what happens today in just a
20 general when there's an execution on a judgment pending
21 appeal, because there is no supersedeas. It does not moot
22 the appeal. The appeal continues but the judgment debtor
23 doesn't get the property back if they win the appeal.
24 What the remedy is under the -- I think it's the Property
25 Code, might be the Civil Practice and Remedies Code -- is

1 that the judgment debtor then has an action of restitution
2 for the fair market value of the property. So that's sort
3 of a realization that once you -- some writs that you
4 execute on have final consequences in terms of being able
5 to put a person back in that position, but that money
6 damages might be the appropriate remedy.

7 There was also concern expressed by
8 Professor Dorsaneo on the expedited nature of these
9 proceedings. I think Bill said he found it disturbing
10 that -- and I don't want to put words in your mouth, Bill,
11 but as I understood your position, you found it disturbing
12 that a forcible proceeding could be expedited and disposed
13 of on an ordinary basis on 6 to 10 days after service. We
14 went and looked at whether that was, one, the norm in the
15 state; and it seems to be, but it is not everywhere; and,
16 two, we also looked at your suggestion that if that is
17 going to be our procedures, that the citation ought to
18 advise the tenant that the answer date is the appearance
19 date; and we did speak with Mary Spector, as you
20 suggested, up at your clinic at SMU, Professor Spector,
21 who was very helpful; and she confirms that in Dallas
22 County that is the norm, that the answer date is the trial
23 date.

24 We did a little more research on the subject
25 and, in fact, tried to look at statutes in other states.

1 I even read The Tenant's Legal Guide from Nolo
2 Publications which cites all these statutes, and what we
3 found is that this -- you know, forcibles really are a
4 trade-off legislatively for self-help eviction. In common
5 law the landlord had the right to go and self-help evict
6 when there was an alleged breach of the lease. Of course,
7 that did not bode well for peace in our society and so the
8 Legislature did away -- in fact, there are penalties that
9 are imposed upon a tenant who -- excuse me, on a landlord
10 who self-help evicts. The landlord must go through the
11 process of forcible eviction and detainer.

12 But the trade-off is, is it's a very
13 expedited proceeding, unlike almost any other civil
14 proceeding that we have. It's a summary expeditious
15 proceeding in which the only issue is the right to
16 possession, at least in theory. It's been enlarged a bit
17 by case law to be potentially rent and possession, but
18 that that adjudication does not serve as a basis for res
19 judicata or collateral estoppel in our proceedings that
20 may be available for the landlord and tenant.

21 There are many other actions that could be
22 brought, at least theoretically, after eviction by the
23 tenant against the landlord and vice versa; and the case
24 law is very clear that that is the way other issues, such
25 as a wrongful eviction cause of action, are to be handled.

1 Those issues are not to be adjudicated in the forcible
2 case itself, and the forcible judgment does not serve as a
3 basis to preclude that under res judicata and collateral
4 estoppel principles. And you have to bear that in mind
5 when you look at why the procedures are that we have in
6 place and how variant we want to be in proposing to amend
7 them.

8 You know, in theory we have all become
9 accustomed to maximum due process and because of things
10 like res judicata and collateral estoppel, but forcible
11 actions, you have to bear in mind, are distinctive. The
12 only thing is the right to immediate possession, but it's
13 not adjudication of the ultimate rightfulness of
14 dispossession or eviction.

15 However, we did look at Professor Dorsaneo's
16 suggestion that we ought not perhaps tie the court in
17 every instance to an expedited proceeding, that that
18 should be the norm our subcommittee felt, but that perhaps
19 we should work into the rules some standard and ability of
20 the trial court to enlarge the trial setting in certain
21 circumstances beyond what is now the 6 to 10-day period.

22 Professor Spector expressed three concerns,
23 and as we go through the materials I did -- she was very
24 kind to review our rules and hold a conference call with
25 us on her concerns. They were -- I'll summarize them very

1 quickly, but I'll bring them up as we go through. Our
2 committee has already signed off on Rule 738. We voted to
3 suggest it to the Court. It includes that a suit -- a
4 forcible action can include rent, contractual late charge,
5 and attorneys fees, that those issues can be joined with
6 possession in an FED case. Professor Spector felt that it
7 was unfair to include late charges as part of the scope of
8 the FE&D proceeding, and I don't want to put words in
9 Steve's mouth, but Steve told me yesterday that that was
10 his view as well. Our subcommittee felt that that issue
11 of late charges is inextricably really intertwined with
12 whether or not rent is due or owing and that you really
13 can't ordinarily look at those issues distinctly and, in
14 fact, the way that the -- Judge Lawrence told me the way
15 that the model -- what is the lease?

16 HONORABLE TOM LAWRENCE: Texas Apartment
17 Association Lease.

18 PROFESSOR CARLSON: Those provisions are in
19 the same paragraph. We have already voted on that, but I
20 do want to point out that that is -- and we did discuss
21 this before -- late charges, currently it's not clear
22 whether you can adjudicate that in a forcible entry and
23 detainer case under the case law. We have voted already
24 that we thought that that was proper, but I did tell
25 Professor Spector that I would advise the committee that

1 that was something she felt was an unfair enlargement.
2 Her position was, as I understood it, was that really
3 should be adjudicated in a separate proceeding.

4 PROFESSOR DORSANEO: I know when I voted on
5 it it seems like a perfectly good idea that people ought
6 to be able to join all claims, et cetera, in the same
7 litigation, but I know I wasn't thinking then about the
8 entire litigation being litigated very quickly --

9 PROFESSOR CARLSON: Uh-huh.

10 PROFESSOR DORSANEO: -- thereafter, and
11 isn't there some sort of a limitation on the ability of a
12 tenant to bring a counterclaim --

13 PROFESSOR CARLSON: Yes.

14 PROFESSOR DORSANEO: -- in this context
15 that, you know, would seem to -- on a fairness basis to be
16 something that ought to be considered, too. I mean, if
17 the landlord can add a bunch of additional claims that are
18 going to be litigated on an expedited basis, you know, why
19 shouldn't the tenant be able to add additional claims? If
20 the reason is that it's litigated on an expedited basis
21 and it will impair the detainer procedure, well, then
22 maybe we ought to go backwards on the other issue.

23 PROFESSOR CARLSON: And that's exactly
24 Professor Spector's position. It was a matter of
25 fairness. Like why should the landlord get to add one

1 more issue to the FED when we're not letting the tenant.
2 The tenants cannot bring a counterclaim. You're
3 absolutely right, Bill. They can take defense positions,
4 but counterclaims are not adjudicated by the tenant in the
5 FED proceeding as a norm.

6 So the committee already voted on this, but
7 we may want to open it up again. I don't know. We have
8 done that many times, but you need to be mindful that it
9 is an enlargement, and you have to ask yourself how much
10 of an enlargement is it to go from "You didn't pay the
11 rent, and the reason you didn't pay is your rent was late
12 the month before, and under the contract you are now
13 required to pay late fees, so when you went to pay this
14 month's rent we applied those late fees, part of that, to
15 the late fees." See how it gets really intertwined
16 conceptually and practically, but -- yes, Carl.

17 MR. HAMILTON: Well, this brings up one
18 other problem. One of the problems that the landlords
19 have now is that they file a suit in JP court and then the
20 tenant goes into county court and files some kind of a
21 claim which he can't file as a counterclaim in the JP
22 court, and so then the JPs say, "Well, I don't think I
23 ought to adjudicate this forcible detainer case because
24 you've got the county court case pending, and we need to
25 dispose of that first," and it sort of delays things, and

1 I think we need to address that because I think we need to
2 give some direction to the JP court that they must not
3 delay the proceedings just because there's another case
4 pending.

5 PROFESSOR CARLSON: And they should not
6 under the current rules, but you're correct. We could
7 have a clarification. I don't get a sense that's a
8 problem in Harris County, but you've advised me that is a
9 problem down in McAllen, down in the Valley.

10 HONORABLE TOM LAWRENCE: We would probably
11 want to put maybe a comment on Rule 746, and the issue is
12 that if the merits of title need to be adjudicated then
13 the JP court would not have jurisdiction over that
14 eviction and the county or district court should handle
15 that, but the case law would indicate it needs to be a
16 legitimate question of title. You can't just say there's
17 a question of title with no proof whatsoever of that.
18 It's got to be a legitimate question. If there is a
19 legitimate question then we would probably need to make it
20 clear maybe in a comment to Rule 746, and I think we can
21 solve that in that issue, in that rule probably. Let us
22 work on that. We will have something next time.

23 PROFESSOR CARLSON: But the final large
24 concern that I saw voiced at our last committee was from
25 Richard Orsinger. He suggested that the affidavit of

1 indigence when it's filed should be determined by the
2 county court and not by the JP court, and here we're
3 talking about the tenant who claims to be an indigent
4 going from JP court to county court and being excused from
5 having to post the bonds. Richard suggested that once a
6 notice of appeal is filed in JP court and the affidavit of
7 indigence, the JP court is deprived of jurisdiction.

8 The way that we've structured the rule is
9 that the affidavit of indigence is filed and initially
10 determined in the JP court and that it is the JP court's
11 ruling on the affidavit of indigence that is one of the
12 triggers for perfection. The thought process of our
13 subcommittee is that the JP ought to make the initial
14 determination on indigency. Otherwise, you could end up
15 with a lot of folks claiming to be indigent to get the
16 additional time to get to county court to have that issue
17 adjudicated.

18 On the other hand, it is supposed to be a
19 de novo proceeding. We have preserved the right of the
20 indigent to seek de novo review in the county court on
21 indigency and sufficiency of the bond. So that's sort of
22 the conceptual framework from our committee votes that we
23 are operating off of. What we'd like to do is go through
24 the rules, I guess the ones that we have not yet signed
25 off on or even revisit perhaps Rule 738, if that is

1 amenable to the chair.

2 CHAIRMAN BABCOCK: Yep. No question about
3 that. Stephen.

4 MR. YELENOSKY: I was just going to say,
5 since you gave some background on it and I think I
6 probably made this clear where I'm coming from, you
7 mentioned the prior self-help evictions by landlords and
8 my -- and you said that we reached a compromise with a
9 summary process. I realize we're not going to legislate
10 here, but any change to the rule I would hope moves us
11 further in the progressive direction because that
12 compromise to me was a compromise with barbarism. I mean,
13 the former practice was you just throw them out, so we've
14 got a summary practice, and I don't buy the assumption
15 that it has to be as summary as perhaps might be
16 interpreted here. I don't really see the urgency that
17 maybe landlords see.

18 So when we get to a point that's ambiguous,
19 such as is it appearance for trial or is it answer, I
20 would hope we do no harm at least because in some
21 jurisdictions -- unlike Dallas County -- Travis County and
22 Williamson County, it's answer, not appearance for trial.
23 And as I said yesterday, and Elaine and Judge Lawrence are
24 aware, I asked Fred Fuchs from the Legal Aid office here,
25 so he knows a lot more about this than I do.

1 Fred Fuchs sitting here has been doing Legal
2 Aid work and housing work in particular since I graduated
3 from high school, so for about five or six years now. I
4 think this is his 25th year representing tenants, so I
5 just wanted to introduce Fred and when appropriate get his
6 comments.

7 PROFESSOR CARLSON: I believe that Justice
8 Lawrence has spoken with you, Fred, and you've been
9 helpful to us in structuring some of our rule proposals,
10 and we do -- as I said last meeting, we invite
11 suggestions. This is not an area that is as simple as it
12 should be, quite frankly; and, as we said, there are lots
13 of rules. We have got the 500 series of rules that would
14 tend to apply, the 700 series rules. We've got the Texas
15 Rules of Civil Procedure and now we've got quite a bit of
16 legislation through the Property Code that we have to
17 intertwine to make our rules consistent with.

18 PROFESSOR DORSANEO: I was going to say,
19 those of us on this committee may have had some
20 familiarity with forcible detainer practice, particularly
21 in the commercial or nonresidential context, so any help
22 that we could get in terms of practical problems in the
23 way these rules have been interpreted over time would be,
24 I think, you know, very useful. So don't be bashful in
25 telling us what we need to know in order to make the

1 decisions on an informed basis.

2 PROFESSOR CARLSON: You're right. I'd like
3 to start, if we could, where Steve left off on Rule 739.
4 One of the things that Bill pointed out last -- in
5 November is that it's not clear when a party is served
6 with citation that the trial date -- the answer date is
7 the trial date. We modify -- we brought 739 back to the
8 table for that reason, because we thought Bill's
9 suggestion was a good one, and the change that we've made
10 is to make clear that the citation directs the defendant
11 in the forcible to appear for trial before the justice at
12 the time and place in the citation, and the time frame on
13 which that must occur under our current practice is not
14 the -- the 6 to 10 days has not been changed.

15 That is the norm in most places that we were
16 able to determine, but as Steve points out, that is not
17 the practice everywhere. There are some counties in which
18 the answer date is a true answer date and the trial is
19 sometime later, but most places, at least from our
20 research indicates, certainly Harris County, Dallas, that
21 the trial date -- that the answer date is the trial date
22 because it is an expedited proceeding.

23 PROFESSOR DORSANEO: It's my understanding
24 that that interpretation was more or less agreed upon some
25 -- Tom, how long ago? 10, 15 years ago?

1 HONORABLE TOM LAWRENCE: Over 20 years ago.

2 PROFESSOR DORSANEO: Over 20 years ago.

3 See, time flies. I'm much older than I would like to be,
4 I suppose, in some ways, but that's an interpretation that
5 probably should have been included in a rule change long
6 ago rather than just let these rules, you know, change
7 their meaning without, you know, language being changed.
8 As I understand it, you know, that's not the way it's
9 interpreted, you know, across the state necessarily; but I
10 do understand from Mary Spector and from my reading in the
11 interim period of time that it wouldn't be unusual across
12 the country to have the adjudication occur relatively
13 quickly after the notice. I don't think the seven days is
14 particularly out of step. Seven days, ten days, or
15 something like that.

16 I'm not so sure that the trial ought to be
17 on everything, though. I mean, the trial on the
18 possession issue, maybe it's good to do the possession
19 issue together with everything else really quickly. Maybe
20 it's not, and I'd like to hear about that. I mean, I
21 could see an argument that an expedited hearing on the
22 possession issue, you know, makes good sense if the
23 possession question needs to be determined quickly in
24 order for people to go about their business; but I think
25 that, you know, there are several issues here.

1 First, it seems clear to me that if it's
2 going to be for trial, it ought to say that.

3 PROFESSOR CARLSON: Right.

4 PROFESSOR DORSANEO: Now, what should the
5 trial be about is another concern I have; and if it should
6 be a full-scale trial, maybe it should say that. Maybe it
7 says it implicitly. If it should be on the possession
8 issue, say that; and I see the issues are kind of clumped
9 together; and, again, anybody who knows more than I know
10 about this -- and I'm sure that that's a large category,
11 large number of people -- chime in.

12 CHAIRMAN BABCOCK: Carl.

13 MR. HAMILTON: One thing we don't want to
14 lose sight of is we don't want to make the system so
15 complex in the JP court that it becomes too cumbersome and
16 too expensive, and you do have the trial de novo in the
17 county court. So, you know, we need to have a quick, easy
18 system --

19 PROFESSOR DORSANEO: I think so, too.

20 MR. HAMILTON: -- and not make it too
21 complicated where you're going to have to have two trials.

22 PROFESSOR DORSANEO: It might make it less
23 complicated. It may be less complicated. I don't know
24 which way is more complicated.

25 CHAIRMAN BABCOCK: Fred.

1 MR. FUCHS: Thank you. I'm Fred Fuchs. I'd
2 just like to give a little bit of a tenant perspective.
3 Quite honestly, when I read through these rules I was
4 dismayed and disheartened at the changes that are being
5 made. I thought our current system -- although I'd like
6 to see some changes from a tenant perspective, but I can
7 see how there are good changes from a landlord's
8 perspective that wouldn't necessarily be good for tenants
9 but that I could support, but these particular rules are
10 going way beyond that.

11 And I also found it ironic at the same time
12 the Texas Supreme Court has this Access to Justice
13 Commission, which is asking for all of us to give input
14 into impediments in the judicial system, that I see this
15 from a tenant perspective creating additional impediments
16 for tenants, and I was -- I'm very concerned about the
17 changes. I'm sorry that you've already voted on Rule 738.
18 I find it ironic on Rule 738 that the court can't render
19 judgment for attorneys fees for the tenant if the tenant
20 is successful, yet the court can render judgment for
21 possession, rent, contract late charge, and attorneys fees
22 for the landlord. There's nothing provided for the
23 tenant.

24 With respect to this whole issue of trial
25 and appearance date, my interpretation of the existing

1 rule has always been appearance date is what it says under
2 the rule. Appearance date is not trial date, but as
3 Professor Dorsaneo said, it is interpreted differently in
4 most counties in the state. Travis County has used -- has
5 always treated it as -- in the 25 years I've been here
6 practicing as the answer date and then the court quickly
7 sets a trial shortly after the answer date. The problem
8 from a tenant's perspective -- and I can give you some
9 examples that I think will help understand that it's not
10 as simple as the tenant just not paying the rent for the
11 cases that we take on in legal services, but the problem
12 from a tenant's perspective, in trying to represent
13 someone when you're truly trying to keep them in
14 possession and where possession is important to them is
15 that when you have to try the case on answer date that you
16 appear for trial, you have no opportunity for any kind of
17 discovery.

18 And what I'm forced to -- in most cases in
19 order to make your case you've got to see the landlord's
20 file. You may have a waiver defense with late payment of
21 rent. In subsidized housing or public housing cases
22 you've got all other kinds of issues. What we're forced
23 to do in the outlying counties outside of Travis County,
24 Williamson County, which are the two counties in my
25 service area that use the two-step process and which I

1 think works quite well, is that when I show up in Hays
2 County in San Marcos or in Caldwell County and I know it's
3 that answer date or appearance date is trial date, I show
4 up with a motion for continuance asking the judge to give
5 me an opportunity to look to -- to at least look at the
6 file in order that I can adequately represent the client.

7 Let me just give you a couple of examples
8 that will help make it -- that can show that these cases
9 aren't just, "Oh, the tenant didn't pay the rent and the
10 landlord gave a three-day notice and the tenant is just
11 trying to stay there." For most of the cases that we take
12 in legal services you've got clients who are on disability
13 or welfare, who are working the minimum wage jobs, who are
14 trying to stay in their housing; and in most of those
15 cases they're in public housing, which is for the poorest
16 of the poor; they're in subsidized housing, which is also
17 for the poorest of the poor; or they've got a Section 8
18 voucher. Some of them are living in tax credit complexes.

19 In all of those, with the exception of tax
20 credit complexes, they have got a right under Federal law
21 to continue living in the property unless they commit a
22 serious lease violation, and those folks are fighting to
23 keep their home, which, to me, absent -- except for
24 liberty is much more important than money and a fight over
25 millions of dollars between corporations. They're

1 fighting to keep their family in that home.

2 I'm going to give you three just recent
3 cases that sort of illustrate sort of the problem if you
4 can't at least get into the landlord's file. I've got a
5 case right now in Williamson County, and bless the justice
6 of the peace out there. Several years ago they converted
7 to a two-step system, but in this particular case the
8 public housing authority filed an eviction, nonpayment of
9 rent, said my client -- there's a minimum rent requirement
10 in public housing, which can be waived. They've got a
11 minimum rent of \$50 a month. They claim my client didn't
12 pay the minimum rent for May, June, and July. You can get
13 exempted from the minimum rent. We had gotten a request
14 for a minimum rent exemption for her and then the housing
15 authority is free after three months to decide whether the
16 tenant can indeed afford to pay that rent.

17 They made a determination after those three
18 months, in late October, that she had to pay the minimum
19 rent, that she didn't have a permanent hardship. Part of
20 it was -- there's some retaliation involved because of an
21 affirmative lawsuit she had, in my opinion; but in this
22 particular case they made a demand for payment; and, as
23 best as I can tell, although she doesn't have all of the
24 correspondence, they never followed the requirement of the
25 law that if they made the determination that you can

1 afford, that there's not a permanent hardship, that you --
2 then they've got to give you a reasonable payment period.
3 And that's going to be crucial to this case, whether she
4 was offered a reasonable payment period to pay back this
5 minimum rent, and she's on welfare. It will be an
6 absolute defense.

7 As soon as they told me they had filed the
8 lawsuit, I sent a letter to the housing authority saying
9 "Send me all of the correspondence about this"; and, of
10 course, you know what the housing authority did. They
11 didn't send anything. And so now my client is sued. She
12 says she remembers getting a letter, no longer has a copy
13 of the letter. I don't even know whether she's got the
14 current lease because they change leases every year.

15 I've got one that's from 2000; and if I
16 don't at least see the lease, if I don't see the
17 correspondence, I won't know whether they offered her an
18 opportunity to pay the minimum rent in reasonable
19 installments, which would be a complete defense; and she's
20 going to be -- she's going to be evicted. I'm left with
21 no choice but to try to get that file and do some minimal
22 discovery. It can still be expedited, but the landlord
23 essentially controls how expedited because the landlord
24 could just make the file available. Here he chose not to
25 do so.

1 I've got another case filed in Travis
2 County. Landlord filed for \$2,000 worth of rent. My
3 client has a Section 8 voucher. This is also just pending
4 and where we filed discovery. What happened here is she's
5 got a voucher. Under the voucher program if your income
6 decreases, your share of the rent decreases. She reported
7 a decrease in her rent after she lost the job. The
8 housing authority never reduced her rent. They've got an
9 absolute duty under the law to do so. She's going to have
10 a complete defense to that eviction, but unless you can
11 get in and get to the housing authority's file and have a
12 little chance to do discovery you can't prove that up in
13 the eviction.

14 I've got another case, a woman got evicted
15 from justice court. She was not represented by our
16 office. She came in after the judgment was final, but
17 with -- I mean, within the appeal time after the judgment
18 was signed. She was evicted from subsidized housing for
19 not paying a monthly rent of \$85 a month. That rent was
20 computed -- it looks strange to me just showing the income
21 she had because she was working three hours a day as a
22 school monitor, minimum wage, \$5.15 an hour. That rent is
23 too high based on her income; and in that case the
24 attorney for the landlord, and the landlord was
25 represented by an attorney in justice court, allowed me to

1 go look at the file because I wanted to determine in
2 deciding whether to take this case on appeal whether there
3 was any kind of defense; and sure enough, I go over, meet
4 with the landlord and the attorney, and he allows me to --
5 he selectively gives me documents; and they had computed
6 her rent based on child support of \$250 a month, which she
7 hadn't been receiving since March. She received a
8 57-dollar payment in March. They never -- and they told
9 her they had to count the child support in determining her
10 \$85 rent when under the law that's clearly incorrect.

11 We have a defense to that eviction, and part
12 of what I'm saying, and then I'll be quiet, is that these
13 aren't always what they seem, and I'm very concerned with
14 tampering with the rules and taking away tenant rights in
15 the interest of efficiency, and we need more justices of
16 the peace to solve the problem and to move cases, but the
17 way to -- we shouldn't do it by eliminating rights that we
18 now have in the rules.

19 MR. LOW: Can I ask you a question? Have
20 you considered some type disclosure when they file, they
21 must file the lease or other documents or things
22 pertaining to that when they file it so that they get the
23 discovery?

24 MR. FUCHS: One of the things that struck
25 me, if there were a mandatory disclosure rule of --

1 essentially what you need is the the landlord's file.
2 That's essentially what it comes down to.

3 MR. LOW: Right, but I'm talking about we
4 have disclosure rules now, and since this is expedited,
5 and I'm not suggesting this. I'm asking have you ever
6 considered that the landlord's file -- what was the
7 question, Bill?

8 PROFESSOR DORSANEO: I want to know what
9 kind of pleadings do they file that gets this process
10 started? What information do you get?

11 MR. FUCHS: Oh, a one-page citation that
12 says "Notice to vacate was given on X date." Oftentimes
13 it's left blank, the date the notice to vacate was given
14 on. And then they say "nonpayment of rent" or "a
15 violation of the terms of the lease."

16 MR. LOW: And the provision about attorneys
17 fees in 738 I find I join you as unusual, that you don't
18 have attorneys fees just for one side, and is that new?
19 There's never been a provision for attorneys fees in these
20 things for the landlord, has there?

21 MR. FUCHS: Where you can get attorneys fees
22 under -- it's in the Property Code that both parties can
23 get attorneys fees.

24 MR. LOW: Both parties?

25 MR. FUCHS: That's correct. It's in the

1 Property Code under 24.005.

2 MR. LOW: When I read the old 738 I didn't
3 see attorneys fees mentioned.

4 HONORABLE TOM LAWRENCE: It's in 748.

5 MR. LOW: 748? Okay. As you know, I'm
6 pretty familiar with these rules.

7 MR. FUCHS: And the Property Code
8 establishes --

9 MR. LOW: What?

10 MR. FUCHS: The Property Code establishes --
11 it's 24.006, establishes the right to get attorneys fees
12 both for the landlord and the tenant.

13 MR. LOW: Both? But this says only for the
14 landlord.

15 MR. YELENOSKY: The rule says that.

16 MR. FUCHS: The rule says that. That's
17 correct.

18 PROFESSOR CARLSON: Rule 748 says, "The
19 justice may also give judgment to plaintiff for back rent,
20 contractual late charges, attorneys fees"; and then it
21 goes on to talk about the ability to obtain attorneys fees
22 in general for both parties, so if there's any suggestion
23 here that a tenant can't get attorneys fees if successful,
24 that is not right.

25 MR. LOW: But it doesn't -- I mean, this

1 looks like that it's complete, and somebody that's not a
2 lot more familiar with the rules than me may have to look
3 someplace else, and it looks like only one side.

4 PROFESSOR CARLSON: I agree, Buddy, and we
5 can finesse that.

6 CHAIRMAN BABCOCK: Carl, then Frank.

7 MR. HAMILTON: Isn't there a provision in
8 the Property Code or somewhere that to start this process
9 you have to give tenant notice that you're going to file
10 the lawsuit in so many days, and if you don't have that,
11 you don't get the benefit of the six-day rule or
12 something?

13 MR. FUCHS: No. The only requirement in a
14 private landlord/tenant case is to comply with the lease
15 and give a demand for possession, which can be -- because
16 it has to be three-day demand for possession unless the
17 lease allows for a shorter period. The TAA lease, the
18 Texas Apartment Association lease, the Association of
19 Realtors lease, both allow for one-day demand for
20 possession. Public housing, federally subsidized housing,
21 have a little different notice requirements, but under the
22 Section 8 voucher program all private housing, all the
23 landlord has to do to get the process started is give a
24 three-day notice to vacate, doesn't even have to state
25 reasons, unless the lease allows for a shorter period.

1 Then give a one-day notice to vacate.

2 MR. HAMILTON: That's before the suit is
3 filed?

4 MR. FUCHS: That's before the suit is filed.

5 MR. GILSTRAP: When you show up and ask for
6 a continuance, do you usually get it?

7 MR. FUCHS: Yes, but -- yes. I have been
8 pretty, pretty -- but I think a lot of that has to do with
9 just having been around, in that the justices of the peace
10 get to know you, and they know you're not just coming in
11 there to delay it.

12 MR. GILSTRAP: I understand.

13 MR. FUCHS: That you're actually serious
14 that the client wants to keep the housing and that you
15 think you have defenses, but part of the problem with that
16 is if you need witnesses, you know, I've got a case in
17 Smithville next week. You know, they're claiming noise.
18 If I show up and don't have the witnesses and the judge
19 says, "I'm not going to give you a continuance to try to
20 develop this," the client doesn't get a fair trial.

21 MR. LOW: What is the two-step process
22 you're talking about?

23 MR. FUCHS: Answer and trial. You answer by
24 between 6 and 10 days and then the judge sets it for
25 trial.

1 MR. LOW: You're not talking about
2 cross-action or anything like that?

3 MR. FUCHS: No. No.

4 MR. GILSTRAP: One more question. One
5 theoretical way to deal with this would be, of course, to
6 appeal the eviction now. Realistically how many of your
7 people are able to post the bond for rent to stay in the
8 place?

9 MR. FUCHS: Oh, nobody can -- I've had one
10 client who posted a bond over -- an appeal bond. The only
11 way they stay in possession is by paying rent, but we do
12 that very frequently.

13 MR. GILSTRAP: But one of the things I think
14 we're proposing here is to allow them to stay in
15 possession merely by paying rent and --

16 MR. FUCHS: That's the existing rule.

17 MR. GILSTRAP: In other words, we're not
18 talking about back rent. We're talking about future rent.

19 MR. FUCHS: That's right. That's the
20 existing rule.

21 MR. GILSTRAP: You're saying your people
22 can't pay the future rent?

23 MR. FUCHS: No, they can -- I'm talking
24 about post an appeal bond for a thousand dollars or
25 \$1,500.

1 MR. LOW: But when you're talking about
2 future rent, at what basis? The disputed basis or --

3 MR. FUCHS: Under the existing rule, if you
4 want to stay in possession, if you're unsuccessful and
5 it's a nonpayment of rent, within five days of the date
6 you file an affidavit with the court after the judgment
7 you have to pay one month's rent into the court registry.
8 One rental period's rent. One rental period.

9 MR. LOW: But you give situations where you
10 say the rent is 50 and they say it's 130. What do you
11 have to pay there?

12 MR. FUCHS: Then what you have to do is go
13 based on the determination made by the justice of the
14 peace, and that can be a problem, and the revised rules
15 are trying to address that as to the issue, but right now
16 I tell the clients, "You've got to pay what the justice of
17 the peace determines."

18 PROFESSOR CARLSON: We do have an enlarged
19 provision for continuance. We just haven't gotten there
20 yet. Rule 745, and there is also a proposal on limits on
21 discovery. I guess I would prefer instead of kind of
22 shotgunning this, going through it rule by rule because
23 we'll never get through these rules otherwise.

24 CHAIRMAN BABCOCK: Judge Lawrence.

25 HONORABLE TOM LAWRENCE: Well, I just wanted

1 to clarify two things. There is a petition that must be
2 filed in addition to the citation. Now, the petitions may
3 vary from court to court, and obviously an attorney can
4 draft their own or client can draft their own, but there
5 are form petitions, and the petitions that I'm aware of in
6 the counties do specify as to the cause of action, the
7 parties, and why you're seeking possession. So there is a
8 petition that should specify that, and the Property Code,
9 Section 24.005, does have specific provisions in any
10 forcible for a notice to vacate, if that responds to your
11 question.

12 PROFESSOR DORSANEO: Yeah. Does the
13 petition include the lease?

14 HONORABLE TOM LAWRENCE: Pardon?

15 PROFESSOR DORSANEO: Or is there a rule that
16 talks -- some special rule that talks about -- trespass to
17 try title we have a rule that talks about what the
18 petition is supposed to have in it. Okay. Is there any
19 rule that says what the petition -- one would expect the
20 lease if you were sued for possession under, you know,
21 violation of a lease.

22 HONORABLE TOM LAWRENCE: Well, this may come
23 as a surprise to a lot of you, but in a justice court suit
24 the petition may be oral, the pleadings may be oral.

25 PROFESSOR DORSANEO: Well, that doesn't come

1 as a surprise to me, but it comes as kind of a surprise to
2 me in a forcible detainer case that's going to be
3 litigated in 10 minutes.

4 MR. LOW: Can that be oral, the forcible
5 entry, or is there an exception?

6 HONORABLE TOM LAWRENCE: I'm sorry. What?

7 MR. LOW: The forcible entry and detainer
8 suit, can that be oral as well, or is there some specific
9 rule?

10 HONORABLE TOM LAWRENCE: Well, you know,
11 there's really under the existing rules, you've got --

12 MR. EDWARDS: Isn't it 741?

13 HONORABLE TOM LAWRENCE: You have 741, the
14 requisites of the complaint, and that's all that -- if
15 you're asking is there any formal pleadings, 741 is the
16 only --

17 MR. LOW: Right, but does 741 say it must be
18 written, or is it oral and you comply with it? I know
19 what it says, but can it be done orally? 741 just says
20 "must state" and you have a general rule that your
21 complaint can be oral.

22 HONORABLE TOM LAWRENCE: You know, that's an
23 excellent question. 741 doesn't say it has to be written.

24 MR. LOW: Right.

25 HONORABLE TOM LAWRENCE: And if you apply

1 the rule that you look from the specific forcible rules,
2 and if they're silent, you go to Rule 7 -- the 500 series,
3 and the 500 series allow oral pleadings, then by that
4 stretch of logic, I guess that they could be oral,
5 although I am not personally aware of ever seeing any oral
6 pleadings.

7 MR. LOW: Right.

8 PROFESSOR DORSANEO: The 500 rules say you
9 look to the --

10 HONORABLE TOM LAWRENCE: The general rules,
11 and the general rules, of course, require it in writing,
12 but I think you stop at the 500 for this.

13 MR. LOW: The 500 rules it's oral.

14 HONORABLE TOM LAWRENCE: And we haven't
15 gotten to any 500 stuff. We need to do that at some
16 point.

17 PROFESSOR DORSANEO: I think that it would
18 be good for landlords and tenants for there to be
19 information provided to the tenant in writing that would
20 be a kind of standard description of the basis for the
21 possession claim or whatever other claims.

22 HONORABLE TOM LAWRENCE: What would you want
23 to see in it? What would you want it to --

24 MR. LOW: The property and the reason it's
25 being foreclosed.

1 PROFESSOR DORSANEO: The lease, the
2 provision of the lease that's being violated, a
3 description of how it's being violated, something that
4 would provide reasonable notice of what the landlord is
5 going to say at the hearing.

6 HONORABLE TOM LAWRENCE: Well, "and it shall
7 also state the facts which entitle the complainant to the
8 possession" can authorize the actions under the Property
9 Code. So, I mean, that's in the existing rule.

10 PROFESSOR DORSANEO: But that could be --

11 MR. LOW: Oral.

12 PROFESSOR DORSANEO: -- they violated the
13 lease or --

14 HONORABLE TOM LAWRENCE: Okay. Well, let's
15 say that we change 741 to require it to be in writing. Is
16 there anything not in 741 that you'd want in there,
17 because you have to describe the lands now?

18 PROFESSOR DORSANEO: See, Tom, I need to
19 know what you think needs to be in there. You're going to
20 be making this determination. You're not going to be
21 making the determination because you, you know, have some
22 bias against tenants. What needs to be in there? And I
23 can't tell you what needs to be in there. I can speculate
24 about what I think needs to be in there, but I need
25 guidance from people who are in this business.

1 MR. LOW: Or the tenant, what the tenant
2 needs to know.

3 PROFESSOR DORSANEO: Yeah.

4 HONORABLE TOM LAWRENCE: Okay. Well, what
5 we could do is, if you look at 748, there are some
6 provisions in 748 that are going to have to be in the
7 written judgment. My thought -- and Elaine and I have
8 kind of talked about this -- is that after we get through
9 this process, at the end of it, and the Court, whatever
10 they approve, that we would try to come up with some
11 forms, and a petition would be one of those.

12 I would think at the minimum you would want
13 to have to allege in 741 whatever is going to end up being
14 in 748, the written judgment, which would be the specific
15 cause of action, be it nonpayment of rent or something
16 else. Those are in the form petitions that I'm aware of
17 now. You have to specify that now, but it's not actually
18 in the rule. We can make the rule be much more specific,
19 if that's what you want.

20 MR. LOW: Not just for your benefit in
21 making judgment, but it's for the benefit of the tenant
22 who needs to give his lawyer something so the lawyer knows
23 something, because I've had some dumb clients, but I bet
24 you you've had some dumber.

25 MR. FUCHS: We have had.

1 HONORABLE TOM LAWRENCE: If I showed you a
2 petition, I think you would say that this form petition is
3 what you want, but it's not required, and there may be
4 petitions out there that aren't that specific.

5 PROFESSOR DORSANEO: I would say probably
6 the petition in the Texas Litigation Guide is probably a
7 good place to look, although I don't know what it says.

8 CHAIRMAN BABCOCK: Before I forget this,
9 Fred, could you be sure to give the court reporter your
10 name and correct spelling after we're done?

11 MR. FUCHS: I can do it, yes.

12 CHAIRMAN BABCOCK: You don't need to do it
13 now. Carl.

14 MR. HAMILTON: The Court Rules Committee has
15 reworked almost all of the 500 series, and in meeting with
16 the JP association one of our recommendations is going to
17 be that all pleadings have to be written in JP court, so
18 that may solve that problem, if it gets approved.

19 CHAIRMAN BABCOCK: Stephen.

20 MR. YELENOSKY: I think most of them -- I
21 mean, most of them are written now, but it's not providing
22 the extent of information that I think we all would like
23 to see; and so maybe the subcommittee can come up with
24 those things; but I also didn't want to lose track of the
25 question about disclosures. I think Buddy asked about

1 that, and my understanding is there is no disclosure
2 requirement that applies to FEDs right now; and that's
3 something that could be put in there that would require, I
4 guess, the lease and the tenant file, as Fred might define
5 that.

6 MR. FUCHS: There's a great Texarkana court
7 of appeals from 2001, Collins vs. Clem Manor Apartments,
8 37 S.W. 3d. It's, if you want to read it, 527, where the
9 court -- and it was a no writ, so it didn't go to the
10 Texas Supreme Court -- where the court deals with this
11 whole issue of tenant's right to discovery and says
12 although the -- and it's great language. The court sends
13 it back because the tenant's lawyer said, "I don't know
14 what this case is about" and loses in justice court, loses
15 in county court.

16 The Texarkana court of appeals says, "Yes,
17 the forcible detainer rules do evidence an intent to
18 expedite the process, but we don't believe it should be
19 done at the expense of the right to a jury trial and at
20 the expense of the right to discovery," and sends the case
21 back. But that case, if you're curious, gives some idea
22 of some of the problems that tenants sometimes face where
23 they're truly trying to keep the tenant in possession of
24 the premises.

25 CHAIRMAN BABCOCK: Frank.

1 MR. GILSTRAP: I'm a little troubled by this
2 because I think, you know, this is -- all of these rules
3 could be scrutinized at length; and we could quote,
4 reform, close quote, them all; and we'll never finish; and
5 I'm just a little concerned as kind of what our mandate
6 is. Is our mandate to merely rewrite and rearrange the
7 rules and preserve generally the balance between tenant
8 and landlord that's historically existed, or are we going
9 beyond that?

10 CHAIRMAN BABCOCK: Well, I think our mandate
11 is to give the Court our best advice, but beyond that is
12 there anything special that you-all are interested in?

13 JUSTICE HECHT: No. Just the problems that
14 have come up here illustrate why these rules need some
15 work.

16 CHAIRMAN BABCOCK: Bill.

17 PROFESSOR DORSANEO: It seems to me -- and I
18 think this is a fair comment, Frank -- that the practice
19 no longer matches what the rules say.

20 MR. LOW: Yeah. That's it.

21 PROFESSOR DORSANEO: And we're way overdue
22 in looking at this in a serious way, and it seems to me
23 this involves the interest of lots and lots and lots of
24 people, and I don't think that working on one little
25 aspect of it without considering the process from

1 beginning to end will be very satisfying.

2 MR. GILSTRAP: That's fine. I just kind of
3 think we all need to know where we're going with this.

4 CHAIRMAN BABCOCK: Yeah. That's a good
5 thing to be reminded of every so often.

6 MR. LOW: You know, one of the things, the
7 way I look at it, is something that you -- first of all,
8 one of your priorities is not to overcomplicate, but to
9 have fairness for both sides and to expedite, but to also
10 inform; and then to that extent as you amend the rules you
11 try to see that you maintain that balance, because if you
12 start getting into discovery too broadly, man, you can
13 have another --

14 PROFESSOR DORSANEO: You destroy the remedy.

15 MR. LOW: Yeah. And so we need to keep in
16 focus those limited things and change only the things that
17 need to meet our purposes.

18 PROFESSOR CARLSON: And that's -- I think
19 that's what we have tried to do.

20 MR. LOW: No, no, no. I'm not -- that's
21 just kind of the way I organized it in my mind.

22 PROFESSOR CARLSON: We kept the one-step
23 versus the two-step process as the norm. We are proposing
24 to amend, for example, Rule 745 to give the trial court
25 enlarged authority to continue when it's appropriate. We

1 specifically provide in another rule that discovery --

2 HONORABLE TOM LAWRENCE: 743.

3 PROFESSOR CARLSON: 743, that discovery is
4 ordinarily not proper in a forcible case, but that the
5 trial court has the discretion to allow it. So we are
6 trying to maintain the current practice in fairness; and
7 in those cases where it's appropriate, Fred, I mean, I
8 agree with you, there ought to be a mechanism for the
9 court to allow it; but what is going to be the normative
10 proceeding and what's going to be the exception is what
11 we're -- I think we're on probably different focuses.

12 MR. LOW: If you can't combine it, it's
13 expensive and time-consuming to add a counterclaim and
14 gets down the road and so forth, but yet maybe you
15 couldn't have that, and it would bog down the --

16 PROFESSOR CARLSON: Right.

17 MR. LOW: -- forcible entry and detainer, so
18 you can't afford that. I think the possession is the key
19 thing that makes this different than just a suit for money
20 damages.

21 PROFESSOR CARLSON: And, quite frankly, my
22 understanding is in most cases, most forcible cases, is
23 the tenant has not paid the rent.

24 MR. LOW: Right.

25 PROFESSOR CARLSON: And most cases are

1 decided, are they not, by default?

2 HONORABLE TOM LAWRENCE: A high percentage.

3 PROFESSOR CARLSON: And it may be we're not
4 giving the tenant enough answers to -- enough information
5 to come and respond. Maybe that's a problem.

6 MR. FUCHS: Those cases that don't have
7 merit, in a legal services office you don't take those
8 cases. You tell the folks, "This is the process. You can
9 go tell your story to the justice of the peace, and you're
10 going to be evicted"; but if they've got merit and we take
11 those cases, we just want a fair shot at being able to
12 present it to the justice of the peace; and when you're
13 saying, well, in most cases discovery isn't appropriate, I
14 just don't think you need to say anything. I think the
15 existing rules are fine; and if the landlord thinks you're
16 abusing the process with trying to get discovery, his
17 attorney can file an appropriate motion for protective
18 order, seek sanctions against you, whatever.

19 MR. LOW: But how can you tell it doesn't
20 have merit if you don't have the lease or there are some
21 exceptions that you're talking about?

22 MR. FUCHS: If you can't see the landlord's
23 file in the type of cases that I do, you cannot.

24 CHAIRMAN BABCOCK: Carl.

25 MR. HAMILTON: Part of the problem with the

1 existing rules -- and Tom would probably know more about
2 this -- is that there are tenants that take advantage of
3 the system, and they use this five days and then they get
4 another five days and another 10 days, and so they stay in
5 the property for X number of days rent-free as we go
6 through the system, and this is what the landlords are
7 complaining about, is that they're not entitled to stay
8 that long.

9 MR. FUCHS: And I think the way you can deal
10 with that -- I think the main problem is and the way you
11 can deal with that and I told Judge Lawrence I wouldn't
12 have any problem with this and tenant advocates wouldn't,
13 is after the justice court has ruled, right now if there's
14 an appeal on an affidavit and the tenant is supposed to
15 pay one month's rent five days after that, and if they
16 don't, the justice court cannot now issue a writ of
17 possession.

18 I have no problem -- it's got to go to the
19 county court, and so that's where a lot of the complaints
20 from landlords come about the delay, because they can't
21 get their -- there is an appeal filed by a tenant maybe in
22 a case that has no merit, the tenant is not interested in
23 staying in possession and doesn't pay that one month's
24 rent which is required within five days of filing the
25 affidavit of indigence, and so -- and the justice court

1 now doesn't have the authority under the rules to issue a
2 writ of possession.

3 I think you can deal with that by just
4 giving the justice court the power to issue that writ of
5 possession if the tenant doesn't make that supersedeas
6 payment into the court registry, and that's where I think
7 a lot of the complaints are coming in from landlords
8 saying, well, the tenant is staying in possession and not
9 paying rent.

10 MR. YELENOSKY: And I think that the
11 proposed rules do address that, don't they, Elaine? The
12 proposed rules address that problem, and Fred is saying
13 you can't address that problem without making some of the
14 other changes here, and to the extent that 95 percent of
15 these are decided by default, those expedited proceedings
16 aren't affected one whit by however complicated the
17 process is, because they don't go through the process.

18 PROFESSOR CARLSON: Right.

19 CHAIRMAN BABCOCK: Yeah, Judge Lawrence.

20 HONORABLE TOM LAWRENCE: One of the problems
21 with the discovery issue and the reason that we are
22 proposing the amendment to Rule 743 to allow the justice
23 court to allow discovery where warranted is that if you
24 look at the discovery rules now and you look at the
25 forcible rules, they just don't merge, they don't mesh,

1 and I think the prevailing view among most JPs in Texas is
2 that you can't have discovery in a forcible case because
3 you can't follow even remotely the time limits in both.
4 They have got conflicting time limits.

5 You've got an expedited proceeding in the
6 forcible. Then you've got a not expedited proceeding for
7 all the discovery rules, so we feel that you probably
8 can't have discovery now as a general rule, so that's why
9 we want to have something in 743 that allows discovery,
10 and the language mirrors our small claims court rules in
11 the Government Code that the Legislature adopted many
12 years ago that allowed discovery where warranted.

13 CHAIRMAN BABCOCK: And in injunction
14 proceedings there is expedited discovery. I mean, it
15 doesn't necessarily follow that just because you have an
16 expedited proceeding and the discovery rules aren't
17 expedited that you can't have discovery because in a
18 temporary injunction proceeding you can take three
19 depositions and exchange, you know, a thousand documents
20 within a couple of days if the judge orders you to do it
21 and then be ready for your temporary injunction.

22 MR. FUCHS: And I have had judges order
23 expedited discovery in the forcible detainer case.

24 CHAIRMAN BABCOCK: But my point is if your
25 proposition is generally discovery is not appropriate in

1 forcible cases and the intellectual underpinning to that
2 is because generally you can't have expedited discovery, I
3 don't know that that necessary follows.

4 HONORABLE TOM LAWRENCE: Well, there's
5 nothing in the rules now that even talk about discovery.
6 I'm not aware of -- other than the one case Fred gave me
7 about the Clem, the Clem case, that's the only case that I
8 have ever seen on discovery in JP court.

9 MR. FUCHS: Well, the way I interpret is
10 you've got Rule 523 which says that all the rules of the
11 county and district courts should be applied to the
12 justice courts insofar as they can be applied, and that
13 means to me you can do discovery, and if the justice wants
14 to put it on a fast track, can expedite it. Or the
15 landlord can --

16 CHAIRMAN BABCOCK: What Fred is saying is by
17 putting this provision in Rule 743, I mean, the intent I
18 think is to expand discovery, but what Fred is saying is,
19 no, you're going to restrict discovery.

20 MR. FUCHS: That's my concern. Yes.

21 MR. LOW: And also the concern is that you
22 say "discovery," and the judge may say, "Well, you don't
23 give me outlines, so then I go to the district court,"
24 well, then you've got 30 days to answer and that kind of
25 thing when you say "discovery" and you put that -- they

1 kick that into the same discovery pattern as the district
2 court, and it won't work here. So when you just say
3 "discovery," you know, that creates a problem.

4 HONORABLE TOM LAWRENCE: I don't see how you
5 could fit the Level 1 discovery rules into a forcible.

6 MR. LOW: That's the reason. That's the
7 reason. I don't see how either. That's the reason I'm
8 saying that when you say "discovery," and you say, well,
9 how do you define it and what? You say, "Well, the only
10 way, I'm referred now to the district court rules," and
11 you go there there to 193 and those discovery rules, and
12 they can't apply.

13 PROFESSOR CARLSON: It won't work.

14 MR. LOW: It won't work.

15 HONORABLE TOM LAWRENCE: The reason the
16 language is in 743 is that we have a track record with
17 this. In a small claims court case this is the exact
18 language that the Legislature adopted for discovery in the
19 small claims court. So we've got a history of dealing
20 with that, and that's why I put that same language in 743.

21 MR. LOW: Well, what is the schedule? What
22 do you use in small claims court? What is the schedule?

23 HONORABLE TOM LAWRENCE: The court
24 determines that. You -- typically there's a hearing. You
25 talk to the parties, what are you going to need, and you

1 write that out at the time.

2 MR. LOW: Well, "discovery as ordered by the
3 court" rather than "the rules."

4 CHAIRMAN BABCOCK: Bill.

5 PROFESSOR CARLSON: Right.

6 PROFESSOR DORSANEO: What would you do or
7 what do you think would be done if a tenant's lawyer sent
8 a deposition notice out to take the deposition of the
9 landlord or the appropriate representative of the landlord
10 before the trial?

11 HONORABLE TOM LAWRENCE: Today under the
12 rules?

13 PROFESSOR DORSANEO: Uh-huh.

14 HONORABLE TOM LAWRENCE: I don't think that
15 I would delay the trial.

16 PROFESSOR DORSANEO: Would you quash the
17 deposition notice?

18 HONORABLE TOM LAWRENCE: You know, I've
19 never -- never even had that issue come up.

20 MR. FUCHS: I've had landlords' attorneys
21 try to quash the deposition notice, and the justice of the
22 peace ordered that they allow me to take the deposition.
23 Very seldom do I take depositions, but there are cases
24 where -- extraordinary cases where you need to do it.
25 Most cases you just need the landlord's file.

1 PROFESSOR DORSANEO: I think that, you know,
2 that maybe work on the -- you know, pleading rules are
3 disclosure rules --

4 PROFESSOR CARLSON: Right.

5 MR. LOW: Right.

6 PROFESSOR DORSANEO: -- depending upon what
7 the pleading rules need to say, and I really do think
8 everybody would be a lot better off if the pleading rules
9 eliminated a lot of these controversies to eliminate the
10 need for continuance motions, to just kind of lay it on
11 the line a little in a clear way and then have it
12 litigated as quickly as makes sense economically,
13 commercially, and --

14 CHAIRMAN BABCOCK: Stephen had his hand up.

15 MR. YELENOSKY: I was just going to say, I
16 mean, as Fred said, it's rare that you need a deposition;
17 and so, unlike the injunction situation, you're probably
18 not going to be taking a deposition; and it shouldn't
19 delay things if, as Bill says, you have what is
20 essentially an initial disclosure requirement up front,
21 because it's there; and I don't think from talking to Fred
22 he would see a problem with an appropriate pleading and
23 initial disclosure requirement that was coupled with a
24 general assumption that you wouldn't have more than that,
25 but you could with the judge's approval if you needed a

1 deposition or something.

2 CHAIRMAN BABCOCK: Judge.

3 HONORABLE TOM LAWRENCE: Under the current
4 Rule 745 you can't postpone a trial more than six days.
5 That's one of the problems, how do you mesh the discovery
6 rules with the current Rule 745, but what we've done is
7 we've changed 743 to allow discovery and 745 to allow
8 extensions, so I think we made the system much better than
9 it is now.

10 MR. LOW: But what he's talking about is a
11 disclosure, and if the landlord comes in and says, "I
12 don't have time to disclose that," say, "Okay, landlord,
13 you can extend it." The landlords are the ones that
14 complain about, you know, to extend it. They want
15 possession. Landlord says, "Well, I can't disclose." I'm
16 not talking about disclosing every check or -- I'm talking
17 about certain basic disclosures, and, surprisingly enough,
18 I don't know enough about it to tell you what needs to be
19 disclosed.

20 CHAIRMAN BABCOCK: The landlord's file,
21 whatever's in it.

22 MR. LOW: All right. But what is a file?
23 And then if the landlord says, "I can't do that," he could
24 get a continuance. How could he complain about extending
25 the time then?

1 CHAIRMAN BABCOCK: Stephen.

2 MR. YELENOSKY: With all due respect, Judge
3 Lawrence, I think when you say some of this will be
4 better, I think that the general practice in JP court the
5 way the law has been interpreted, the majoritarian view
6 that you're saying this is better than, is simply wrong on
7 the law, and Fred's view of the law is the correct view of
8 the law. So to say it's better is to say it's better than
9 what is the majoritarian wrong view of the law; i.e.,
10 there's no discovery. I mean, I think Fred's analysis of
11 why the law is correct on the ability to discover is
12 right.

13 So I don't think our benchmark should be the
14 majoritarian view across the state, for instances,
15 appearance may be trial. I think that's just wrong, and
16 Fred's right about that. It's answer, and I think
17 judge -- or Professor Dorsaneo made that point last time.
18 I mean, he reads "appearance" as "answer." So I don't
19 think we should take as a benchmark what's happened in a
20 majority of JP courts across the state.

21 CHAIRMAN BABCOCK: That sounded very deep,
22 what you just said.

23 MR. YELENOSKY: What?

24 CHAIRMAN BABCOCK: I said that sounded very
25 deep, what you just said.

1 PROFESSOR DORSANEO: I think what we're
2 trying to do is come up with -- not decide who's right or
3 wrong, but to come up with a procedure --

4 MR. LOW: Right.

5 PROFESSOR DORSANEO: -- that makes sense and
6 that works quickly, as quickly as it makes sense to
7 proceed, and I think we can do that. Now, granted,
8 interrogatories and that kind of written discovery
9 procedure makes no sense in an expedited proceeding,
10 really. A deposition, I would have thought a deposition
11 might make sense, but a deposition is at least not
12 customary, and may --

13 MR. YELENOSKY: Rare.

14 PROFESSOR DORSANEO: -- be expensive. Maybe
15 it doesn't make sense, so what makes sense? I perceive
16 this landlord's file is not some great big file. It's a
17 little old, itty bitty file with not much in it for --

18 MR. FUCHS: It really depends. I've got
19 tenants who may have lived there for 10 or 15 years.

20 PROFESSOR DORSANEO: And some sort of
21 pleading requirement that discloses the information that
22 the JP would need to know in order to make a reasoned
23 determination, that makes sense.

24 PROFESSOR CARLSON: You're right.

25 PROFESSOR DORSANEO: In order to keep people

1 from coming in and moving for a continuance just to delay
2 the day of reckoning, would cut off the tenant's argument
3 "I need to continue" if they don't have the information or
4 they have the information and would be a good starting
5 point, I think.

6 CHAIRMAN BABCOCK: Let me ask the question.
7 Judge Lawrence, did I hear that you're not going to be
8 able to be here for the March meeting?

9 HONORABLE TOM LAWRENCE: Well, I have a
10 conflict. We're not going to get through very much today
11 obviously to vote on.

12 CHAIRMAN BABCOCK: We're not going to get
13 through anything today to vote on because we're about
14 to --

15 HONORABLE TOM LAWRENCE: Yeah. I can be
16 here in March.

17 CHAIRMAN BABCOCK: Okay. I mean, that would
18 be good if you can.

19 PROFESSOR CARLSON: You said on Friday?

20 HONORABLE TOM LAWRENCE: Yeah. Can we do it
21 Friday? That would help me if we could do this Friday.

22 PROFESSOR DORSANEO: Let's do it Friday.
23 Everybody's here.

24 CHAIRMAN BABCOCK: Yeah. Yeah. We can do
25 it Friday. The only thing we've got to do on Friday, that

1 we absolutely have to do on Friday, is the parental
2 notification.

3 HONORABLE TOM LAWRENCE: If we could do it
4 in the morning so I could get out of here in the afternoon
5 maybe.

6 PROFESSOR CARLSON: He's got to get a
7 flight.

8 HONORABLE TOM LAWRENCE: Yeah. I'm supposed
9 to go to Tyler.

10 CHAIRMAN BABCOCK: Okay. All right. We'll
11 do it right after parental notification then. We'll do
12 the report from Justice Hecht, parental notification, and
13 then FED.

14 Everybody will be happy to hear that there
15 is going to be a special either video or teleconference
16 meeting of the Supreme Court Advisory Committee on
17 February 26th from noon to 5:00 to consider the three
18 trailing issues on the TRAP rules. That's Rule 9.5 and
19 Rule 52 is one issue. Rule 33.1(d) and then Rule 38, and
20 we'll send you notice and details out about that. The
21 Court is very interested in getting the TRAP rules wrapped
22 up, so we want to do that.

23 Our next meeting is March 8th and 9th.
24 There are two new assignments, one of which has got to be
25 done at that meeting, which is the offer of judgment rule,

1 which Elaine Carlson is chairing -- boy, you're up to bat
2 all the time now -- is chairing the subcommittee on that,
3 which includes Tommy Jacks and Elaine and David Peeples
4 and --

5 PROFESSOR CARLSON: John Martin.

6 CHAIRMAN BABCOCK: And John Martin. And
7 then Bill Edwards sent a letter about ex parte
8 communications and the physician/patient confidentiality,
9 and that's been referred to Buddy Low.

10 MR. LOW: Yeah. I've sent that along with
11 some cases to all my committee members. We only have
12 three minor things to meet on. That's about the only
13 major thing, but we do that by meeting actually, rather
14 than telephone or e-mail.

15 CHAIRMAN BABCOCK: Okay. We'll try to --
16 we'll put you on the agenda for March 8th and 9th.

17 MR. LOW: Okay.

18 CHAIRMAN BABCOCK: Which again is going to
19 be at TAB, not at the Bar, not here.

20 MR. LOW: I'll need to be reminded of that a
21 few days before.

22 CHAIRMAN BABCOCK: We'll send out a reminder
23 to everybody. I apologize for having to end the meeting a
24 little bit early, but it's a matter of personal necessity
25 here. I've got to go meet my daughter who's getting on a

1 plane.

2 PROFESSOR CARLSON: That is a great reason.

3 CHAIRMAN BABCOCK: Yeah. Thanks, everybody.

4 I think we accomplished a lot. Not as much as I had
5 hoped, but we got a lot done, and, Fred, thanks very much
6 for coming.

7 MR. FUCHS: Thank you for allowing me to
8 participate.

9 CHAIRMAN BABCOCK: And if you can come back
10 on March 7th, we would love to have you.

11 MR. FUCHS: Okay. I'll try to be here.

12 (Meeting adjourned at 11:15 a.m.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand
Reporter, State of Texas, hereby certify that I reported
the above meeting of the Supreme Court Advisory Committee
on the 26th day of January, 2002, Saturday Session, and
the same was thereafter reduced to computer transcription
by me.

I further certify that the costs for my
services in the matter are \$ 939.50.

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

Given under my hand and seal of office on
this the 6th day of February, 2002.

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