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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

September 28, 2012

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 28th day of September, 2012, between the hours of 9:01 a.m. and 5:02 p.m., at the South Texas College of Law, 1303 San Jacinto Street, Houston, Texas 77002.

INDEX OF VOTES

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

Documents referenced in this session

12-14 Small Claims Task Force Report

12-18 Supplemental Small Claims Task Force Report

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CHAIRMAN BABCOCK: Welcome, everybody. And we not only have a transcript, a written record of our proceedings today, but we have a video recording, so don't anybody pick their nose while they're talking, because you'll be captured on film. As best anybody can remember -- and I've consulted with Buddy Low, who is our historian -- we have never had a Supreme Court Advisory Committee meeting in Houston before, so this is a first. Justice Hecht and I were reminiscing and do recall that we had a meeting way back when in Dallas at SMU Law School, but I think very few of the people on the committee now were on the committee then, but other than that nobody can remember being outside of Austin. We are here and not in Austin because we felt we needed a meeting this month, and with accommodation of football and the hotel and other events in Austin, we just -- there were no weekends where the hotel and meeting facility was available, so we decided to do it here, and I hope it hasn't inconvenienced anybody.

We need to thank Elaine Carlson and Dean Guter of the law school here for making this facility available, and more importantly, for hosting the cocktail reception at 5:00 o'clock immediately after we adjourn, right? I think in the next room, right?

PROFESSOR CARLSON: Yes, sir.

CHAIRMAN BABCOCK: Right in the next room, so that should be fun, and with that I'll turn it over to Justice Hecht for his usual opening remarks.

HONORABLE NATHAN HECHT: Just a few. We did approve the word limit amendments to the Rules of Appellate Procedure and published those for comment. They're to take effect December 1st, so that's done. We also approved electronic filing for the Twelfth Court of Appeals, so that brings to six, I think, total the courts of appeals that have mandated electronic filing and another seven that are allowing it. There are only two that don't, the Eighth Court and the Tenth Court, but I'm sure they'll be along directly. And we also have only two more days to serve with Justice Wainwright, who has announced that he is retiring and going into practice with Bracewell & Giuliani, and so we wish him the best, and you can send your application to member Jeff Boyd, except he's not here today. I'm sure he will be happy to receive it. So those are the -- that's all I have to report. The Court is working on dismissal and expedited actions and should have those rules done within the next several weeks, and then that leaves this project as the only one remaining from the last legislative session, and we -- it's due by May 1st of next year, and we see no reason why

we won't meet that deadline. That's all I have.

CHAIRMAN BABCOCK: All right. I think that we left off with finishing Rule 739. Is that everybody's recollection? Which would leave us on Rule 740. Bronson, is that what you recall?

MR. TUCKER: Yes, but that's -- I slept once or twice since then, but that's what I -- that sounds correct, yes, sir.

CHAIRMAN BABCOCK: All right. So I think we probably can just go -- continue on the eviction rules from Section 10, having discussed Rule 738 and 739, and so we'll pick up on Rule 740, and, Bronson, are you leading the discussion about this?

MR. TUCKER: Yes, sir. As far as from representing the task force, yes, sir.

CHAIRMAN BABCOCK: Okay. Well, you want to just tell us what you're trying to get at on Rule 740 and then we can have discussion from there?

MR. TUCKER: You bet. And on Rule 740 there's really no substantive change to what currently exists. It just states that a plaintiff, a landlord, can join a suit for rent with an eviction suit, so 740 doesn't really have any substantive change from what the current rule would be.

CHAIRMAN BABCOCK: Okay. Any comments on

740? No changes in the current rules. If nobody knows of any problems in the current rule then we will move on to 741.

MR. TUCKER: Yes, sir. Rule 741 is our citation rule that talks about what should be in the citation for an eviction suit, and this -- the way that the rule currently works is that the judge is supposed to put in the citation when the hearing is going to be, and the trouble with the judge putting in the citation when the hearing is going to be is when the hearing is going to be is currently based on when the defendant gets served with the citation. It's supposed to be 6 to 10 days after the defendant gets served with citation is when the hearing date is supposed to be. Well, obviously that creates some problem with the judge trying to set the hearing date based on what's going to occur in the future.

So what we decided would make more sense is to make the hearing date based off of when the filing date was and then basically work from there, and we wanted to include in there a provision that the constable has to serve the citation at least six days before the hearing date. That matches what they have to do now. This would give them a wider range of time where they could actually serve it, and so what we wanted to do was create a time frame that would basically keep the time frame for

eviction suits the same as it is now. We had no desire to either speed it up or slow it down. What we put in the rules was 7 to 14 days from the date of filing. Now, since then we've talked to some judges and some constables, and they seemed to indicate that that might be a little bit of an aggressive time line to try to get to the hearing, so what I had mentioned in the report was possibly 10 to 21 days.

Now, I've talked to David Fritsche, and I welcome you guys' comments on what you think as far as how that time frame would work. I seem to remember you were thinking generally three to four weeks after filing is when those suits go to trial, but we basically are open to input on what those numbers should be. What we just hope to do is base it off of the filing date to allow the judge to set the hearing date, and the other thing that that would do, for example, right now, it has to be 6 to 10 from the date of service. Okay. Well, if I get an eviction suit and I want to have the trial 10 -- or 14 days from now, those first four days the constable can't even serve it even if they wanted to, because if they served it on the next day, that 14-day trial window is now too late; whereas if we say 14 days from filing, the constable can serve it that day, the constable can serve it any time up to that six-day window. So we just think

this will be a lot better.

There's also one other issue that does come up from time to time when it's based on service. We have some courts that feel that it's not appropriate to do evictions around Christmas, for example; and so one of the ways it gets around that is the constable just says, "Well, I'm not going to serve it until January 1st." Well, since the trial date is based off of service there is nothing that's explicitly wrong with that; whereas, here, if I'm a landlord and I come in and I file the eviction suit on December 10th, they're still required to have that hearing 10 to 21 days from there. So we really felt that basing it off of filing would clear up several problems, but we are open to what the numbers should be on how many days that should be.

CHAIRMAN BABCOCK: Okay. Great. Richard Orsinger, you want to comment?

MR. ORSINGER: No. That sounds very sensible to me.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: You know, I had one question. We've been dealing with the word "shall," "must," and "will," and they use "shall," and I think a lot of the committee was of the opinion we should use "must." Are we going to be consistent in these rules, or I just make that

note for the Court; and where he says, "The plaintiff or his authorized agent shall file," does he mean from the time he's required to file or when he actually files, when he files?

MR. TUCKER: Yeah, and we had started drafting these, and obviously some of the language was brought from the existing rules. We had discussions with Marisa about this issue; and, yeah, our intention was to go ahead and knock those out; and it had been mentioned that those will probably get knocked out regardless, so we didn't scour it with a fine-toothed comb; but, yeah, that's my understanding, too; and I think on that one it should be, "When a plaintiff or his authorized agent files his written sworn petition" because they're not required to -- they just want to do it. So, yeah, I think that should say "files," and we had talked about that, going through and making the shalls into musts.

CHAIRMAN BABCOCK: Did we ever reach consensus on whether it should be "shall" or "must"?

MR. LOW: "Must."

MR. ORSINGER: "Must."

MR. LOW: We use "shall" and "will" grammatically like "I will do that," "You shall do that," depends on the parties, but Dorsaneo convinced us I think "must" applies to everything.

CHAIRMAN BABCOCK: Okay. And "must" is stronger than "shall"?

MR. LOW: They're both strong depending on the sense, but you can use -- "must" is more effectual.

HONORABLE NATHAN HECHT: "Must" is mandatory and "shall" is ambiguous, so we don't use that.

MR. LOW: Yeah, there.

CHAIRMAN BABCOCK: So we must use "must." Good for us. Okay. Lisa.

MS. HOBBS: So currently you -- generally a tenant would have 6 to 10 days notice of an eviction trial basically. I would personally be in favor of instead of that 6-day window that you're talking about, moving that to a 10-day window. I mean, I know these things are meant to be fast, but six days, people are on vacation for six days easily.

MR. TUCKER: So to make it where the constable would have to serve it 10 days before the hearing date?

MS. HOBBS: I mean, that would be my preference. I mean, I understand this is current practice, but six days does seem really short to me.

CHAIRMAN BABCOCK: We got any six-day advocates here?

MS. BARON: I have a question.

CHAIRMAN BABCOCK: Pam.

MS. BARON: As I read this, does it key off the citation date of service or the day the petition is filed?

MR. TUCKER: Well, are you talking about in our proposal or as it currently stands?

MS. BARON: In what -- I'm looking at Rule 71, citation, is that not the current proposal?

MR. TUCKER: What -- yeah, what we've proposed here is that the clock starts ticking under our proposal when the plaintiff comes and files their petition. Okay. That's -- that sets the initial time frame that the court is going to have to have a hearing no less than 10 and no more than 21 days from the day that the plaintiff comes in and files that petition. Separately the service issue comes up, and that's what Ms. Hobbs had brought up for discussion. The constable is going to have a requirement that they have to get that citation to the defendant no less than six days before that trial date that the court set, which is their current time frame, but that means it could -- I mean, that means the constable is going to have a minimum of 4 days to serve it and a maximum of 15, obviously depending on when that trial date was set.

I think the issue that you might run into if

you start going with 10 days, is that's going to start to enlarge the process. I think under our rule versus the current rule tenants are going to start getting a lot more notice of the trial setting because the constable has a larger window to serve it. Like I said, now the constable will be able to go serve it the next day or that day even; whereas, currently sometimes the constable has to wait to serve it just to ensure that they don't serve it any less than 6 or more than 10 days before the date that the court wants to have the trial. So it kind of removes an artificial limit on when the constable can serve that. So we do think this rule will enlarge the period of time on average that a tenant would have, but the minimum would still be six obviously, so --

MR. LEVY: But your example about Christmastime suggested that constables like to hold onto things and manipulate the system a little bit, and I would just be concerned that if you give them a larger window there might be some constables in some counties that might wait until the last minute to serve.

MR. TUCKER: Right, but at least -- and to be fair, I don't think it's a widespread issue. I didn't mean that -- I don't mean to throw all of them under the bus or anything like that, but in this situation at least there is still going to be a deadline. They can't push it

past this 21 days, which eliminates kind of the situation where sometimes landlords get unfairly prejudiced by them holding it on, because they just can't stretch it out that far. Really what it's going to do is it's going to help the constable be able to serve it earlier so they can get it off of their desk and get onto other things rather than trying to make sure everything goes in the right box.

CHAIRMAN BABCOCK: Pam.

MS. BARON: I'm sorry, I'm being very dense this morning, I suppose, but in Rule 741 is there this statement that it cannot be less than six days from the date of service?

MR. TUCKER: No, ma'am. That comes up in a subsequent rule where we explicitly talk about service.

MS. BARON: Okay. That helps me. Thank you.

MR. TUCKER: Yes.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: Is there a requirement that the return of service has to be on file, and is that something that the court has to look at before it enters a judgment?

MR. TUCKER: Yes, sir. The -- currently the rule is the return of service has to be on file no later than the day of trial. What we also did when we get to the service rule, you'll see that we backed that up a

little bit to allow the court to at least have that on file to review that to make sure everything is okay with that.

CHAIRMAN BABCOCK: Okay. Any more comments about 741?

MR. ORSINGER: I just had a question. You may have discussed this before, excuse me if you did, but it says that the rules are at www.therules.com, and I'm wondering who maintains that domain and the accuracy of it.

MR. TUCKER: Yeah, therules.com was just our placeholder in the rules.

MR. ORSINGER: Oh, okay.

MR. TUCKER: Yeah. It hasn't been officially decided where the rules would be hosted, so wherever we ultimately have the rules hosted we would substitute that in.

MR. ORSINGER: Well, is it going to be hosted at a government site?

MR. TUCKER: That's our thought. It had been discussed possibly on the Supreme Court site.

HONORABLE NATHAN HECHT: OCA maybe.

MR. ORSINGER: Okay. Something where the government has control of the domain name and all of that.

MR. TUCKER: Yeah.

CHAIRMAN BABCOCK: Okay. Makes sense. Anything more on 741? Okay, 742, request for immediate possession. From the note it appears that this was somewhat controversial in the subcommittee.

MR. TUCKER: Yeah. There was definitely some controversy over this, and what we currently have is Rule 740 under the Rules of Civil Procedure, and that rule is pretty confusingly written. The way this process works is the plaintiff can come in and post a bond and say, "We are requesting immediate possession." Okay. The defendant is then supposed to be noticed that they have six days to request a trial to occur within that six-day period or to post a counter-bond. Okay. What the rule says is that if the defendant fails to do either of those things, the plaintiff shall immediately be placed in possession of the premises. Okay. Well, that raises a lot of problems because there's -- there's debate over whether or not a court can do that, and courts do that differently. Some courts say, "Well, yeah, you can, that's what the rule says." Other courts say, "No, the only method we have to place a plaintiff in possession is a writ of possession. There's no other way we can do it"; and the Property Code says, "No writ of possession shall issue except after a hearing," six days if it was a contested hearing, immediately if it was a default hearing

and an immediate possession bond was on file.

So that's the first conflict in Rule 740, is does this create a separate mechanism that the court can place the plaintiff immediately in possession or is only a writ of possession the only way to get a plaintiff in, and therefore, the Rule 740 really can't apply because the Property Code would trump that. Okay.

The second issue that it does allow, as I mentioned, if this immediate possession bond is on file, if there is a default judgment then the plaintiff can have a writ of possession immediately at that point. Okay. And so there's a lot of discussion of whether or not a landlord needs this remedy or not. It was split pretty evenly. The thought on why the landlord does, there are definitely situations where the landlord really needs to get a tenant out as quickly as possible, where the tenant, for example, is threatening other individuals or the landlord, doing damage to the property, selling drugs out of the house.

It also provides a mechanism where the landlord can get the situation over with quickly. For example, when the tenant has left but the landlord wants to get the rent to make sure they can't ever come back and say, "Oh, no, I still have a right to possession." The tenant has already left, they're not going to show up at

trial, the landlords can get their writ of possession that day and go on their way.

So, again, we had some discussion. About half of the committee wanted to take this completely out and then about half of the committee liked this proposal that we had put in, which sets up kind of a separate mechanism. We eliminate that language about ever taking the tenant out before trial. We think that that's problematic to remove someone from their premises without a hearing. Most courts aren't doing that currently under the rules because of the Property Code.

So the way we set it up is the plaintiff can file a request for immediate possession, post a bond. The defendant gets a notice saying, "This has been filed. If you have a judgment against you, you might only have 24 hours to preserve your right to stay in the property during appeal. You're going to have to post a counter-bond. Contact the court immediately if you want to do that," and how you calculate that. Okay. Then it goes on to say if we then have a default judgment the plaintiff gets their writ of possession immediately, which is the same as it is currently.

If it is a contested hearing, what this provides is that the judge can then hear evidence on the issue of immediate procession where the plaintiff can make

a showing to the court that they have good cause to require a bond of the defendant if the defendant is going to stay in the property during -- during the appeal, and the judge can rule on that one way or the other. Okay. If the judge finds good cause, the tenant is going to have to post a bond to stay in the property during an appeal, okay, which can either be a counter-bond that they filed originally or they can appeal with a surety bond, but what this would do is prevent a tenant where a judge has found good cause that they should be removed immediately from staying in the property with only a pauper's affidavit, which really doesn't give the landlord a lot of insurance because there is nothing to recover against from that.

It kind of sets up a similar track as the new change on evictions for nonpayment of rent. The Legislature put in a mechanism now for an eviction for nonpayment of rent. If you want to appeal that with a pauper's affidavit, you have to pay the rent directly to the justice court within five days or you get removed from the property. You still get a right to an appeal. You're just not going to be in the property while you have it, and that's similar to what we tried to do with this. If the judge finds good cause that you're doing something to the property where the landlord is not protected by the normal appellate procedure, you're going to have to put up

a bond to protect the landlord against future damages or your appeal is going to be done from off the premises.

CHAIRMAN BABCOCK: Let me ask you a question. This Rule 740, which you proposed to substantially rewrite, has been on the books for 70 years. It was last amended 25 years ago. What are the problems with Rule 740 that everybody -- I mean, you said in the note that it was problematic, but you're not -- you didn't spell out what the problems were.

MR. TUCKER: Yeah.

CHAIRMAN BABCOCK: Judge Peeples is very much against changing rules just for the sake of changing them.

MR. TUCKER: Of course, and I think that's a reasonable position. Like I said, the biggest problem with Rule 740 is this language of "The plaintiff shall immediately be placed in possession of the premises if the defendant doesn't post a counter-bond." What does that exactly mean? Can a judge actually do that? We have some courts that interpret it to mean -- where it says, "The defendant has six days to request a hearing," we have some courts that interpret that to mean if they don't request a hearing they don't get a hearing, that the plaintiff just gets possession. That seems problematic to me, but, you know, the way the rule is written it's a reasonable

reading of the actual words on the page.

Can the judge put the -- and another reading would be, yeah, no, the tenant gets taken out at six days, but we're still going to have the hearing in good time, and if the tenant then wins, well, that's why we made the plaintiff post a bond. Now the tenant recovers against that to cover their expenses for moving in and out. It's just very unevenly applied, and it's vague as far as what it tells the court, whether -- whether what it tells the court the court can actually do and what it actually means.

CHAIRMAN BABCOCK: Judge Casey.

HONORABLE RUSS CASEY: I think that this is one of those situations where the rule didn't change but the world around it did. I think if you look at the Property Code where this is -- I think it's 24.063 -- that there were some changes to that recently. Also, the addition of having rent during the appeal, these sorts of things, there's been lots of Property Code changes and other rule changes around it to where it just doesn't quite make sense as much anymore. We have some conflicts, and so it -- and also, if you look at the way that we worded our proposed rule would require a legislative change, so I don't think that there is in anything a -- an easy solution to this. It is something we definitely feel

there is a problem.

We kind of -- we had so much debate on this. We had lengthy, lengthy, hours and hours of discussions, and I hate to relive it all here, but trust me, it was a -- it was a necessity that we felt that the issue be addressed by this Supreme Court, and like you said, one half of the group thought we should just eliminate it because of the problems. The other proposed this part of the problems, and it's about evenly split. Either way I feel that since immediate possession bonds are mentioned in the Property Code, if we eliminate the rule I think there should be a tweaking of the Property Code there. If we modify the rule for this, there would need to be a tweaking of the Property Code there. So I think that probably the best thing that we can do from our committee standpoint is tell you what we see the problem as being and leave it up to you guys.

MR. TUCKER: Yeah, and -- oh, I'm sorry.

CHAIRMAN BABCOCK: No, go ahead, Bronson.

MR. TUCKER: Just to elaborate on what Judge Casey is talking about as far as the problem in the Property Code, the way the Property Code currently reads is "No writ of possession shall issue except after six days after a hearing, except after a default judgment where an immediate possession bond is on file." So to

adopt this current rule it would be changed to say -- or the proposed rule, it would have to change to say "except as provided after an immediate possession bond has been on file as provided for the Rules of Civil Procedure," something along the lines to show that one other potential option if you don't like this contested hearing part where the -- even when the defendant shows up they might be immediately moved if you could just take out (f) of this proposed rule and that would just leave in the part where basically the plaintiff puts up a bond. If the defendant doesn't show up, they get their writ immediately. I think that's a reasonable outcome also.

I would like to include the contested hearing part because I think the landlord sometimes still has a need to get that tenant out even if they show up for the hearing or at least have the tenant put up something to protect their interest, but if we don't like that, that would be fine to take it out. Like I mentioned in the notes, I would really not want to leave current 740 as is. We can eliminate it, we can do this, we can set it up where it's only on default judgments, but as is it's really -- you know, when I was talking to some judges about the rules I talked to three of the judges that I really respect the most and asked them how they handle current Rule 740. They all handle it a totally different

way, and I think when you have three of the best judges that are doing it an entirely different way --

CHAIRMAN BABCOCK: Where are those judges located?

MR. TUCKER: One was in Midland and two were in Dallas.

HONORABLE RUSS CASEY: I wasn't one of those?

MR. TUCKER: You were number four.

CHAIRMAN BABCOCK: Let the record reflect there were ties for third, I would think. Carl.

MR. HAMILTON: You mentioned good cause for possession, but 742 says, "Only allege specific facts that should entitle the plaintiff to possession." Does that mean good cause is specific facts?

MR. TUCKER: Yeah. And what we were trying to get at with that language, we don't want -- and they wouldn't be trained this way, but -- pardon me, I'm sorry. We don't want judges to basically say, "Oh, well, they haven't paid their rent, so that's good cause to take them out right now." What we really contemplated with that is this is something -- and, again, we have that language if it's determined that the plaintiff's interests will not be adequately protected during the normal appeal procedure. We have something in the appeal procedure to protect as

far as just the payment of rent, which is that they have to either post a bond or if they do a pauper's affidavit, they've got to pay rent into the registry of the court or they don't get to appeal while they're there. So the rent part is really kind of covered. We were trying to get at some of these other issues where the landlord is not adequately protected where we have a tenant who is committing crimes on the property or is destroying the property, threatening people, things like that. That's what that was targeted at.

CHAIRMAN BABCOCK: I think Robert had his hand up first and then Buddy.

MR. LEVY: A couple of questions. One, is it clear that a tenant is entitled to recover attorney's fees under the law in the event of a wrongful action?

CHAIRMAN BABCOCK: Robert, try to speak up, because Dee Dee can't hear you, and if she can't hear you, they sure can't hear you.

MR. LEVY: My question is whether it's clear that a tenant can recover attorney's fees in the event of a wrongful immediate possession action.

MR. TUCKER: It's not currently clear, I wouldn't say, no.

MR. LEVY: Because this rule seems to suggest it is, because it says it can include attorney's

fees, so I'm not sure you want to put that in there. And then I'd also suggest on the notice to the tenant, it seems a little confusing, particularly for a tenant who is not legally literate, the concept, for example, of a counter-bond. I realize that's what the rule provides, but does it have to say "counter-bond"? Could it just say "a bond" or at least think about trying to make it a little bit easier for them to understand?

MR. TUCKER: Right. No, yeah, I think that's very well-taken, and I mentioned -- I mean, that's really been our goal, is to try to make these rules as open and friendly to, you know, nonlegally trained litigants and judges as we can. I think that's what the Legislature told us to do, so, yeah, any phrasing like that, though, that would make it more accessible to someone who is getting that I think would make sense.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, I have a question. Is there a difference -- 740 speaks in terms of evictions, and I can see where somebody is doing something illegal you need to get them out. Is there a difference between evictions and writ of possession? I'm not giving you possession, but I'm kicking you out. You use them interchangeably. Is there a difference?

MR. TUCKER: Yeah, really a writ of

possession is the tool that is used to enforce a judgment in an eviction suit. So as the landlord I come file an eviction suit, I get a judgment for possession. After I get that judgment for possession I then can get a writ of possession, which is my enforcement mechanism where the constable goes out, gives them a 24-hour posting, and then the constable comes back the next day; and if they're not out, the constable takes them out. So the writ is kind of the enforcement tool of an eviction judgment. They have to wait six days currently for that writ after the judgment, unless an immediate possession bond has been filed and it's a default judgment.

CHAIRMAN BABCOCK: Okay. Professor Carlson.

PROFESSOR CARLSON: Yeah, is this the first time that the landlord is proving up or the plaintiff is proving up the grounds for the dispossession?

MR. TUCKER: Yes.

PROFESSOR CARLSON: I have some real concerns.

CHAIRMAN BABCOCK: Speak up.

PROFESSOR CARLSON: I have some real concerns because, you know, under *Fuentes vs. Shevin* and those lines of cases there are certain constitutional protections before you can have ex parte seizure of property, and now we are ex parte potentially seizing

someone's home. I think you need some more protection here.

MR. TUCKER: Well, this is -- the part where the landlord is putting on that extra evidence, that's always going to be at a contested hearing. If the tenant doesn't show up -- the way that it currently works in eviction suits, the landlord has to file a sworn petition. They can't just come in and file it, and what the Property Code and the rules of procedure provide for is if a tenant doesn't show up we take the landlord's sworn petition as factual, and that's what it's based on. But as far as this new immediate possession part, that would only be at a contested hearing because if the tenant doesn't show up then we're under what it's always been where the landlord's sworn petition is taken as true.

PROFESSOR CARLSON: And so is this the tenant not showing up after the 24-hour notice? No?

MR. TUCKER: No. So the way that the process would work is the tenant would receive the citation, would say, "Show up on court on October 5th." Okay. And they would have at least six days' notice of that. They would then show up at court, and we then have a contested hearing where the landlord would at minimum prove up, "This is why this person has breached the lease and why I'm entitled to possession." Okay. If they filed

an immediate possession, they would also need to then prove up "And here's why they should have to put up a bond if they want to stay in the property during an appeal because here are the things that they're doing," and the tenant would have an opportunity to respond to that. If the tenant does not show up at the contested hearing on October 5th then we're going to take the landlord's sworn filing as true, but that really doesn't impact this -- that's as it is currently right now. If the tenant doesn't show up on the eviction hearing date, we take the landlord's filing as true, and the tenant is going to be removed.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: What are the circumstances that entitle a landlord to immediate possession of the premises?

MR. TUCKER: Do you mean currently, or do you mean under -- what did we contemplate on this?

MR. MUNZINGER: What are they at law today?

MR. TUCKER: At law today, at minimum that the plaintiff has posted a bond and that the defendant has failed to post a counter-bond or request an early trial.

MR. MUNZINGER: So it's not dependent upon some conduct of the tenant?

MR. TUCKER: Currently, no. The reason why

we included conduct of the tenant in this part, the only part where conduct of the tenant becomes relevant under this is if the tenant shows up at the eviction hearing but the landlord still has something that right now they couldn't get that tenant out until at least six days after the hearing. Currently even if the landlord shows up and says, "This guy is selling drugs out of the house, he threatened my children," whatever it is, if that tenant shows up that day at court, at least six days before they could get a writ of possession. What we tried to do here is include a provision that says, well, look, even if the tenant shows up, sometimes there are situations that immediate possession is going to be appropriate.

MR. MUNZINGER: But the Legislature has provided in the Property Code that a writ of possession is required to oust a tenant?

MR. TUCKER: Yes, sir.

MR. MUNZINGER: And does not make any provision in the Property Code relating to any distinction between immediate possession or not immediate possession, so this is arguably the creation of a new substantive remedy.

MR. TUCKER: Well, yeah, I think this part -- yeah, I think this part would be a new substantive remedy, but the Property Code does distinguish between

immediate possession and not, because the Property Code says after a -- after a default hearing it's six days to get a writ of possession unless an immediate possession bond was on file and then the landlord can have it immediately. So the Property Code does distinguish between writs after immediate possession and not, but yeah, I would think that's a fair statement, that this would be substantive.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: Under the proposed 742(a), you talk about plaintiff filing or posted a bond in cash or surety in an amount approved by the judge, and then it says, "The surety may be the landlord or its agent," implying to me, of course, that the party could be its own surety. I must be missing something. Why is that a good idea? Why does that make sense?

MR. TUCKER: Well --

HONORABLE KENT SULLIVAN: And how would that provide protection for a wronged tenant?

MR. TUCKER: Well, you know, there was discussion about that, and the general consensus was that there is nothing that explicitly prohibits that right now, and I guess the thought is if I can make a showing that I have this money that's available to recover, that actually requiring the cash to be posted is a superfluous step, but

I mean, we -- you know, I don't think anybody is married to that idea or concept. Certainly we would be open to discussion on whether that's a good idea, but that was the thought process.

CHAIRMAN BABCOCK: Judge Peeples, and then Professor Carlson.

HONORABLE DAVID PEEPLES: If there's no waste, no violence, no drugs, that kind of thing, the only thing the landlord can prove is three or four, five, six months of no rent, is that enough to get one of these writs?

MR. TUCKER: You know, the way we have it written, it's going to be up to the trial court. If a trial court called me and, you know, was discussing that situation to me, I don't think so. I think there needs to be something beyond nonpayment of rent because I think nonpayment of rent protection is available already under the rules and the Property Code with the -- the tenant would have to post either an appeal bond or pay rent into the registry if they want to stay there during the appeal. So I think rent is really covered. I had thought about that issue of multiple months rent. It would be open for -- an open question for discussion, but I would lean towards no.

CHAIRMAN BABCOCK: Professor Carlson, then

Carl.

PROFESSOR CARLSON: Yeah, you know, the definition of a surety is someone backing up another person's obligation, and in other bonding instances under the rules a party can't be their own surety because it's an oxymoron. Have you thought about putting in these extraordinary grounds into the rule to warrant this type of immediate dispossession, such as the drugs, the violence, whatever?

MR. TUCKER: Yeah.

PROFESSOR CARLSON: Because, you know, when you look at other types of writs, attachment, garnishment, sequestration, and you look at statutes that create that right and that ex parte followed by a hearing, they all have grounds that indicate the defendant is essentially trying to make themselves judgment proof.

MR. TUCKER: Sure. And actually in my original draft of this rule I did enumerate the grounds that would underlie that. The discussion was then there are so many things that could happen between a landlord and a tenant that it -- the thought was it was better to leave it open and give the court flexibility for unusual situations rather than making it be pigeonholed into one of the categories that we had enumerated, but, yeah, when I drafted the rule I did enumerate grounds. So --

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Does the bond get posted at the time of the filing of the petition? And if so, if the defendant shows up and there's a hearing held and the plaintiff gets a writ of possession, then he doesn't need the bond to take it, right?

MR. TUCKER: Well, the issue is if the plaintiff hasn't posted this immediate possession bond they can't get a writ of possession even if -- immediately after a hearing, even if the defendant doesn't show up. The way it --

MR. HAMILTON: No, if he shows up and you have a hearing.

MR. TUCKER: Right.

MR. HAMILTON: And the plaintiff wins, court issues a writ of possession, right?

MR. TUCKER: Six days later.

MR. HAMILTON: It still has to be six days?

MR. TUCKER: Still has to be six days later. That's the issue with this. Yeah, exactly.

MR. HAMILTON: Default is the same way, six days later?

MR. TUCKER: Default, six days later unless there's an immediate possession bond on file, yes, sir.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: If we're worried about drafting categories that when a writ of possession might be reasonable, we could at least put in language that says, you know, something like "Nonpayment of rent, even multiple months nonpayment of rent is not good cause."

MR. TUCKER: Sure.

MS. HOBBS: You could do the reverse of what you don't want it to be if you're afraid of the categories being -- you know, we won't hit everything.

MR. TUCKER: I think that would be perfectly reasonable.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: Was there any thought to instead of in every case requiring the tenant to put up a bond to just allow the tenant to move to dissolve the writ like we do in other types of writ situations? And now the burden of proof is on the plaintiff to establish the grounds.

MR. TUCKER: Well, I mean, I think the way that it's set up, the burden is automatically on the plaintiff, even absent -- you know, the plaintiff still has to prove to the court that there are grounds from that, but it's not automatic. The plaintiff is going to have to make a showing of proof. It's not just, well, we filed this so in a contested hearing there's -- they're

going to have to make a separate showing of what their additional grounds are. Maybe I'm misunderstanding that.

PROFESSOR CARLSON: Then I notice that you really don't tie the amount set by the court on the bond on either side. There's really no standard. Is it just a matter of -- is it supposed to be for damages that could accrue by virtue of the wrongful issuance of the writ or something?

MR. TUCKER: Right, well, under (b) that talks about what the court is supposed to look at as far as setting the original bond. It's supposed to cover the defendant's damages if a writ of possession is issued and then later revoked, and so we give some examples of what that could include which are moving expenses, additional rent, loss of use, attorney's fees, and court costs. So that's saying, okay, landlord comes in and gets this writ -- this immediate possession, so the plaintiff is immediately removed during the appeal. Then when we go up to the appeals court, they say, "No, that was incorrect, we're going to put the tenant back in." Basically the judge is supposed to anticipate what would the tenant's damages be for that and set the bond in that amount. That's what they're supposed to be considering, and then the counter-bond under (d), court should it in an amount that will cover the plaintiff's damages if the tenant

maintains possession of the property during appeal. So, again, depending on what the conduct of the plaintiff is complaining of, there's a lot of things that could go into that. So that was the thought on leaving it fairly flexible, but I think there is some guidance there on what courts should be looking at.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: If I understood you correctly, the last part of subdivision (a), "The surety may be the landlord or its agent," is a presumption on the committee's part that the landlord would have money in his pocket to pay the bond and it would be unnecessary for him to go get a bond; is that correct?

MR. TUCKER: Yeah.

MR. MUNZINGER: That doesn't make sense to me.

MR. TUCKER: Okay.

MR. MUNZINGER: Why would -- not every landlord has the money. I mean, if the purpose of a surety is to protect the person who has been unlawfully harmed, and such a presumption in my opinion has no place in a rule like this.

MR. TUCKER: Yes, sir. And I guess the only -- my only response to that would be I don't think that it's automatically the landlord. I think the judge

has the right, the duty, to determine if the surety is sufficient, and if -- I don't think just the fact that they're a landlord renders them sufficient.

MR. MUNZINGER: Well, but this rule as written says, "The surety may be the landlord or its agent." It's totally silent as to whether he or the landlord, whoever it may be, has to have money in their pocket. It has no -- in my opinion has no place in a rule like this from the Supreme Court. It's choosing sides. It's making -- carving out something saying landlords are a special class and they ought to get treated differently. That's not right.

MR. TUCKER: And that -- you know, I guess that's how we drafted. That certainly wasn't our intent to do it that way.

CHAIRMAN BABCOCK: This is a little off point, but it's a broader issue. The Court's received letters from both Representative Jackson and Representative Lewis. Representative Lewis is maybe from Odessa, and I think Jim Jackson is from Dallas, right?

HONORABLE NATHAN HECHT: Yes.

CHAIRMAN BABCOCK: And they are critical of the task force work because they say that you're making substantive changes, the intent of the statute was just to merge -- to have a smooth transition between the two

systems. Did y'all talk about that? What do you think about that?

MR. TUCKER: Yeah. I mean, we've discussed that somewhat, and we've kind of seen that argument, that, well, didn't really -- we're -- the eviction rules were kind of outside the scope of what we were supposed to do and things like that. I mean, we just relied on the plain language of the bill that said we were supposed to promulgate rules for eviction cases, and so what took -- what we as a committee decided was this is an opportunity not to necessarily change the system or do anything like that, but to plug some of these holes, some of these vague and ambiguous rules, some of these rules that don't really work, like things like judge setting hearing dates based on service that hasn't occurred yet. You know, just things like that that will help make the process, in our opinion at least, move smoother for courts and litigants alike.

HONORABLE RUSS CASEY: I don't think it was our intention, and my belief, I don't think that we ever did substantially change anything in the eviction process as much as we did try to clear things up. If substantial changes occurred it was unintended, but like the service of process, you know, that is a completely changed around way of doing it, but you know, right now most courts are

not given a DeLorean with a flex capacitor. I hear that Dallas does, but I'm not certain.

CHAIRMAN BABCOCK: That's what I heard.

HONORABLE RUSS CASEY: But -- and that's something that needed to be addressed. Here again, on this particular rule, this is something that we feel needs to be addressed. In particular on this rule, I think it's important to say that what we propose we do not see as a firm answer. We see it as a -- as us trying to present to the Supreme Court the problems and to allow a thoughtful discussion among this committee and among the Court to come up with an answer, and it may need to take legislative changes in regards to that.

CHAIRMAN BABCOCK: Okay. Let the record reflect we're going to evict Judge Wallace for having a cell phone on.

MR. TUCKER: Immediate possession.

HONORABLE DAVID EVANS: It's $75 in the 96th District Court. Just go ahead and cough it on up.

CHAIRMAN BABCOCK: You could just throw it in the middle, and we'll all divvy it up. Okay. Any more comments about 742? Yeah, Justice Gaultney.

HONORABLE DAVID GAULTNEY: Just to make sure I'm following this, this is a pretrial remedy?

MR. TUCKER: Well, somewhat. Somewhat. I

think it's hard to categorize this. The way it is right now, arguably it's completely pretrial in some implementation of it. What we tried to do here is eliminate that whole can someone be dispossessed before a hearing. We decided that's bad idea. So what happens here is the wheels go in motion pretrial by the plaintiff filing the bond when they file the suit. That enhances their remedies that are available, but nothing different is going to occur until we get to the trial date, and that -- and the two ways that it could be different at trial date, if the tenant doesn't show up, landlord is going to get the writ immediately, which is as it is now; and if the tenant does show up, the landlord has an opportunity to make an additional showing that we need additional protection if this person gets to stay in the premises during an appeal.

HONORABLE DAVID GAULTNEY: So is the contested hearing that's referred to in (f) a trial?

MR. TUCKER: Yes, sir.

HONORABLE DAVID GAULTNEY: Because there are other rules that talk about trials occurring and things like that, that follow.

MR. TUCKER: Yes. Yes.

HONORABLE DAVID GAULTNEY: So but this is -- this is the trial.

MR. TUCKER: Yes, sir. And that's reflective, I think, of how the eviction process works, being speedy. In eviction cases there really aren't, you know, pretrial hearings or advance hearings. It's pretty much the defendant gets served, we have our trial setting date, and we show up, and the case gets heard and disposed of that day, so there's really not an opportunity for kind of a pretrial hearing and then later we're going to have the trial.

HONORABLE DAVID GAULTNEY: So if the plaintiff puts up a bond and the defendant says, "Wait a minute, I want a trial" and requests a trial, what they get is this contested hearing in which they have to put up a counter-bond.

MR. TUCKER: Well, they only have to put up a counter-bond -- they only have to put up a counter-bond if they lose the right to possession and the judge says, "Yeah, I find additional facts warrant that the landlord is going to be damaged if you don't put up something to protect them, if you want to keep living here during an appeal." So they have to hit that parlay first before the tenant has that obligation.

HONORABLE RUSS CASEY: No bond will be required if the defendant --

MR. TUCKER: Prevails.

HONORABLE RUSS CASEY: Yeah, prevails at the time of trial.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: The last sentence of subparagraph (b), "the amount could include" is this new language or was this -- this idea that the damages would be enumerated, first off, it doesn't appear to be an exhaustive list of the damages. If it is new, why is it included as distinct from just simply a statement that the damages, whatever they might be, should be covered and calculated?

MR. TUCKER: There had been some discussion that sometimes judges were not requiring a -- not requiring a significant enough bond of plaintiffs when they post this immediate possession bond, and so there was some discussion over if we're going to remove somebody we need to make sure that the amount of the bond is adequate to protect them, so there was a thought -- that language is new, yes. Right now it just says "should cover the damages," doesn't say what they are, so we put that in there as kind of a guideline to kind of say, "These are the things, Judge, you need to be thinking about when you're thinking about what are the damages" and not just say, "Oh, it's a hundred bucks" or something like that that's not going to be a sufficient.

MR. MUNZINGER: My personal belief would be that unless you made a statement to the effect that this list of damages is not exhaustive that the courts would consider it to be exhaustive, and that, too, is a substantive change. It's enacting a limitation of damages, and there may be unusual cases where the damages differ.

MR. TUCKER: Sure. No, our intention was just this list is not exclusive, and that's why we put "could include." We thought that communicated that, but we would certainly be open to say "could include, but is not limited to" or any kind of language like that. Yeah. We definitely didn't want to limit it to those things.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: In this contested hearing/trial in subsection (f), is there a right to a jury in those?

MR. TUCKER: Yes. Yes. And we talk about the jury process a little bit later on and what they can do to get that, but, yes, they do have a right to a jury.

PROFESSOR CARLSON: Thank you.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: How many eviction cases generally are appealed?

MR. TUCKER: A small percentage. From my

understanding, less than five percent of them are appealed.

CHAIRMAN BABCOCK: Okay. Yeah, Richard.

MR. ORSINGER: Are these -- are there ever written answers filed, or is the contest always by the party of possession appearing at the trial?

MR. TUCKER: There are on occasion written answers filed. When that occurs it's generally in a situation where there's -- it's, you know, a large commercial eviction, you know, with two represented sides. The vast, vast, vast majority of the time, no, there's not a written answer. The tenant just shows up, or doesn't, at the hearing.

MR. ORSINGER: Okay. So that means they almost always waive their jury trial because they have to do that three days in advance of that, right?

MR. TUCKER: Well, the way that it currently works -- and we can examine that when we get to the jury rule. The way that it currently works is they have five days after service to request a jury trial and pay the jury fee. The difficulty is, is those five days don't count Saturday, Sunday, or holidays, so five days from service, not counting those days, but the trial is 6 to 10 from service, so there are currently situations where the defendant could come in the day of trial and say, "Oh, I

want a jury." They're within the time frame, and obviously the court is not adequately prepared to have a jury, so that creates delay on the part of the eviction case. Evictions are supposed to be speedy, and so we kind of modify that to try to reduce the amount of time where this is delayed without infringing on someone's right to a jury trial, but they don't have to have a written answer or anything like that. It happens sometimes where they'll come in and say, "I want a jury" and pay that, but they don't file an answer with the court other than that.

MR. ORSINGER: So people actually read this petition and they actually show up three days early and say, "I want a jury," so they come back three days later for their jury trial? That really happens or do people always waive the jury and we never have a jury trial?

HONORABLE RUSS CASEY: It's rare that we would have a jury trial, but I mean, it depends. I can tell you that in every case where I've had a jury trial I have had notice that they wanted a jury trial. The most I ever had was two days before they -- the trial date. The law does not allow me to extend that trial date a whole lot further out if they want a jury trial, but that's one reason why they're asking. I mean, I've rarely had them ask it for any other reason other than to try to get an extra three or four days for me to get a jury together.

And that's -- just is my presumption, I guess, because when we actually had the trial they weren't contesting anything.

MR. TUCKER: Yeah.

HONORABLE RUSS CASEY: You know, this is yet again another way where the Rules of Civil Procedure in eviction cases don't mesh real well, and this is another situation to where we're trying to, you know, fix something.

MR. ORSINGER: Well, as a follow-up to that, if I might, I've been comparing some of these procedures to the general procedures, and we have in the previous rule a reference, if you -- "for further assistance consult the Rules of Civil Procedure 500 through 575." I haven't found one yet that applied.

HONORABLE TERRY JENNINGS: Can you speak louder?

MR. ORSINGER: Yes. In the previous rule the comments said to the pro se "For additional assistance consult Rules of Civil Procedure 500 to 575," and just as we've been discussing it I have been comparing these, and it seems to me that almost all of these are exceptions to the normal rule, and if I was not a lawyer and I went back and looked at Rules 500 through 575 I would be very misled in addition to being very confused about what I'm supposed

to do, and I'm worried that referring them back to the general rules may be a real detriment rather than an assistance.

MR. TUCKER: Yeah, and that's a point well-taken, and I guess we're trying to balance all of that between there are going to be issues that are only listed in those rules that don't necessarily -- aren't addressed in eviction rules. We do have a rule right at the start of that section that says this section, the 738, 755, these govern the eviction rules, and the others only apply if there's silence, but it's certainly well-taken that is someone going to understand that and can someone implement that, and so the question that would have to be answered is, is showing them these rules may also apply, is that favorable or detrimental to their understanding of the situation?

MR. ORSINGER: Another alternative is for you to cherry pick the general rules that do apply and then put a comment after this rule that relates to it, so that the 80 or so rules that are conflicting or unrelated are not brought into their awareness.

MR. TUCKER: Right. Yeah.

MR. ORSINGER: See what I'm saying?

MR. TUCKER: Absolutely. And we talked about that. Of course, the problem with that is that

requires 100 percent perfection if you're going to say -- if you leave one out inadvertently, then it's out.

MR. ORSINGER: That's why we have Marisa.

MR. TUCKER: That's true. Excellent point.

CHAIRMAN BABCOCK: Richard, and then Judge Peeples.

MR. MUNZINGER: Whenever we get to subsection (g) I have a question about subsection (g). If it's appropriate now, I'll do it now.

CHAIRMAN BABCOCK: Do it now.

MR. MUNZINGER: When you appeal a case like this from the justice court to the county court, is the decision of the county court final, or may it be appealed?

HONORABLE RUSS CASEY: Depends.

MR. TUCKER: Right.

MR. MUNZINGER: Yes, which?

MR. TUCKER: Yeah, the Property Code lays out -- sometimes there is a right to an appeal the county court's decision on up, and sometimes it's going to be final.

MR. MUNZINGER: Well, then the way you've drafted the first sentence of subparagraph (g) doesn't contemplate an appeal because you write "is subsequently" -- "subsequently is awarded possession at the county court." Well, now you've got a rule that doesn't

contemplate an appeal from the county court and the final judgment in the court of appeals. You could build up a problem here.

MR. TUCKER: Yeah. And you're right, that's a fair point and wasn't something we considered when drafting, so that might be something that would need to be addressed.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: To what extent can the rules be changed by contract? In other words, if at the end of the day this committee and the Supreme Court makes some changes that the landlord-tenant bar doesn't like or the apartment association, can they insert provisions in their leases that would strengthen their right to quick possession, just for example, or can that not be done?

MR. TUCKER: I don't think that that can be done, no.

HONORABLE DAVID PEEPLES: And why not?

MR. TUCKER: Well, I just -- you know, I guess I don't know. I don't have an explicit answer to that. I just think that when we put -- when there are rules put in place and it says this is how the procedure is done, then for a private entity to say, "Well, not against me, it doesn't," I think that would be -- I don't

think that would work. It would be the same as an apartment complex saying, "Well, if we evict you, we get to have the trial three days after we file it."

HONORABLE DAVID PEEPLES: Yeah. Rules of procedure that apply in court I can see, but the right to a writ of possession when there's a long -- you know, several payments of nonpayment of rent, and that court, it may take a while to get to trial --

MR. TUCKER: But under this the court can't take more than 21 days to get to trial. That's the absolute maximum from the time that they file the suit, and I guess that would be the response is, well, how did this get four months behind rent before you ever filed the suit. That's really the responsibility of the party that let it get to that point.

HONORABLE RUSS CASEY: One of the reasons that the immediate possession in it has changed a little with recent laws, especially from just the last session, but it was -- when a person filed a pauper's affidavit on appeal, first off, immediate possession, even if they posted a bond was gone. The -- even if they did not pay rent into the court they had to have a hearing at the county court at law level. The county court at law level, as a -- I guess a more common practice than less common practice would take at least four weeks to have their

hearing in regards to why they didn't follow the law as putting into their appeal process, and there has been a lot of work by the tenant -- or I should say the landlords to I guess help clarify the process with legislative changes, and one of the things that we are looking at here with our proposed immediate possession was to say that even if the landlord -- if the landlord posted a bond and the defendant appeared, just because they appeared or just because they filed a pauper's affidavit or whatever, it didn't negate everything, that they would need to -- they would need to either put up a bond or something to show that, you know, the immediate possession bond was worth putting up for the landlord to begin with.

If the landlord is required to put up money then basically if the defendant is wanting to go forward, they need to put up a little money as well, and that was the general thought process on that. We did try to protect the tenants; we did try to protect the landlords. We tried to protect -- we tried to consider a lot of different things, and at the end of the day this is what we came up with, and every member of the committee will tell you that this is the imperfect solution. So we were catching -- this is what we have, and we would like the Court and the Legislature to resolve it.

CHAIRMAN BABCOCK: Okay. Any more questions

on 742? Let's move on to 743, service of citation.

MR. TUCKER: Yeah, and it might be helpful to take 743 and 743a together. Those are the two service provisions.

CHAIRMAN BABCOCK: Let's do that.

MR. TUCKER: And what -- there's not a whole lot of substantive change here other than on 740 -- how it works right now, the constable gets the citation, and they're responsible to go serve the tenant with the citation. They have to try that at least twice. If they can't get the person served then they go to the alternative service provision, which would be 743a, and they can drop that off at the residence and mail it to the residence. Under the rules that's considered prima facie good service in this type of suit, so it's different than what we have in a normal civil suit where there has to be some showing that the party was likely to receive it. Here it's just if that's what the constable does, then that's what they did, and that's kind of why we like giving the constable extra time up front. We're not giving them extra time on the back, but extra time up front to accomplish that because that makes sure we have time to get the alternative service things accomplished in plenty of time to have that six-day window.

743, here's where that says that they must

be served at least six days before trial. Currently the rule is they have to have the return at least a day before trial. We backed that up to three days before trial to allow the court to have time to consider that. 743a, again, same thing that they have that right to do this. Currently they can give the return the day of trial. We modified that to say the day before trial, and we kind of made it clarify the rule and laid it out explicitly on what the constable needs to do to effect that alternative service.

CHAIRMAN BABCOCK: Okay. Comments about these rules? Marisa.

MS. SECCO: I maybe just need a reminder, Bronson. When we talk about "constable, sheriff, or other person authorized by written court order," was that meant to include private process servers generally?

MR. TUCKER: No.

MS. SECCO: Okay.

MR. TUCKER: And we had that discussion. That's a good point to bring up. The way it currently works right now, to serve an eviction suit it has to be a constable or sheriff or the court can individually designate any noninterested person over the age of 18 to serve the citation. Private process servers currently are not automatically authorized to serve eviction suits. The

judge could say -- you know, I can come in as a landlord and say, "This is Russ Casey. He would -- I would like to have -- I would like to make a motion to have him serve the citation," and he might be a private process server, and the judge could say "yes" or "no." And so we kept that language there, and so it would be either the sheriff or the constable or the judge has the option to name someone, but a private process server is not automatically entitled to serve.

MS. SECCO: And is that taken from the current rules or from the Property Code?

MR. TUCKER: Current rules.

MS. SECCO: Okay.

HONORABLE NATHAN HECHT: And why is it limited?

MR. TUCKER: It's been -- you know, I don't know if it was left from -- as a just how it was set before the system was. To be frank, a lot of our courts have concerns somewhat with some of the private process servers. Especially it's come up more in the credit card case situation where there have been situations where, you know, service really didn't occur. You know, I gave the example last time, our judges do the death investigation of people, the inquests, and we had a judge who had a process server stand before them and say, "Well, I

personally served this guy on such-and-such a date," and that judge had done the death investigation on the guy before that. So kind of a big pothole to step in there.

So I think there's some angst about that. You know, obviously there are great process servers and poor ones, just like there are great constables and poor ones, so I don't know what the thought process is originally, but we maintained the system of service as it currently is.

CHAIRMAN BABCOCK: Okay. Anymore questions about 743 or 743a? Richard Orsinger.

MR. ORSINGER: I wanted to focus just for a second on the return of citation, and I don't have all of this clear in my mind. I wish Frank Gilstrap were here, but there is a statute --

CHAIRMAN BABCOCK: Where is Frank?

MR. ORSINGER: What?

CHAIRMAN BABCOCK: Where is Frank?

MR. ORSINGER: I shouldn't have mentioned that he wasn't here. Maybe he stepped out to the men's room.

There's a procedure that's now been authorized by the Legislature for electronic filing of returns, and it's not evident to me that this language is designed to adapt to that. Have you had a thought about

that, on 743, "return the citation with his action written thereon to the court"? We spent a lot of time on how we were going to do the return rules to adapt to that statute. I just wondered if you had had that thought process. Maybe this is perfectly fine. I just --

MR. TUCKER: Yeah, no, I mean, I think that we would want to continue the direction that the Court has already shown inclination to go in. Let me look real quick at what is current language on that. In our other rules, you know, we kept -- the Supreme Court just modified the regular justice court return of service rules to say, "Hey, you don't have to have the original citation as long as you filed this document and it has all of these things." We kept that as-is, so it maybe helpful to refer --

MR. ORSINGER: And the word "written" here troubles me a little bit. There maybe some special definition of written, but if it's not, the traditional definition it would be anticipated then.

MR. TUCKER: And show me explicitly where the written part on 743. Yeah, and we would be perfectly fine with changing that to "with his action noted."

MR. ORSINGER: Whatever -- we went through that process, and then if I can follow-up on 743a where you have an alternate service, there are instructions

about returning citations throughout in different places, and I'm wondering if those are supposed to be different from the return in 743 for the normal service. Or are they all meant to be identical?

MR. TUCKER: No, I would think they would be identical, yes.

MR. ORSINGER: Okay. Well, you might take a look at that to be sure that the language is consistent.

MR. TUCKER: Right, absolutely.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: Yeah, I think the current rules for citation refer back to Rule 536(a) and 536(a) was amended to include a possibility, Richard, of the unsworn declaration in lieu of affidavit. That's already in there, and that probably happened while y'all were working on your task force, and you weren't -- you know, may not have got that.

MR. TUCKER: I would like to claim that excuse, but I think it's probably just an oversight, but I would agree that that would make sense to include in the service of citation rule here the same reference back to the justice court return of service, I think which we have renumbered, but I would have to look back at that. But I would absolutely agree with that, that it would make sense to tie that back just as it has been done here, yes.

MR. ORSINGER: And then also look for consistency between 743 and 743a, subdivision (c) and (d), where returns are all discussed is slightly different language each time. If there's not a reason for that maybe y'all could just harmonize it.

MR. TUCKER: Okay.

HONORABLE RUSS CASEY: That would be good.

CHAIRMAN BABCOCK: Okay, good. Yeah, Peter.

MR. KELLY: Just two grammar points. Somebody who knows better than me should probably answer it. In the first line of 743a it says, "Addresses of the defendant which are known." Maybe that should be "that are known" because it's restrictive, and then somewhat for readability on the second paragraph of 743a would be -- it starts off "If the officer receiving such citation is unsuccessful." There's been no discussion of a delivery or transfer or receipt otherwise and no definition of who is officer receiving, and I think it's trying to restrict it to the officer charged with service or attempting to serve, but this receiving of the citation seems to be a very passive restriction that doesn't add anything.

MR. TUCKER: Yeah, and another thing that I think may need to be modified is we may need to say "officer or individual," because it could be someone authorized by written court order also, may not explicitly

be an officer.

MR. KELLY: "Person attempting service" or something like that.

MR. TUCKER: Right, yeah.

CHAIRMAN BABCOCK: Okay, good. Anything else? All right. Let's move on to 744, docketing.

MR. TUCKER: Okay. Let me have a second here, sorry. Okay. What we did here, the current rules hint at and indicate that the defendant needed to have at least six days notice for us to have trial. We just made that explicit that no trial may be held less than six days after the defendant gets service of the citation. There was also a proposal that we add -- and I think it would be a good idea, that we add language in here that no counterclaims may be docketed in an eviction suit. There's current case law that indicates there is no counterclaims in eviction suits, but there's nothing in the rules or the statute, so that might be helpful to include here just to avoid confusion on that.

CHAIRMAN BABCOCK: Okay. Any comments on 744? Yeah, Richard.

MR. ORSINGER: The very last sentence, I'm a little confused. If there's a default by failing to appear in the general civil case, even if it's after an answer, I believe that concedes liability, doesn't it,

Elaine? That if you file an answer it's a so-called default nihil dicit or where you fail to show up at trial then --

PROFESSOR CARLSON: Yeah, Rule --

MR. ORSINGER: -- liability is conceded.

PROFESSOR CARLSON: -- 239a.

MR. ORSINGER: The way this is written, it doesn't appear to allow a default for failure to appear at trial after the filing of an answer. Is that intentional, or is that historical, or is there a reason for that?

MR. TUCKER: Yeah, I guess our working understanding of the default is if the defendant never answers then they haven't contested the plaintiff's claim, but if the defendant files a general denial but doesn't appear at trial, the plaintiff would still need to put on evidence of all their cause of action.

MR. ORSINGER: And is that the way it is right now?

MR. TUCKER: That's at least how it's -- yeah, that's our understanding of how it is.

MR. ORSINGER: Is there already language that's saying that a default can only occur if you fail to file an answer and fail to show up for trial?

MR. TUCKER: In eviction cases it's not explicit like this, no.

MR. ORSINGER: So this might be an inadvertent change. In other words, maybe the policy shouldn't be that a landlord can take possession after an answer is filed when no one appears at trial without putting on their case, but was that a conscious decision on your part to do that?

MR. TUCKER: Yes. Yeah, that was our concern, was that if the defendant filed an answer denying the landlord's allegations, we thought that that meant that the landlord then would need to prove their allegations even if the tenant didn't show up at the hearing because the tenant has said, "This is not true," so the landlord then needs to prove it beyond just their petition, so that was our thought process on this.

CHAIRMAN BABCOCK: The way this is written it looks like if the defendant fails to appear and fails to file an answer the court still has some discretion about whether they'll take the allegations of the complaint as admitted because it says "may."

MR. TUCKER: Yeah, and I think that was probably a poor adjustment from the current "shall," but I think our thought process is if the defendant doesn't answer and doesn't show up then the landlord's sworn statement is taken as admitted.

CHAIRMAN BABCOCK: So "may" should be

"must."

MR. ORSINGER: "Shall." No, "must," I'm sorry.

MR. TUCKER: "Shall" is a dead soldier.

CHAIRMAN BABCOCK: I could go either way on that, but --

MR. ORSINGER: Sorry, I forgot.

MR. TUCKER: Yeah, and I think currently it's "shall," and I just inadvertently put "may." I would agree it should be "must."

CHAIRMAN BABCOCK: Yeah, Professor Hoffman.

PROFESSOR HOFFMAN: So violating my own rule, but, you know, you walk into a room and two minutes later you start talking.

CHAIRMAN BABCOCK: Yeah, well, you're not violating your rule. You were here three minutes ago.

PROFESSOR HOFFMAN: So I have to say I'm confused by this. I think the normal process is that in every case the plaintiff has to prove up their case. They have to prove liability. They have to prove damages, but in a default situation we accept liability as given, but you've always got to prove up damages, and the difference doesn't turn on whether you either answer or appear, which then leads me to point number two. It's not clear to me that there is a difference between answering and

appearing. You answer, and that's how you make your appearance. So I'm both confused about -- if I've got the law right, which I think I do, that in all default situations plaintiffs always have to prove up their damages. Some are easier than others, but I believe in all you do, and then separately, is there a meaningful difference between answering and appearing that we need to highlight in the rule?

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: Well, having had a big default judgment practice my first year at Thompson & Knight, I remember dealing with this quite a lot, and answer is -- if you answer and with a general denial, you are denying liability, and so that puts the plaintiff to the proof. If you don't file an answer, it's like you said. Then you have effectively admitted by waiving your right to contest liability. If you appear -- it is possible to appear without answering, and you know, if you appear by only saying, "Here I am" or it used to be challenging personal jurisdiction or challenging subject matter jurisdiction, that's an appearance without an answer. That's why people tend to file answers subject to a special appearance to make sure they're contesting the facts on liability, and for damages you have to prove -- in a default situation if there's no answer default you

have to prove up damages, unless they're liquidated damages. You have to prove up unliquidated damages. So I'm in agreement with you, that if there's a no answer default, that's one thing. If there is an answer then you have -- your plaintiff is put to their proof. It's pretty easy because they don't have any cross-examination. They just present their proof.

PROFESSOR HOFFMAN: But in any event, the language here in the end of 744, "The judgment by default shall be entered accordingly" doesn't distinguish between liability and damages. I understood what you just said. We always have to prove up damages. It's just that in an unliquidated damage context the proof is pro forma, but there is something that has to be proved. You don't just take the allegation as true.

PROFESSOR ALBRIGHT: Yeah, I think we could look at the default rule in the other rules, in the --

MR. TUCKER: And I learned this stuff from Professor Albright, so I'm glad to know I still have recall of that; but, yeah, and the reason why we did this as it is, the way it currently works, it just says, "If the defendant fails to appear, the allegations of the complaint shall be taken as admitted and judgment by default entered accordingly"; and remember that the landlord had to file a sworn petition, so that's why they

have this additional credibility in viewed upon what they have alleged in their filing because it's sworn.

Generally in these cases defendants don't file an answer. In the overwhelming majority they don't file an answer. They just appear at the hearing. In the discussion, though, it was raised, well, sometimes they file an answer, and if they file an answer but don't show up, is it appropriate to take those allegations as admitted when, as Professor Albright mentioned, by answering with a general denial, they've denied the plaintiff's liability, so our thought was the plaintiff should be held to prove up the liability and the damages at that hearing because the defendant answered.

It's a rare situation, but that was our thought process in the task force of why we wanted to include that caveat that we don't just take those allegations as admitted if the defendant has denied them.

CHAIRMAN BABCOCK: Eduardo, and then Professor Carlson, and then Peter.

MR. RODRIGUEZ: Well, I just want to be sure that I understand, and from my perspective if a person files any kind of an answer in writing but doesn't appear, we ought to give that person the benefit of the -- of the plaintiff having to prove all of the allegations that they're making, because we're dealing with a group of

people who very easily could not -- would want to appear but may not for various reasons. They have nobody to take care of the children, the child is sick, they've got to take them to the doctor, they've got to go to work all of the sudden, and so if they have filed an answer, whatever kind of answer it is, I think that should -- that should require the proof to be put on by the plaintiff.

The other thing is that if they don't file an answer but appear, I think that should be the equal of filing an answer, requiring the same thing, and I think that's what I understood was -- they were trying to say was being done. If the person just appears, doesn't file anything in writing but is there when the case is called, that's the equivalent of requiring them to put on the proof.

MR. TUCKER: Yes, sir.

MR. RODRIGUEZ: You don't have to do anything else other than say, "I'm here."

MR. TUCKER: Yeah. And, I mean, we would absolutely agree with all of that. One thing that could be put on the table, depending on what people think, what I was just thinking about when you mentioned that, in these type of cases you may have an answer filed, just as not really an answer. It may be beneficial to put "failed to file an answer contesting the allegations." A general

denial would obviously be sufficient, but you may have an answer filed that says, "Yeah, well, I just lost my job and I can't afford to pay the rent." Is that a sufficient answer to then force the plaintiff to prove liability, and I mean, my thought process would be, no, because they really didn't contest liability by saying, "I can't afford to pay the rent." But that would be an issue that, I mean, we don't -- we didn't explicitly discuss, but I think it -- our thought process was the answer should contest liability if we're going to not take the sworn allegations as admitted.

MR. RODRIGUEZ: Well, I --

CHAIRMAN BABCOCK: Go ahead.

MR. RODRIGUEZ: I think we're dealing with a group of people that may not understand all of those ramifications and may think that just saying, "Look, I just lost my job and I don't have money to pay the rent" is sufficient to give them some kind of protection. Why can't we do that when we're dealing with this group of people that are for the most part not educated or able to have the funds to get anybody to help them?

CHAIRMAN BABCOCK: Right. Okay. Elaine.

PROFESSOR CARLSON: Yeah, you know, the rule dealing with default judgments and proving up damages is in 239, and that's part of the rules that apply to the

district and county courts, I guess to the same extent they would if they don't conflict in justice court.

MR. TUCKER: Yeah, we have a separate rule in justice court. 538, I believe, which is moderately similar to that, but it's more explicit that in our courts there has to be a hearing on damages if the damages are not liquidated.

PROFESSOR CARLSON: Okay, that's consistent. The appearance that Professor Albright was speaking of, and I, again, don't know what the justice rules parallel is, but in district and county court a defendant makes an appearance by filing an answer timely, by appearing in open court and making themselves available to the court other than a special appearance, or by making a motion to quash service. That's considered an appearance. I don't know if the justice rules mirror that.

MR. TUCKER: Yeah.

CHAIRMAN BABCOCK: Peter, then Judge Wallace.

MR. KELLY: The comment was made that it might do that, but I would like to suggest perhaps an addition that the rule does not specifically address the situation of failing to file an answer and appearing in trial. Perhaps just saying, "Appearance at trial may be taken as a general denial or as a filing of an answer" so

the court knows the power to take the physical appearance at trial as a filing of a paper answer.

CHAIRMAN BABCOCK: Justice Wallace.

HONORABLE R. H. WALLACE: Yeah, and I agree with Eduardo's comment. I mean, if a defendant takes the time to file a piece of paper, they're trying to say, "You shouldn't throw me out of my house" for whatever reason, and the fact that they don't use the magic word of "I deny" or whatever, I mean, I think most courts pretty liberally construe answers anyway.

MR. TUCKER: Right.

HONORABLE R. H. WALLACE: And certainly in that context I think it should be.

MR. TUCKER: Yeah. And I think that's totally fair, and I think ultimately it's close to moot just because of the issue that Professor Albright mentioned, too. The situation we're talking about is where they file an answer and then they don't show up for trial. They don't show up for trial, it's not going to be especially difficult for the landlord to prove the liability because they have no one there to cross-examine or contest what the landlord is putting on, but, yeah, I think that's a fair comment to say, hey, let's liberally construe an answer and hold a plaintiff to their burden of proof.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: I have a question. This concerns eviction cases, right, Section 10, and the remedy that the plaintiff is seeking here is immediate possession, right? And now the plaintiff can also join a suit for rent. Can the Rule 744 be read as -- as far as a default being concerned, being concerned only with the remedy of immediate possession? In other words, is there really any need to be concerned about proving up damages? Is the suit for rent being treated differently? You get the default in the eviction and then you can prove up your damages in the suit for rent separately. How is that handled?

MR. TUCKER: It's handled all at one time.

HONORABLE TERRY JENNINGS: All at one time.

MR. TUCKER: Yeah, and so if the tenant doesn't show up then we're going to have a judgment on possession and a judgment for back rent, which is either going to be, again, what is put in the sworn allegations by the landlord or what's proven if those are part of the denial.

CHAIRMAN BABCOCK: Okay. Richard, and then Marisa.

MR. MUNZINGER: Is every eviction case a case in which the landlord is seeking immediate eviction,

immediate possession?

MR. TUCKER: No. And, yeah, I might have -- just to clarify that, yeah, no, the majority of cases they don't file this immediate possession bond. Obviously it's quick possession, but, yeah, generally we're not talking about immediate possession. They're seeking a writ of possession, which is, again, six days after the hearing when they can get that.

MR. MUNZINGER: But immediate eviction is a special remedy --

MR. TUCKER: Right.

MR. MUNZINGER: -- and the rule governing immediate eviction is intended only to apply to that.

MR. TUCKER: Yes, sir.

MR. MUNZINGER: I'm looking at Rule 741, the citation rule, and it says, "The court shall command the defendants to appear." It doesn't say "personally appear." It doesn't say "appear at trial." It says "appear," but the trial setting is required to be set in the citation that's being sent, and some of that may be confusing to us as attorneys because we believe we appear in a case -- I appear in a case for my client when I file a general denial, and maybe the citation ought to be specific if we're telling people that you can file an answer but lose your case, notwithstanding that you filed

a written answer, et cetera. Maybe the citation needs to say "appear in person or through attorney," or whatever it might be, to make it clear that they have to be there and contest this.

MR. TUCKER: Right. Yeah, no, I think that makes sense, and I guess that's what -- what we were going for with the "at a time and place named in the citation," meaning be there -- you know, it doesn't say "appear by October 5th." It says "appear on October 5th at 10:00 a.m. at the justice court located at XYZ Elm Street," but I would have zero objection to it being more explicit and saying, you know, whatever -- you know, off the top of my head or whatever, but whatever language we need to put in there to say, "This is when the trial is going to be. If you aren't there, you're not going to be able to argue your side."

HONORABLE RUSS CASEY: I don't see any reason of just going with that plain language. "Your trial is at this date, this time. Be there."

MR. TUCKER: Right. Right. Yeah.

HONORABLE RUSS CASEY: You know, I mean, it doesn't have to be fancy, flowery. "This is your trial."

MR. TUCKER: And shouldn't be fancy.

HONORABLE RUSS CASEY: "Be there this date, this time."

CHAIRMAN BABCOCK: Marisa.

MS. SECCO: I just wanted to clarify the current practice for an eviction suit joined with a suit for rent is that it's treated like a liquidated damages claim on -- and there's no evidence is required to prove up damages at a default hearing, a no answer default.

MR. TUCKER: Correct. Because the landlord has filed a sworn allegation that those are the correct amounts.

MS. SECCO: Okay. And that's not in the rules. That's just the law.

MR. TUCKER: Yeah, it's -- I guess it's kind of implied in the rules with the -- because that language is already there, that "The sworn allegation shall be taken as true," and those allegations generally will include "This guy owes me this amount of rent," but it doesn't explicitly lay that out, but it's kind of implied.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE RUSS CASEY: There are things that are properly heard at the hearing.

HONORABLE DAVID GAULTNEY: I was just curious about the title of Rule 744, and is there any other rule in the eviction rules that talks about the defendant's appearance or answer, and maybe there should be? I mean, we've got a rule on the petition. Maybe

there should be a rule on -- entitled "Appearance or answer by defendant," which addresses a lot of the issues that are in Rule 744 that have been talked about and --

MR. TUCKER: Yeah, and that certainly might be the case. I guess the reason why we probably didn't put it in there is just because the -- I mean, way over 95 percent of defendants don't answer. They just show up at the time that the citation tells them to, but, I mean, that would -- I mean, there's no -- or we could even retitle 744 or whatever the committee thinks and the Court thinks would be most helpful in communicating to a defendant what their obligations are. That certainly would be our desire also.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I totally would second what Justice Gaultney said, because if you look at the reference back to Civil Rules of Procedure 500 through 575, it's going to pick up all of those answer rules, which is going to include venue changes, it's going to include general denials, sworn affirmative whatever; and it seems to me like, first of all, I would reiterate, I think we ought not to globally refer to a bunch of rules that don't apply; and secondly, this set of rules ought to be a standalone set of rules for pro ses where they can just pick up a photocopy of this from the JP's office and

figure out what they need to do; and we don't necessarily want to encourage the filing of written answers; but if we're going to say that you can file a written answer, maybe we ought to have a simple answer form for them to just sign and have it in a stack of them down at the JP's offices because these guys are not going to know what a general denial is and what have you. So I would be in favor of having an answer rule saying you can answer either in writing and refer to some kind of website form or something or you can answer by appearing at trial and contesting. Is that a bad idea?

MR. TUCKER: Well, the problem if we say "or" is they may file their written answer and think, cool, I've done everything I need to do. Then we have the trial date --

MR. ORSINGER: Okay.

MR. TUCKER: -- and, yeah, now the landlord has to prove their case, but the tenant doesn't show up because they think, well, I did what I was supposed to do. The landlord is generally going to win at that trial date if the tenant doesn't show up.

MR. ORSINGER: Then we really shouldn't even encourage a written answer. We should just say, "You may answer by appearing" or "only by appearing" or "You must appear." No -- "must," right.

MR. TUCKER: Yeah, something along -- if we want -- and our thought was, you know, we tried to avoid -- we wanted to make it clear; but we tried to avoid getting too much into advice in the rules of, "Hey, you should do this," "Hey, you should do that"; but, yeah, I mean, if we wanted to do that, something along the lines of, you know, "You may file a written answer, but your appearance is still required at the hearing date" or something along those lines. Yeah. I mean, again, I think -- I think there is probably a general conception that more answers are being filed in these cases. I think it's exceptionally rare that that even happens, so I would just be somewhat concerned with opening the door and muddying that a little bit.

MR. ORSINGER: It's still a valid concept, though --

MR. TUCKER: Yes.

MR. ORSINGER: -- to have an answer rule even if all you're doing is telling them you should answer by appearing in person at the designated time and place.

CHAIRMAN BABCOCK: I saw an answer in justice court a long time ago. It said, "I deny the allegations. I defy the alligator." That would be a good form to have. Peter, Eduardo, and then we're going to break.

MR. KELLY: Just brief comments on this, on 744. It says, "If the defendant files an answer but fails to appear at trial, the court will proceed to hear evidence," and it's phrased in a mandatory way, and the court is at that point required to hear evidence from the plaintiff. There could be other considerations, it seems to me, removing all judicial discretion. It should be phrased as "may proceed" or "the court may hear evidence from the plaintiff." Because there could be considerations that we can't even think of in this room that the court may not want to hear evidence at that time or extend the time to grant a continuance for some reason, but phrasing it as "may hear evidence" it's no longer mandatory.

MR. TUCKER: Yeah, and honestly, our thought process in drafting it was that it really -- it should be mandatory, because our thought was, okay, the defendant has filed an answer, they haven't appeared, so really we have three options. Number one is continue the case. Well, in an eviction suit that's going to be problematic if a defendant can extend their time when, again, most of the time they're in a situation where the landlord is kind of getting free rolled because they're not paying the rent and this is dragging the process out, so we didn't want to drag the process out. So just continuing it because the

defendant is not there, that would create some significant problems.

Also, we thought there were problems for the court to go ahead and accept the sworn allegations as true even though the defendant denied them. We thought that the defendant denying them did place an affirmative burden on the plaintiff to go ahead and put on evidence of those allegations at the hearing, and so we didn't see that they could continue it. We didn't see that they could just accept the filing as true, so that kind of left us the option in the middle of, well, landlord, let's hear your evidence then.

CHAIRMAN BABCOCK: Eduardo, and then I missed Lisa. So Eduardo, and then Lisa, and then we'll break.

MR. RODRIGUEZ: Well, and I apologize if I'm maybe going back to something that we already passed up, but it seems to me that when we notify people of these lawsuits, why can't we attach a document that says in big bold letters, you know, "You need to respond to this lawsuit by being there or answering or something, or you may be evicted from your place of business." I mean, why can we not just give them notice of what the possibilities are in big bold letters just like we have in many other -- many other things that consumers have?

MR. TUCKER: And we actually do. It's not explicit in our rules, but if you look at Rule 741 it says that the citation must contain all warnings provided for in Chapter 24 of the Property Code, and in the Property Code they lay out some warnings that have to be in that citation that warn the tenant that they will be removed from the premises if they don't respond, that provides actually a phone number that they can call for legal assistance and a warning stating that if you're a service member or a dependent of a service member you may have additional rights. So there are other explicit warnings in the citation that we just haven't talked about today because they're statutory rather than in our rules.

CHAIRMAN BABCOCK: Okay. Last comment before the break, Lisa.

MS. HOBBS: I guess when we're going back and talking about whether to file an answer or whether -- you know, creating an answer rule, my question was do -- if a tenant were going to request a jury trial, would that typically be done in the answer or -- I know it's not -- they don't do it very often, but --

MR. TUCKER: I guess my answer would be no. Generally there wouldn't be what we would think of as an answer with that. It would just be a demand for a jury.

MS. HOBBS: Is that a form at the JP's

office or --

MR. TUCKER: No, there's not a specific form for that. Some courts probably have a specific form, but there's not a standardized one, but they're told in the citation you can request a jury. We tell our courts anything that's construable as a request for a jury, treat it as a request for a jury.

MS. HOBBS: And they have to pay like a -- is it like a five-dollar fee or something?

MR. TUCKER: Uh-huh.

MS. HOBBS: So they come down, or is that online now?

MR. TUCKER: You know, it's generally not as available online, but a lot of times in this situation we're not dealing with people who frequently are yet engaging in commerce online. Sometimes we are, but a lot of times it's more they're going to go down to the court. In eviction suits the jurisdiction is only in the precinct. It's not countywide, so it's generally the people live fairly close to the court. So often you'll have people that will go down there, you know, take the bus over there, things like that.

MS. HOBBS: I guess my comment is this: I generally support Richard's comment that an answer rule might be a good idea, but I would fear the rule saying,

"No need to answer, just come on down to the hearing" because then people might come down to the hearing and not request a jury and thereby lose their right to a jury without -- unintentionally through this answer rule we are getting them to forfeit their right to a jury, which might be beneficial to them.

MR. TUCKER: Right. And we do -- in the citation, again, it explicitly says how they can get a jury, and then we have a separate jury rule that we'll talk about in a second that tells them "Here's what you need to do," but, yeah, your point is definitely well-taken. We don't want to inadvertently get them to waive their own rights. Agreed.

CHAIRMAN BABCOCK: Okay. We're going to take our morning break for 15 minutes, and we'll come back and tackle Rule 745.

(Recess from 10:40 a.m. to 11:04 a.m.)

CHAIRMAN BABCOCK: All right. We're moving on to Rule 745, demanding jury, and let's talk about this one.

MR. TUCKER: Okay. This is one that I mentioned a minute ago that kind of has some complications with the current rule, and that has to do with computation of time. As I mentioned, the current rule says that you can demand a jury by requesting it within five days of the

date that you're served with the citation, but under the Rules of Civil Procedure periods of five days or less don't include Saturdays, Sundays, or holidays. They carved out an exception to that for all the other eviction time frames under five days. For example, appeals in evictions you have five days, and they carved out an exception that says that means five calendar days, even though it's a period of five days or less. They didn't do that for the jury demand, and so really you're going to have at least until the seventh day after you were served to request a jury because there's going to be at least a Saturday and a Sunday in those five days and sometimes there's a holiday.

So if you can request a jury up to the seventh day after you were served, and the trial is going to be possibly on the sixth day or seventh day or eighth day after you were served, that creates an impossible situation for courts where defendants can come in and say, "I want a jury" the day of their trial, and then the court is not prepared to deal with that, and there's no great option. We still think that the trial has to be held within that time frame that's laid out in the rules, so the court could delay it a couple of days at best, which is also unfair to the plaintiff, who may have taken off work or done whatever they need to do to be in court.

They show up and the other side says, "Oh, ha, I want a jury," and we're going to come back in two days, and that's problematic for the litigants.

So what we did is modify that to say that the request must be at least three days before the day set for trial to allow notice and to allow the court to try to prepare to have that jury trial. Also keep in mind the defendant is frequently --

(Off the record for the reporter)

MR. TUCKER: Frequently the defendant is going to have additional time to process that and request it because, as I mentioned with the service, often the constable will be able to serve it earlier than they actually serve it now because they don't have to worry anymore about serving it too early. As I mentioned, right now serving it too early is a possible problem because they can't serve it more than 10 days before the day the court wants to have the trial. Now they can serve it 20 days before the day the court wants to have the trial, or if that's how it works out, and so the defendant would then have all that time up to then to request a jury, but the court would have at least three days' notice and the plaintiff would be prejudiced less often by delays related to jury trials.

CHAIRMAN BABCOCK: Okay. Any comments?

Robert.

MR. LEVY: What happens if you've got a trial setting on a particular day and that happens -- and I don't know if JP courts have jury and nonjury days, but if that day does not happen to be a day when they've got a venire set? Does it get reset and is there notice? Is there a limit of how long you have to notice the defendant for the reset?

MR. TUCKER: Yeah, there's not a -- and basically the -- kind of the constraints we're in right now is the 6 to 10 from service, so if the defendant gets served and the trial is set for the seventh day after service, that's fine right now. The defendant, though, then could come in that day and say, "I want a jury," because under the Rules of Civil Procedure it's only been five days since I was served because we're not going to count the weekend and so, okay, we need a jury. Our current advice to our courts is all you can do would be to postpone it to no later than the 10th day after the date the defendant was served because the rules say the trial must be held within that 6 to 10-day window. That can still sometimes be stressful. We've had parties be granted continuances because they come in and say, "Oh, I want a jury today, and also I need a continuance," so you can get a jury. Basically what our goal was, was to try

to preserve the right to a jury but eliminate some of the gaming of the system as a mechanism for delay only.

MR. LEVY: So if plaintiff drops off his request for a jury trial and the case is set three days later, how does the -- I'm sorry, the defendant.

MR. TUCKER: Right.

MR. LEVY: How does the defendant -- the court has to send out a notice to the defendant that the trial is reset for the following day four days out, and how does the defendant find that out?

MR. TUCKER: Yeah, and that's part of the issue as to why we pushed the time back, is to hopefully reduce or eliminate the time where we actually need to change the trial date because of the jury. That was kind of what we were aiming at doing. Yeah, there's not an explicit procedure. Obviously sometimes that's still going to need to happen where the court is going to notify the parties that, A, the defendant has come in -- we have an eviction next Monday. The defendant has come in on Friday and said, "I want a jury on Monday," and the court said, "You can't have a jury on Monday, so we're going to need to push the trial back." We still would say they can't push it back outside of that 10 to 21-day window that they are to have a trial, but they could push it back to a day that would allow them to do that.

MR. LEVY: How practical is it in the JP courts to actually get a venire in with two or three days' notice?

MR. TUCKER: It have varies widely from court to court. Some courts -- or in some counties is what I would more properly say, some counties have systems in place where there is not a problem. For example, they have possibly a busy district court docket where there are juries going on constantly, and sometimes our courts can receive, you know, extra venire panels from those courts. There is also a provision in the Government Code that can be the last resort stopgap where the constable can actually go out and round up folks to be jurors. Our thought was we tried to eliminate that as much as possible, but in the situation where you're pinned in a corner that would probably be what would have to happen.

HONORABLE RUSS CASEY: I have actually done that. I grabbed 14 very unhappy people from the tax department that were there to get their license renewed.

MR. TUCKER: Yeah, nothing like going in dealing with getting your driver's license renewed, and "Oh, by the way you've got jury service today. You hit the lucky lottery."

HONORABLE RUSS CASEY: It wasn't a long trial, but --

CHAIRMAN BABCOCK: Okay. Any other comments on this? Richard.

MR. ORSINGER: This is another one of these rules that conflicts with the standard rule, 529, and I think it would be potentially confusing to a layperson to be referred to two rules that apply that are contradictory. The last sentence in 745, this may be a term of art, but it says, "Upon such request a jury shall be summoned." Should we say "jury panel" or "venire" rather than "jury," because I think in a lot of our rules the jury is the petit jury we have, and the venire is the group from which you select a petit jury, and I assume there is the jury selection process.

MR. TUCKER: Yes, sir.

MR. ORSINGER: You get one peremptory challenge or three?

MR. TUCKER: Three.

MR. ORSINGER: Three, okay.

MR. TUCKER: Yeah, I would agree. That's the language as it currently is, but I would definitely agree that "impaneled" would probably be a more accurate term than "summoned."

MR. ORSINGER: Okay, and I'm a little worried about the use of the word "jury" because I think in the rest of the rules that means the petit jury.

CHAIRMAN BABCOCK: Well, you could say, "Upon such request a jury panel should be summoned."

MR. ORSINGER: Okay.

MR. TUCKER: Right. Sure. You bet.

CHAIRMAN BABCOCK: Okay. What else? Anything else about this rule? Okay. Moving right along.

MR. ORSINGER: Oh, I do have one thing. Well, I've lost that thought. I was a little bit worried that, you know, we do have a three-day requirement, and it's repeated here, and I think maybe somewhere else there's -- I'll withdraw that comment. Sorry.

CHAIRMAN BABCOCK: The whole comment?

MR. ORSINGER: No, just that last part.

CHAIRMAN BABCOCK: 746.

MR. ORSINGER: Nonresponsive.

CHAIRMAN BABCOCK: Trial postponed.

MR. TUCKER: For Rule 746 we did two changes to the current continuance rule in evictions. The current rule is you can have a continuance for up to six days in an eviction case, and you have to submit an affidavit, and what we thought was, number one, requiring an affidavit from pro se parties may not be reasonable. I think we should change it to "good cause shown by either party." We thought that was less onerous and restrictive. We also extended the period from six days to seven days. The main

reason we did that is we have a lot of courts that, for example, have Thursday as their eviction day, and so that would allow them to continue the case to their next eviction day by making it a seven-day continuance versus a six-day continuance, and so for ease of court dockets we thought that was a good choice.

This last sentence, "A continuance may exceed seven days if both parties agree in writing," that's -- I mean, I think that's probably currently a legal statement, that if -- you know, the current situation is it says continuances are limited to six days, but we would argue right now if both parties say, "Hey, we're cool with a 30-day continuance," no one is harmed by allowing that. So we just put that in to say, hey, we can go more than seven days, but both parties are going to have to sign off on that to go over the seven days.

CHAIRMAN BABCOCK: Okay. Comments about 746? Yeah, Justice Gray.

HONORABLE TOM GRAY: This is a bit more general, but is it safe to assume that Marisa is going to scrub these drafts with comparing like the titles to the content of the rule and word choice? For example, in this one, first rule -- or first sentence says, "The trial may be postponed." The next sentence starts "a continuance," and then the title of the rule is "Trial postponed." I

mean, we're all talking about continuance, but --

CHAIRMAN BABCOCK: If she has to stay up all night every night she'll do that.

HONORABLE TOM GRAY: As long as that's the understanding then I won't make those kind of suggestions as we go along.

CHAIRMAN BABCOCK: And if there are any complaints, they can be laid right at her doorstep.

HONORABLE NATHAN HECHT: Feel free to send them to us, though.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: On the last sentence I would suggest that you use the word "postponement" instead of "continuance" so that we're using that more understandable word consistently throughout because I think an average person won't understand what a continuance is when everything else is called a postponement.

MR. TUCKER: That's reasonable.

CHAIRMAN BABCOCK: Shave a little bit of nighttime work off of Marisa's --

HONORABLE TOM GRAY: And the reason I brought that up now, 745, the title is "Demanding a jury" and then we use "request" in the body of the rule, and so little things like that I just wasn't going to comment on as long as we knew Marisa was on the job.

CHAIRMAN BABCOCK: Yeah, she is way on the job. You can tell. She's eager, too. Okay. Somebody got their hand up? Lisa.

MS. HOBBS: I just wonder if we really care whether that agreement is in writing. I could see where both parties are right before the court and one of them wants to continue and the other side says, "Do you care," and he says, "No, September 25th works for me, too," and it's done. I mean, I don't know if we really need it in writing.

MR. TUCKER: I think that's a good point, and I guess what I would say, probably it could be modified to "if both parties agree in writing or in person before the judge." We were just trying to eliminate the situation where someone -- one party is there and they go, "Oh, I talked to them, and they said it's okay if we go more than" -- so, yeah, if the judge can either see it in writing or the person is saying it, sure, absolutely.

CHAIRMAN BABCOCK: Okay. 747, only issue. Yeah, Richard, you got a comment?

MR. ORSINGER: No, you talk first. I thought you were asking. I apologize.

MR. TUCKER: Yeah, this rule is verbatim what is already in existence.

MR. LEVY: What does it mean?

MR. ORSINGER: I'm a little concerned about our saying that there's only one issue, and I know an eviction case is technically different from a rent case or a damages to the premises case, but, in fact, are we not throwing them all together in one proceeding; and should we not be careful that we don't in any way lead someone to think that the only matter that can be tried in this trial is going to be eviction when we know that it's probably going to be rent and maybe damages?

MR. TUCKER: Yeah. And I'll address both of those points if I can. For what does it mean, our courts have no jurisdiction to adjudicate a dispute as to title, and so what this rule was aimed at was saying all that our courts can deal with is the issue of possession and not the issue of title. So if I want to file -- Judge Casey builds his boathouse on land that I say is mine, okay, and we are disputing on whether or not his boathouse is on my land or his, I can't go get an eviction to evict his boathouse off my property because it's a title dispute. So that's what that rule is aiming at. Certainly could argue that it could be rewritten in a more -- a more clear -- but we didn't touch that one. We just moved it in, so --

CHAIRMAN BABCOCK: Well, you changed the wording a little bit, but what if you said, "In eviction

cases, the merits of the title shall not be adjudicated"?

MR. TUCKER: I think that's good. We might -- it does start to raise -- the other issues that might want to be brought up are things like, "Oh, and also he's damaging my property, so I want some money for that also." Those are also prohibited in eviction cases. So I think that's also part of what this rule does, is it keeps anything else from coming up. What might be helpful is to either move the "may sue for rent" behind this or to combine it with this rule and say in eviction cases -- and what I had actually -- when I drafted this what I put is "The only property rights issue shall be the right to actual possession" to clarify that we're not eliminating rent, but some type of language that -- or modification of the location in the rules to indicate that the two things that we can hear about are who has the right to possession and back rent.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: They can do that by saying "except as provided in 740." 740 provides it may be combined.

MR. TUCKER: Right.

MR. LOW: And this states you "shall not have title except as provided in 740." The only issue is to be that.

CHAIRMAN BABCOCK: Yeah. Okay. Anything

else on 747?

MS. HOBBS: I just --

CHAIRMAN BABCOCK: Yeah, Lisa.

MS. HOBBS: Is that by statute? I mean --

MR. TUCKER: That we can't handle title? Yeah.

MS. HOBBS: Well, then why do we need it in the rule? If the statute already sets a parameter of the jurisdiction in the JP court, why do we need a rule that restates jurisdiction in different language? That would be my only comment.

MR. TUCKER: Yeah, I mean, and I think it also -- like I mentioned, I think the "only issue" part also does preclude things like damage to the property, late fees, other things that the landlord is prohibited from raising in eviction suits, but it could be more artfully stated, I would agree.

CHAIRMAN BABCOCK: Okay. Anything else on 747? Yeah, Richard.

MR. MUNZINGER: Why was the reference to the chapter -- section 24.001 of the Property Code deleted? The existing rule, if my computer is right, says, "In case of forcible entry or forcible detainer, under sections 24.001 through 24.008, Texas Property Code." If that is what the rule says, and I'm trusting my computer that it's

accurate, why was that language deleted?

CHAIRMAN BABCOCK: That is what it says. That is what it says.

MR. TUCKER: Yeah. Yeah. And I think the reason is there has been a general movement to move towards the term "evictions" and "eviction cases" versus "forcible detainer" and "forcible entry and detainer."

MR. MUNZINGER: That may be the case, but the substantive law as set out by the Legislature is in those chapters.

MR. TUCKER: Right.

MR. MUNZINGER: Or in those sections rather.

MR. TUCKER: Right.

HONORABLE RUSS CASEY: I don't think it was intentional.

MR. TUCKER: Yeah, I mean, we were basically just trying to make it simpler and just straightforward that we're talking about eviction cases and not -- and if you have Joe Tenant reading "forcible entry," "forcible detainer," random sections of the Property Code, are they going to understand what that means. That was our thought process, but I mean, we're not married to modify that. We would be -- no objection to putting those sections back in if that's beneficial.

MR. MUNZINGER: If the Legislature has said

that the only way that you can get possession of property is through a forcible detainer action, I'm not quibbling over whether we call it an eviction case because I know they call them that in the last statute when they said promulgate rules about evictions. I just question why we would delete reference to the statutory authority under which these proceedings are brought, even though the Legislature uses a different term.

MR. TUCKER: I guess our thought was what is the benefit to that reference?

MR. MUNZINGER: Certainty.

HONORABLE RUSS CASEY: We're not trying to argue. We were just explaining.

MR. MUNZINGER: No, I understand. I'm not trying to be ugly about it either. I'm just saying you deleted language to the authorizing sections of the Legislature. I don't understand that. I'm very suspect of efforts to dumb down the law to meet people who are not lawyers, because the law is the law and must be expressed with precision and give fair notice to all its citizens, even the smart ones.

MR. TUCKER: But the law is also that these rules have to be dumbed down to people who are not lawyers. That's what the Legislature said to do.

CHAIRMAN BABCOCK: Not in so many words, but

they are unwilling to take the uncertainty side of the argument there, Richard. Okay. Any other comments on 747? Let's move to 748, trial. Now we're getting somewhere.

MR. TUCKER: Yes. 748, again, no substantive change to what is there. It's basically this is just a standard trial. There's no jury, then the judge is going to try the case. This also provides the fact that the jury will be impaneled as they are in our normal cases and that they return the verdict. No changes on that.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: Now is the time for my premature withdrawn comment, which is that you must request a jury three days before the trial, but this rule doesn't say that. It says, "If no jury is demanded by either party," and I think it reasonably could be argued that that demand could be made after the third day before the trial, so to me it should say something like "If no jury has been timely requested."

MR. TUCKER: "Or is demanded by either party as provided by rule" blah, blah, blah, that says three days.

MR. ORSINGER: Just as long as we're making it clear that this demand is subject to the same three

days in advance of trial requirement.

MR. TUCKER: That's fair.

CHAIRMAN BABCOCK: Okay. Did you change the language from the current rule, which is one number off, 747?

MR. TUCKER: If it did, it was just to try to make it smooth, but I don't think there's --

HONORABLE RUSS CASEY: I think we added in one. I think 747 was the current rule.

CHAIRMAN BABCOCK: No, I think that's the same language. That's another 70-year-old rule.

MR. TUCKER: Right.

CHAIRMAN BABCOCK: Okay. Any other comments about 748? Peter.

MR. KELLY: I just found it odd that it wasn't part of 745 because Rule 745 tells you how to demand a jury, and 748, three rules later, tells you the effect of demanding or failing to demand. It makes more sense if it tells you this is how you demand it, this is what happens if you don't.

MR. TUCKER: Sure.

MR. KELLY: And also, sort of having the rule is solely about trial by jury from the general rule of "Trial" as a title is not very descriptive.

HONORABLE RUSS CASEY: I think that makes a

lot of sense to combine those.

MR. TUCKER: Yeah. Yeah. We're, you know, certainly on board with any type of sliding or combining or rearranging that will be the most user-friendly arrangement of the rules. I would absolutely agree with that.

CHAIRMAN BABCOCK: Consistent with having certainty.

MR. TUCKER: Yes. Absolutely.

CHAIRMAN BABCOCK: Okay. Anything else in 748? Yeah, Professor Carlson.

PROFESSOR CARLSON: Judge Casey, I had a question. In the jury trials is the jury charged in writing, orally?

HONORABLE RUSS CASEY: The jury is -- a justice of the peace is prevented from charging the jury.

PROFESSOR CARLSON: Okay. So how does it work when they find for the plaintiff or defendant?

HONORABLE RUSS CASEY: We give them a sheet to say "find for the plaintiff" or "find for the defendant."

PROFESSOR CARLSON: So they actually find for one of the parties?

HONORABLE RUSS CASEY: Yeah. No charge.

PROFESSOR CARLSON: Thank you.

HONORABLE RUSS CASEY: And, yes, it can get out of hand when the defendant wants to talk about everything other than why they didn't -- if they didn't pay their rent, they want to talk about why they didn't pay the rent, and it's more of an emotional trial than anything else, but it still is what it is. And we -- because of that we went back and revisited that rule of whether the justice of the peace should charge a jury and especially in cases of evictions, negligence, and other types of things when there is good reason, and we never could come back with a good way of making that work or making it beneficial. So I think it's best just leaving it where the judge doesn't charge.

PROFESSOR CARLSON: Thank you.

CHAIRMAN BABCOCK: Yeah, the parties argue the law and the facts, right?

HONORABLE RUSS CASEY: Yeah.

CHAIRMAN BABCOCK: Have you ever seen that big book called *The Law in JP Court*?

MR. ORSINGER: That Judge Barton wrote?

CHAIRMAN BABCOCK: I don't know. It was like 30 or 40 years ago. It was a big, thick book, and it had every propositional law in it that you could ever hope, no matter which side of the case you're on, so you just take it with you and say, "Here's the law in JP

court. Page 347, it says it right here." I thought it was great.

Okay. Anything about 748 other than that? Yeah, Justice Gray.

HONORABLE TOM GRAY: It does seem that because of that we've shifted the burden of proof to the defendant by the end of that sentence. I was wondering if you could end the sentence "will return its verdict," period.

MR. TUCKER: We would have no objection on that. I guess whatever the committee thought was more clear and straightforward, if you think that additional language is helpful or hurtful.

HONORABLE TOM GRAY: It may be a gnat in these type proceedings that doesn't matter, but --

CHAIRMAN BABCOCK: You think this shifts the burden?

HONORABLE TOM GRAY: I do. If you're returning a verdict in favor of the defendant, I think you've -- it's not that the plaintiff didn't prove their case, it's that the defendant has proven in effect a defense, is what it seems to read like to me. I'll put it that way, but that may be a nuance that's just not a problem in eviction cases.

CHAIRMAN BABCOCK: I'm sure *The Law in JP*

Court addresses the question.

MR. TUCKER: Page 543.

CHAIRMAN BABCOCK: Page 543. Okay, 740 -- yeah, I'm sorry, Lisa.

MS. HOBBS: I just have a question about what kind of cases might be in JP court. Would a big commercial eviction like kicking somebody out of the Bank of America building for failure to do the inside of the building, like the build out like they were supposed to, kind of --

MR. TUCKER: Yes.

MS. HOBBS: I mean, that may not be, but it could be a --

MR. TUCKER: No, yeah.

MS. HOBBS: -- real big dispute, millions of dollars at stake, the breach is really questionable, and we're going under these rules where you don't charge the jury and that kind of stuff.

HONORABLE RUSS CASEY: Yes.

MR. TUCKER: Yeah, the justice court has exclusive right -- exclusive jurisdiction in eviction suits to determine the issue of possession. Now, if there is a breach of contract for back rent that exceeds our 10,000-dollar cap, that would have to be brought in a separate court. Okay. So where we say we can add rent,

rent has to be within our scope, our jurisdiction of $10,000. So if I'm evicting somebody that's renting a building or whatever for $75,000 a month, they don't pay it, I get possession from the justice court, but I have to sue elsewhere to recover my $75,000.

CHAIRMAN BABCOCK: Any other comments on this rule?

MR. ORSINGER: If I may, I think the reason that there's not more concern is because you get a trial de novo in a very short period of time, right? So we don't need to turn this into a Federal case because we can have a Federal case in county court.

MR. TUCKER: Yeah. And it may make sense -- Judge Casey and I discussed this. It may make sense in some ways to set up massive commercial evictions with, you know, either just saying if rent is over a set amount, that the case is just -- the county court starts with jurisdiction or to have separate rules for those, but our thought process was those are a very tiny minority of eviction suits, and to hold all of these pro se landlord and tenants to this higher standard of rules to accommodate that sliver would be problematic, but maybe they can be carved out -- carve those cases out of the rules, but that's kind of above what we're able to do here.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: What's the bond that's necessary to go to the county court at law on de novo?

MR. TUCKER: It is -- there is not an explicit formula. It's laid out in current Rule 752 and 753. Basically it just says the judge should consider things like expenses, damages, rents that may be lost, things like that, so it's going to kind of depend on if the plaintiff is appealing or if the defendant is appealing to go to county court.

PROFESSOR CARLSON: And if the tenant is dispossessed, do they still have that ability?

MR. TUCKER: Yes. The tenant can appeal to county court even if they lose. They won't be removed from the property unless there was an immediate possession bond and they defaulted and didn't show up at the hearing, or for nonpayment of rent cases the tenant is required within five days after judgment to put a month's rent into the registry of the justice court, and it seems -- if they appeal by pauper's affidavit, and it seems a little bit counter intuitive to say, well, they've just posted a pauper's affidavit, they don't have any money, how are we going to require them to pay rent, and the issue is because rent is something -- if they don't have the money to pay the rent they're just not entitled to be there.

Unfortunately they don't have a right to possession of that, and that was the thought process I think in taking them out. Now, they would still get their appeal, and if the county court found their argument persuasive, they would be placed back into possession of the property.

CHAIRMAN BABCOCK: Any other comments? Okay. Let's move on to 748a, representation by agents.

MR. TUCKER: Okay. We took what is currently there, we expanded it a little bit to bring in some other rules that are found elsewhere just to avoid difficulty and confusion. What the current rule says is in forcible detainer and forcible entry cases -- we simplify that to "in eviction cases" -- if it's for nonpayment of rent or holding over after the rental period has ended, the current rule is the parties can represent themselves or be represented by authorized agents who don't have to be attorneys. Okay. So if I'm a tenant being evicted for nonpayment, I can send my brother Steve to represent me at my hearing as my authorized agent, even though Steve is not an attorney. That's the current law right now.

We also added in eviction cases for any other reason if a party is a corporation, it may be represented by its authorized agent who need not be an attorney because there's been some confusion over this.

There is a separate provision in the Government Code that says, "In justice court a corporation need not be represented by an attorney," and the way that we look at that is if a corporation is sending in its authorized agent, that's basically the corporation representing itself. They're showing up by themselves pro se because that's their agent, so we just included that language here to clarify that the provision in the Government Code, that that's how these two things work together, and then just a clarifying sentence there, "All other parties may either appear in person to represent themselves; otherwise, they must be represented by their attorney." So we try to cover all the bases in one rule.

CHAIRMAN BABCOCK: Okay. Richard, and then Justice Bland.

MR. ORSINGER: That last -- I'm having trouble understanding the last sentence, and are you trying to say there that an individual cannot be assisted by a layperson as opposed to a lawyer or what -- because "all other parties besides persons and corporations," does that mean partnerships and LLC's, or does that mean human beings or "All other parties may either appear in person, otherwise they must be represented by their attorney." So are we telling them they have to go hire a lawyer?

MR. TUCKER: No. They can represent

themselves. What we're trying to say, basically that's just a -- basically a summary sense of we gave two examples of specific representation rules and then that is kind of then the default rule. In any other situation your options are be pro se or have a lawyer.

CHAIRMAN BABCOCK: Well, Richard raises a pretty good point, because a lot of these landlords are LLP's or --

MR. TUCKER: Right.

CHAIRMAN BABCOCK: -- partnerships or you've seen a lot of corporations.

MR. TUCKER: And that's because that's how the Government Code singled out. The Government Code just says "corporations." That's why we chose "corporations." We agree that that raises questions about LLP's or partnerships. Our thought is they probably have to -- you know, the question is how do they represent themselves or do they need an attorney, and we didn't have anything really to go on, and that's probably something that would need to be modified at the statutory level.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Is there something that prevents us from allowing for agents in all eviction cases? Why are we making a distinction for eviction cases for nonpayment of rent and all other kinds of eviction? I

mean, I think it would be simpler just to say, "In eviction cases," comma, "the parties may represent themselves or be represented by authorized agents," period.

MR. TUCKER: Yeah. And --

HONORABLE JANE BLAND: If we're going to allow it in a lot of instances, why don't we allow it in all instances?

MR. TUCKER: Yeah, and the reason why we drafted it at least this way is just because that's -- that was already the distinction that had been made, but I would be open to any comment from tenant or landlord interests on why there would be a problem. I don't see a problem with it.

CHAIRMAN BABCOCK: Professor Hoffman, and then Justice Gaultney.

PROFESSOR HOFFMAN: I like that language for another -- the language that Justice Bland just suggested for another reason. I just ran into some law, apparently corporations cannot represent themselves pro se. Apparently it is a common rule both here and all over the country. I never knew such a rule existed, but apparently it does and it's fairly established, and so you were saying something about the Government Code. Maybe there's a special provision that I don't know about, but short of

that provision, apparently this is inconsistent with the law.

MR. TUCKER: Yeah, it's explicit in the Government Code that says, "A corporation need not be represented by an attorney in justice court."

HONORABLE RUSS CASEY: It's in Chapter 27. It was also duplicated in Chapter 28.

PROFESSOR HOFFMAN: Chapter 27 of the Government Code?

HONORABLE RUSS CASEY: Yes.

MR. TUCKER: Yes.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Is there any concern that there might be professional authorized agents? In other words, businesses that provide eviction services or something else essentially acting as lawyers without a license.

HONORABLE RUSS CASEY: Yes.

HONORABLE DAVID GAULTNEY: I mean, the original -- the current rule is limited for nonpayment of rent, and what was the history of allowing an authorized agent to represent a landlord in that instance?

HONORABLE RUSS CASEY: Well, I think this is another way where things have evolved over the years, but basically we have a -- this is generally for apartment

complexes. The property manager may have all knowledge of the facts. The actual owner of the property or -- may not, so in a pro se case that's the owner of the property that should have to appear, and I think for efficiency that they have made it that the property manager could. This is actually tied to Property Code as well. I'm trying to remember that.

MR. TUCKER: 24.011 of the Property Code.

HONORABLE RUSS CASEY: Yeah, which is tied into that. Where you said that the issue where all kinds of cases should be handled in this way, I think that that would actually be good. For example, if the trial is for criminal activity and the defendant is currently in jail, it may be best if his sister or mom could come down for him instead, even though it's not a nonpayment of rent or a hold over. On the other hand, if it's criminal activity, there really shouldn't be a need for a corporation or a landlord to have to hire an attorney since it's not for a nonpayment of rent or hold over issue in regards to that, and I think that even though that would be a change to what we have, I think that would be a very welcome change for both sides, though. I think that I would -- I guess I shouldn't speak for the Realtors, but I think that that would actually be good in regards to that.

CHAIRMAN BABCOCK: Robert, and then Buddy.

MR. LEVY: It seems like, though, the first sentence and the last sentence are contradictory, that it says you can have an authorized agent, but then it says, "except your authorized" -- you must be there either yourself or with an attorney, and as I understand, the practice has been that an owner of an apartment complex, as you point out, can use a property manager to go -- they shouldn't have to hire an attorney to do these evictions. It adds considerable expense, and that expense will end up potentially going on the tenant anyway.

MR. TUCKER: Yeah, and what we meant when we said "all other parties," we meant that to apply to both of the first two sentences, not just corporations, meaning all tenants and landlords in nonpayment or hold over cases and corporations, all those people don't have to have a lawyer. Anybody else can show up themselves or have a lawyer. So we meant to exclude landlords and tenants in nonpayment or hold over cases when we say "all other parties."

CHAIRMAN BABCOCK: Buddy.

MR. LEVY: Who else would be a party then in an eviction case?

MR. TUCKER: A landlord or a tenant in an eviction because I have a dog and I'm not allowed to have

dogs under my lease, that's not an eviction for nonpayment of rent or holding over, and under the current rules I can't have an authorized agent represent me in that case.

MR. LEVY: Then I would say "all other parties in non" -- "cases not involving nonpayment of rent or hold over" to make that clear.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I'm still troubled the way the rule is written where it says specifically, "In eviction cases if the party is a corporation it may be represented by its authorized agent. All others need" -- I have a friend who is a property manager, and a lot of people are corporations, but there is a individual in Beaumont, owns it individually, and he goes down, and he handles all the evictions and so forth. He can't do that any longer because they're not a corporation?

HONORABLE RUSS CASEY: It was not our intention to exclude that.

MR. LOW: Well, if you read it, it says "In all other cases," and it's specifically in eviction cases. Now, earlier you're talking about nonpayment of rent, but just in not those, and it says that if he's not a corporation then his property manager wouldn't be able to do it.

MR. TUCKER: If it's an eviction for

something other than nonpayment of rent or holding over then that's what the Property Code says.

MR. LOW: Well, I'm not trying to change the law.

MR. TUCKER: No, no. I'm sorry. I was just trying to explain why we made those distinctions. Those are laid out in the Property Code. The distinction or the change that Justice Bland makes, like I said, I think that would be perfectly reasonable. It would need to modify the Property Code 24.011 to do that, but that's why we laid -- what we were trying to do, I guess, ignoring the language a little bit, we were -- we weren't trying to change at all who can or has to have a lawyer. We were just trying to summarize what the current rules are, which are located in different locations, and what we wanted the rules to reflect are if it's a nonpayment of rent eviction or a holding over eviction, either side, regardless of their status as a person, corporation, partnership, whatever, can represent themselves or be represented by their authorized agents who don't have to be an attorney.

Secondly, if you're a corporation, regardless of what the eviction is for, because of the explicit provision in the Government Code you don't have to have an attorney because these suits are in justice court.

MR. LOW: You answered my question. I can blame the Legislature and not us.

CHAIRMAN BABCOCK: Judge Casey.

HONORABLE RUSS CASEY: If I -- there was a bit of a question on whether you have people sort of going around just in the business of doing evictions, and the language that was used in Rule 737.5, it may be good for that language to be better reflected here in regards to that, and I just wanted to put that on the record.

CHAIRMAN BABCOCK: Marisa.

MS. SECCO: It's safe to say that you could just delete the second two sentences and the rule would have the same effect. Those are -- or the second and third sentence, because the second and third sentences are just meant to sort of clarify what the general rules are in any event --

MR. TUCKER: Yes.

MS. SECCO: -- and were just added for clarification here.

MR. TUCKER: Yeah, there's argument sometimes over whether or not a corporation has to have a lawyer in an eviction suit, even though it says in the Government Code, there's sometimes argument that, well, that doesn't mean in this type of suit or something like that.

MS. SECCO: Okay.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, if I'm -- if the current rule that I'm looking at is correct, it says, "In forcible entry and detainer cases for nonpayment or rent or holding over beyond the rental term the parties may represent themselves or be represented by their authorized agents in justice court." I mean, that is -- why is that not clear enough? It seems to me that wouldn't need to change that.

MR. TUCKER: Because sometimes there are eviction suits for other reasons, and so then the situation, well, what is the rule for eviction -- other eviction suits, particularly with regard to corporations. There have been times where corporations can be told, "No, you can't send your vice-president here to do this because you have to have -- you have to have a lawyer." This is -- I have a corporation evicting someone for unauthorized pet, okay, and I send my vice-president who is not a lawyer --

HONORABLE R. H. WALLACE: Okay. All right.

MR. TUCKER: -- to be there. There have been times where they have been prevented from doing that because there was confusion over how this rule works with the Government Code provision about corporations not

needing a lawyer, so we just wanted to make it explicit.

CHAIRMAN BABCOCK: Justice Hecht, then Justice Bland.

HONORABLE NATHAN HECHT: But is there any reason why any party in any case in the justice court should have to have a lawyer?

MR. TUCKER: I mean, my argument would be no.

CHAIRMAN BABCOCK: Justice Bland, and then Richard, and then Kent.

HONORABLE JANE BLAND: I think that 24.011 of the Property Code would allow the change that we're suggesting to not make a distinction between eviction suits for nonpayment of rent and eviction suits for other reasons because, although the first sentence says, "In eviction suits for nonpayment of rent the parties may represent themselves or be represented by their authorized agents who need not be attorneys," the second sentence says, "In any eviction suit in justice court an authorized agent requesting or obtaining a default judgment need not be an attorney." It seems to me that they're implicitly contemplating that there would be eviction suits with authorized agents of other kinds. So I think, although it's different than -- it's different than the Property Code, what we're suggesting is different from the Property

Code, it's wholly consistent with it, and so I don't think it would require any amendment to the statute. It would just merely be a rule that would say, "Look, we know justice courts are different, and we're going to let parties have authorized agents in them."

MR. TUCKER: Well, I think we would have to modify the Property Code because the only time you can get a judgment for an authorized agent is a default judgment or a nonpayment or a hold over. If you look at -- if I'm evicting a tenant for unauthorized pet and the tenant shows up, nothing allows me to get a judgment as an authorized agent. I agree that seems kind of a silly rule, but that's how it's written, is you can get a judgment as an authorized agent in a nonpayment or hold over or a default judgment in any other eviction, but not a contested judgment in any other eviction.

HONORABLE RUSS CASEY: I think that --

MR. TUCKER: And why it -- I don't like that rule, but that's -- I mean, I don't see any reason it couldn't be changed, but I think it would have to still be modified to allow a contested judgment in a non -- in an eviction other than nonpayment or hold over that's contested. I think that the statute wouldn't allow that right now.

CHAIRMAN BABCOCK: Go ahead, Justice Bland,

follow through that argument, that you're not buying it.

HONORABLE JANE BLAND: No, I don't think that the rule has any prohibition against what we are doing, so although it may not cover it, in that it allows -- in that it allows default judgments to be obtained by authorized agents, there's nothing forbidding us from expanding that concept to eviction suits generally for the ease and convenience of the parties, because right now we've got a confusing rule that says in some cases you can have an agent and in other cases you can't have an agent, and I haven't heard any good reason for this distinction. And I don't think that the Property Code, although it's different than the rule that we're crafting, it doesn't forbid the rule.

MR. TUCKER: You don't think explicitly saying you can get the judgment if the default means --

HONORABLE JANE BLAND: No, it's actually expanding the use of authorized agents by allowing it, and if we allow it further, that is not inconsistent with that statute.

HONORABLE RUSS CASEY: I would agree with that.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: If I could disagree with Justice Bland, I think the answer to Justice Hecht's

question is because the Legislature did not so provide in section 24.011 of the Property Code. The Legislature obviously believed it was sufficiently important to address the issue of nonlawyer representation before the justice court in eviction cases. No one would argue that point, so when can you have a lawyer or not have a lawyer? Well, go look at 24.011. They give you two kinds of cases where you can't -- you don't have to have a lawyer. If they had intended to give you every situation, you never had to have a lawyer in justice court, why didn't they say so? Now, I think there is a statutory interpretation, principle and contract at law interpretation principle, I'm not good at Latin but expressio --

MR. ORSINGER: Unius.

MR. MUNZINGER: -- unius exclusio alterius, or something along those lines, but the point is if the Legislature intended to do what we are saying do, why didn't they? So now then the Texas Supreme Court adopts a rule which ignores that principle of statutory interpretation. So the next time I'm in front of the Supreme Court and I'm faced with that problem, I can say, "Yes, your Honor, but you did exactly the same thing when you ignored section 24.011 of the Property Code and made substantive law regarding lawyers in justice cases."

MR. TUCKER: And one quick follow-up to the

point that you made, Justice Hecht. I think one -- I don't think we have any situation where we're requiring a person to have a lawyer, but one thing is I guess that what we have to look for and what this is saying is when can I have someone do the job of a lawyer who is not a lawyer. Never going to make them have a lawyer, but when are we going to say, well, if you aren't going to do it yourself, you can bring someone in who is a nonattorney.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I'm not going to use the Latin, but what we're debating here is called the rule of implied exclusion, which has a long history going all the way back to the most famous case of *Marbury vs. Madison,* and it's been used by the Texas Supreme Court in *Arnold vs. Leonard,* and there's a long esteemed history of it, which I'm sure Justice Bland is aware of and just didn't bring up, and so I think an argument could be made that we should just look the other way at the Latin notwithstanding and do something that makes life simple for the people that actually use this legal service, or we can go ahead and honor that tradition that probably goes back all the way to the civil law of Rome.

MR. MUNZINGER: May I respond, Chip?

CHAIRMAN BABCOCK: Sure.

MR. MUNZINGER: It's law we're dealing with.

You don't just turn your face and ignore the law. How can you ignore the law for convenience sake? If you do it today, why not tomorrow? If you do it in this issue, why not the next issue? It's law, and you have to deal with law as law. If the Legislature didn't cure this problem, let them cure it at the next session, but for God's sakes don't ignore the law for convenience.

CHAIRMAN BABCOCK: Justice Bland, who has got her hand way high. She is on a rampage.

HONORABLE JANE BLAND: In the more recent legislative session the Legislature directed us, not us particularly, but the Texas Supreme Court based on our recommendation, to adopt rules in this area of the law, small claims court, evictions, all of this, that would not be so complex that a reasonable person without legal training would have difficulty understanding or applying the rules. The rule that we're discussing is difficult to understand and difficult to apply, and it is not inconsistent with the Legislature's previous law on when or when you can't have somebody go down to court for you because you're at work. So I think that the Legislature has asked us to look for ways to simplify the proceedings in justice court, and this would simplify it.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: But they didn't ask us to

amend the Property Code.

HONORABLE JANE BLAND: I don't think we need to amend the Property Code.

MR. MUNZINGER: In effect you amend the Property Code when you do this. I think the issue is there. I mean, we're not going to agree and --

CHAIRMAN BABCOCK: Yeah, you two take it outside. Lisa.

MS. HOBBS: I would just add to what Justice Bland has pointed out that the Court's general rule-making authority and the Court's general ability to regulate the practice of law might fill any gaps that we would need to feel comfortable making this rule make sense. Because I agree with you, it just doesn't make any sense right now. It just should be plain and simple. If you're in JP court, you could be represented by yourself or by an authorized agent.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: I just wanted to follow up on a point that Justice Gaultney made, and I wonder to what extent anybody has any concerns about the lack of any definition or clarifying the scope of who could be an authorized agent and to what extent we fully vetted this against the, you know, issue of the potential interaction with the statute on the unauthorized practice

of law and the like. I just wonder if there's an issue there. I mean, I'm all in favor of simplicity and trying to facilitate at low cost the disposition of these cases, but I just wonder if there is something there; and, of course, it also raises a policy issue, I think, if you have a case where we think this sort of low cost facilitation is advisable. Then what about the exact same case, same parties, same stakes, in county court when someone appeals it?

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I think it's a big policy question. I mean, we're acting like it's no big deal, this is a justice of the peace court, and it is a big deal. The question is are we going to allow the unauthorized practice of law to be expanded, I mean, because the agent that's going down there is arguing the law. They're arguing the case. So if -- it's one thing to say, "Well, I'm just sending my sister down there" or whatever. That's one situation, and if we define authorized agent to say your relative or something, it's not in a professional business of being an authorized agent, but if there is a business we are creating of authorized agents who can represent without a license anyone, either side of the docket, in justice of the peace court and then we want to expand that to include not only

a situation of eviction for nonpayment of rent but let's say any other cases in justice of the peace court, then policywise what's the difference between that and saying why not do it in county court? And you're arguing the law and the facts, and sometimes, you know, we say, well, you can have a de novo review of your case by just filing an appeal. Well, sometimes those appeals don't get timely filed. Sometimes the appeal process, just getting the process of the bond is so difficult you don't get your appeal done.

So I think there are tremendous policy choices here. I agree with Richard wholeheartedly that, you know, the Legislature apparently made a policy choice with respect to a specific deal, and I suspect they had in mind being able to send the manager down there to prove up your loss of rent. That's one thing, but to expand it and say we're going to permit an authorized agent in an expanding number of cases, I think that's a big policy choice that we ought to think about.

CHAIRMAN BABCOCK: Eduardo, then Lisa, then Justice Bland.

MR. RODRIGUEZ: I think this could be a significant -- could have a significant effect in the Hispanic community. As you know, we have a difficult time because in Mexico and in countries south of us notary

publics are considered lawyers, and so a lot of people that come over here go to notaries and thinking that they're getting the equivalent of legal advice. If we don't clarify exactly what -- what we mean about who an agent can be, we're possibly opening up that -- that to be strengthened among this segment of our population and could lead to people thinking that they could go to a notary public who could represent them in this issue on other issues that require an attorney. So I agree that we need to clarify exactly what is meant by "an authorized agent," and we need to limit it in some way so that people don't think that a notary public, for instance, could then go on and help them in other things where they really need legal advice.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Well, under chapter -- Property Code 24.0054, it looks like the statute even authorizes representation by an authorized agent who need not be an attorney in some instances in the county court in these cases, and I'm having a hard time tracking it, but it seems to me if the tenant fails to file rent during an appeal, it's almost like this ancillary little proceeding, and in that little ancillary proceeding you could be represented by your authorized agent who need not be an attorney even in county court.

CHAIRMAN BABCOCK: Okay. Justice Bland.

HONORABLE JANE BLAND: Well, Justice Gaultney makes a good point. I don't know about expanding this to all justice cases, but this rule is only limited to eviction cases, and it sounds like the universe of eviction cases that are not for nonpayment of rent is relatively small, so I don't think that we would be creating a wholesale business where one doesn't currently exist by amending this rule, and I can only say that with respect to the justice courts none of the Rules of Evidence and Procedure apply. They are largely used by nonlawyers now, and so I don't see that we can have an issue from this one clearing up what's a confusing rule, but I guess if we did that would be a reason not to have it.

CHAIRMAN BABCOCK: Peter.

MR. KELLY: I just want to say that as a practical matter the business already exists, and it's a property management company that manage the apartment complexes. They'll usually have someone on staff whose only job is to go down to JP court everyday and process evictions. So to the extent -- I mean, I understand the other more philosophical objections to it, but I don't think it's creating any business. It's just making clear that that business already exists and continuing it.

CHAIRMAN BABCOCK: Okay. Let's talk about judgment and writ, 749. Afraid further hostilities are going to break out if we don't change the subject.

MR. TUCKER: Okay. For judgment and writ, we did a couple of things with this. In the first paragraph as it's currently written it says "damages," the judgment can be awarded for damages, which we thought was moderately confusing because you can't really get a whole lot of damages in an eviction. It's limited to only back rent and attorney's fees, would be the only thing that you could recover. "Damages" we thought communicated to people that you could get other things like late fee, damage to the property, things like that, which are not allowable. So we changed that to "attorney's fees and back rent, if any," instead of "damages for the plaintiff and cost and attorney's fees, if any," and instead of "damages for the defendant."

We also added "except as provide by Rule 742" where it says, "No writ of possession may issue until five days have expired," so other than as provided by the immediate possession bond.

The second paragraph we put in there to address a situation that currently occurs. It's not common, but it's not uncommon either. The way that the rules are written right now it just says, "When the

plaintiff wins the judge shall give them their writ of possession," and it just says it can't be any earlier than the sixth day after judgment. There's no back end cap on it, and I think when the rules were written you wouldn't contemplate why the landlord wouldn't do it as soon as possible, right, because that's why they came to court, they want possession of the property. What unfortunately happens frequently is the landlord will get their judgment for possession and then there will be a discussion between the landlord and the tenant. "Well, maybe I can let you stay if you do this and this and this," and really what's happened there is a new contract has been formed.

The tenant sometimes will live there for 6, 8, 10 months and then will do something that the landlord disagrees with, so the landlord will then go to the justice court and say, "I want that writ of possession on that judgment I got 10 months ago." Well, that's really not proper to terminate this because a new agreement has been created, one that was not terminated by that judgment for possession 10 months ago, and so our court, though, under the rules doesn't have any discretion. It just says you shall give that writ of possession, so our court has to give that writ of possession even though the tenant's rights are really being infringed on at that point. The tenant could theoretically go to a higher court and get an

injunction against that writ, but the funds and the knowledge to do that are not really present.

So what we did to try to address that problem is to say that "A writ cannot be issued after the 30th day after the judgment for possession." That allows enough time if the landlord wants to say, "Look, I'll give you a couple of weeks, you know, to get your stuff together," we don't think that's a new contract. That's just giving a concession, but we thought 30 days was a reasonable amount of time to say, look, if they're there more than 30 days after the judgment it's because you guys have come to some new agreement and if you subsequently want to terminate that agreement then you need to use the process that's set up, which is an eviction. You're going to have to start over, and also it has to be executed within 30 days after it issued.

So that was the reason we included that 30-day period, was just to prevent this situation where landlord is going to have this writ hanging over a tenant's head that they can then drop, and keep in mind if a landlord does that, we're eight months after the judgment, landlord goes and gets the writ. That means the tenant from that time has 24 hours to be out or the constable will come and move their stuff. The tenant doesn't even have time to arrange for a moving at that

time because they think "I get to live here now because the landlord has let me do this for this amount of time."

We would -- it's been discussed and raised, and we would possibly be amenable to adding in there "may not be issued after the 30th day after judgment for possession, except for good cause shown," where a landlord could possibly show a good reason, but our thought really was 30 days was probably long enough where any reason why they're there is probably because the new agreement has started.

HONORABLE RUSS CASEY: And we've had a couple of things on that. I think most of the committee or I think almost all the committee was for this rule in some form, though we did have discussions on if there should be limitations on it, expand out the 30 days, or show the good cause. I have had issues where you had a foreclosure and people -- the bank decided not to do a writ beyond the 30 days, and I think that we wanted to put it forward in this form to at least allow that this is what we counted on -- or what we decided on as a committee, was this form, and any discussion or modifications would be up to you guys.

CHAIRMAN BABCOCK: Okay. Any comments on this? Richard.

MR. ORSINGER: These may be a little more

technical. In the first line, "The judge will give judgment for plaintiff," is "will" the word we want in light of our discussion about "shall" and "must"? Is it "will" or is it "must"?

MR. HAMILTON: "Must."

MR. ORSINGER: Is it "must"? It's "must." Okay. Then the third line we use the word about the court being a "he," and I can't remember if we have a protocol about how we use a neutral term or not. Do we have a protocol? I thought we went through and deleted all of that out.

MR. HAMILTON: Yeah.

MR. ORSINGER: We did?

MR. LOW: There are a number of he's in the group but not the general rules.

MR. ORSINGER: Well, I don't know. I'm just going to mention it. I don't have a big problem with it, but I know that there are people who do, so I'll call it to your attention. The next thing is "If the judgment or verdict be in favor of the defendant." That seems to me like an archaic use of the verb, so let's use "is" or something. And then the next line, if defendant wins they get a judgment for costs and attorney's fees, and I thought I heard you say that there is no independent right for the defendant to have attorney's fees.

MR. TUCKER: A defendant is entitled to -- there are two ways that a plaintiff can be entitled to attorney's fees in an eviction suit. Number one is that the written lease says so. Number two, they can give a specialized notice to vacate, which is an 11-day notice to vacate where they say, "Look, here's your notice to vacate. If you haven't left in 11 days I'm going to file a lawsuit for eviction against you, and I'm going to be entitled to attorney's fees." So those are the two ways that a plaintiff can be entitled to it. A defendant is entitled if either of those situations is in effect also.

MR. ORSINGER: You mean if the lease says the landlord recovers fees, then by law, even if the lease doesn't say the defendant can, the defendant gets it?

MR. TUCKER: Yes, sir.

MR. ORSINGER: What law says that? The statute?

MR. TUCKER: The Property Code.

MR. ORSINGER: Okay. So any time the plaintiff puts -- the landlord puts his fees in play he's putting the defendant's fees in play at the same time?

MR. TUCKER: Right.

MR. ORSINGER: Okeydoke.

CHAIRMAN BABCOCK: All right. Any other comments about this? Yeah, Kent.

HONORABLE KENT SULLIVAN: Just a quick question. If you assume someone has demanded a jury in one of these cases, the court proceeds to hear evidence, and it is clear after presentation of evidence that one side is entitled to judgment as a matter of law. Is there a mechanism for an instructed verdict?

MR. TUCKER: Well, I guess that may be something we want to address somewhere in the rules. I think it should be, and I guess right now it's tied through through -- in our justice court rules it says the other rules apply if there's nothing -- and there is a rule for that, so we've talked somewhat about construction last time, and we may revisit that, but if we don't -- you know, what the -- what I think everyone decided last time was we're going to kind of leave that up to the judge's -- I think that's part of the judge's inherent power, but I think it might be a good idea to have it explicitly laid out that, yes, you have the power to instruct a verdict.

HONORABLE KENT SULLIVAN: That was ultimately my question. Why would we not want an explicit rule to that effect just as we have a rule in the rest of the Rules of Civil Procedure?

MR. TUCKER: Yeah. Yeah. I agree.

CHAIRMAN BABCOCK: Richard, and then Carl.

MR. MUNZINGER: Rule 749, the second

paragraph in essence says that you can't get a writ 30 days after judgment, and if you do get a writ, it only has a 30-day life span, and if you don't execute the writ within the 30-day life span of the writ, you've got to go back and start the whole process over again. That's what I've understood you to say this is, and I don't find that provision in section 24.061 of the Property Code, which addresses writs of possession, and it wasn't in the previous rule, so I am assuming that this is a suggestion by the committee that the Court adopt this rule because it makes sense. Have I --

HONORABLE RUSS CASEY: Exactly.

MR. MUNZINGER: -- interpreted so far?

MR. TUCKER: Yes, sir.

MR. MUNZINGER: What happens in the situation where I'm the landlord, and my tenant comes to me, I have a writ of possession. "Please don't put me out on the street, for God's sakes, my wife is pregnant. My son has got ABC condition." Well, I can only be a decent human being for 28 more days. This --

MR. TUCKER: Well --

MR. MUNZINGER: Let me finish, just a minute. This rule puts a 30-day time limit on a judgment of a court where the Legislature saw no reason to do this. It doesn't allow people to adjust themselves. Your

justification for this is the parties have entered into a new agreement. There is no judicial finding of a new agreement. If I'm a landlord, I can say to somebody, "I have a writ of possession. You have not been paying your rent, whatever it might be, and I want you out of here."

"Yes, but please, my wife is pregnant."

"All right. I'm going to let you stay here until the baby is born." Well, the baby is three weeks late, but now he comes and says stick it in your ear because of so-and-so. That doesn't make sense to me.

MR. TUCKER: That part when he said, "I'm going to let you stay here when the baby is born" was when he created a new agreement.

MR. MUNZINGER: Well, but that's my point, though. Does the Supreme Court of Texas want to say to the landlord -- who may be just as naive as the tenant because this rule applies to everybody. I lease my garage apartment to Joe Schmoe, and I'm not me. I'm a guy that came from Germany that has no degree --

CHAIRMAN BABCOCK: Are you a screenwriter?

MR. MUNZINGER: -- and is whatever he is. He rented his garage out. You know, are you telling me that this is what we want to do, and we're doing this because we think it's a good idea, even though the Legislature didn't think it was a good idea and even

though it militates against people reaching accommodations outside of court? It doesn't make sense to me.

HONORABLE RUSS CASEY: I think that a possible solution to that if you don't like this particular section is to allow the judge some -- allow the judge ability to decide whether he wants to sign a writ or not, because right now the judge does not have a choice on whether he can sign that writ. He has to do it.

MR. TUCKER: Of course, the difficulty with that is we open it up to, well, now we have the judge getting persuaded by the stories of, "Well, I'm sick and my wife is pregnant." That's problematic. I wouldn't -- I would be hesitant to say -- to allow just broad discretion. I think one thing that could be -- could be amended in here if you thought if it's after the 30th day the judge could have a hearing to decide if a new contract has been entered into, and if a new contract has been entered into, no writ of possession would issue, something along those lines; but just keep in mind, though -- I mean, I'm cognizant of what you're saying, is the landlord is being limited; but just remember what we're talking about is a situation where we came to court a year ago and as far as I know we're totally good; and then I come home and there's a note on my door that says the constable is going to come move your stuff out of your house in 24

hours, move it out and put it on the street; and to be able to respond to that, that person has no ability to respond to that whatsoever; and they have no way to know it's coming because the court case was so long ago. There's been no further proceedings at all. I just come home, and I have 24 hours to move.

CHAIRMAN BABCOCK: Lisa, then Carl.

MS. HOBBS: Well, I actually have a different comment; but I would say that in the State Bar's landlord or tenant handbook they have a big warning about this, so I presume that this is actually a problem where landlords and tenants subsequent to a writ of possession negotiate for staying on the property; and this says, "Warning, unless you get a signed written agreement from the landlord saying the judgment from the court is void or that she will never enforce the judgment and file it with the JP court the landlord can evict you at any time" and basically lays out what will happen in this scenario, so I presume it's a real problem since it's in this.

MR. TUCKER: It is.

MS. HOBBS: That wasn't my comment. My comment is this says, "The judge will give judgment," and I might change that to "render." I'm not sure what "give judgment" is, and then you raised a point about judgment, why you use this phrase, "possession of the premises,

costs, attorney's fees, and back rent, if any," and I thought we were saying you -- it would be improper for a JP to render judgment awarding damages to property, and that harkened back to our other comment about the bond, which apparently the bond you file in JP court for a writ of immediate possession is to protect the landlord for damage to the property that the JP court has no ability to render on behalf of the landlord, so how would you ever get the funds from the JP court that the tenant deposited to the JP court -- I'm saying this -- I'm not being very poetic here, but what happens if a writ of immediate possession is entered -- well, it wouldn't be. It would be that it wasn't entered and the tenant put in the funds to cover any damages that might occur and then damages do occur. It's not like the landlord is going to be able to go to the JP court and get a judgment and get those funds out of the JP court, right?

MR. TUCKER: Well, yeah, generally that -- and that situation is going to happen at the county court. The landlord could also file a suit in justice court to get those damages. It just can't be joined with the eviction suit.

MS. HOBBS: Oh.

MR. TUCKER: Yeah. The justice court can award late fees, damage to the property, and all that kind

of stuff as long as it's under 10,000, just not in concurrence with an eviction suit. The only thing that can be joined on this fast track eviction suit is rent.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I'm not sure it's a good idea to let the judge do an instructed verdict because historically we argue to the JP juries the law and the facts, and they're the ones who decide based upon that, and if we give the judge the right to do an instructed verdict then he can just nullify the jury completely. So, I mean, it's not like district and county court where we just argue facts to the jury and then the judge decides the law, so I'm not sure it's a good idea to allow the instructed verdict in a JP court.

MR. TUCKER: Right, and I can just say, frequently on these -- especially in eviction suits it can come in handy because you really do have emotional issues that a jury may have a really difficult time. You know, we've had judges who had to evict someone who has terminal brain cancer. Well, when someone is standing in front of a jury saying, "You're going to put me in the street, I have terminal brain cancer, I don't have anywhere to go," that's really difficult for sometimes a jury to avoid.

HONORABLE RUSS CASEY: "It's Christmas."

MR. TUCKER: Yeah, "It's Christmas." You

know, these are situations where it's extremely difficult for a jury to avoid being persuaded by that, but by the same token, the landlord has a legal right to possession. So my thought is that's why we would want an avenue for the court to handle when the jury verdict is absolutely contrary to the law.

CHAIRMAN BABCOCK: Okay. Munzinger had his hand up a minute ago, and we always call on him because he's entertaining, but he's passed to Kent. And then we'll go to Robert.

HONORABLE KENT SULLIVAN: I just wanted to acknowledge Carl's point, because I think it is a good point; but it I think raises perhaps a more fundamental issue, which we can't resolve but is at least worth noting, which is that it's hard for me not to react to the absurdity of arguing the law from the point of view of being able to argue anything, not arguing the law the way we normally think of it in terms of for final argument application --

CHAIRMAN BABCOCK: You've never read *The Law in JP Court*, have you?

HONORABLE KENT SULLIVAN: -- of facts in the law, but arguing what the law ought to be or what the law is and making it up as you go along. It's an absurd concept, and I wonder at some point if we shouldn't

revisit it, but it then, I think, crystallizes the issue that we're talking about, and that is if you have a case in which one side has conceded the case, albeit perhaps unknowingly, why then would you throw it to a jury and particularly in a situation in which the jury is not being instructed as to what the law is but may be instructed completely incorrectly because you just have parties who have -- and there is no need for either of the parties to have any legal training whatsoever, so there is no guarantee that there is any indication in the courtroom during the entire process that anyone knows what the law is, but we will not allow the judge, who is our only hope in this situation, to instruct a verdict and end the process in the most efficient, economical, and sensible fashion. It's an extraordinary situation.

CHAIRMAN BABCOCK: Which as -- that's what makes Texans unique, Kent. Yeah, somebody, Robert had his hand up for a long time.

MR. LEVY: I love this discussion, but I have a more mundane comment, so on the question of --

CHAIRMAN BABCOCK: Such a downer.

MR. LEVY: Yeah. On the question of the reference to costs, I would suggest including -- saying "court costs" so that there is not a question of does this mean the costs of the guy driving down and, you know,

those types of things, and then you also might -- because of the issue about the defendants recovering costs, to make it clear say "as provided for under the law," so that the -- there has to be a tie back to some statutory authority to give the defendant their attorney's fees.

MR. TUCKER: Okay. Yeah. Makes sense.

CHAIRMAN BABCOCK: Yeah. Richard. Then Carl.

MR. ORSINGER: In response to what Judge Sullivan was saying, it does occur to me that at this level of the judicial system, this court is called a justice court, right, that this is a court where justice should prevail, not necessarily the law. We have other courts where the law should prevail, and we a lot of times have nonlawyers in there arguing in front of a nonlawyer?

MR. TUCKER: Yes, sir.

MR. ORSINGER: And I'm not sure how well the law will be applied anyway between three nonlawyers, but justice is a broader concept that maybe is appropriate in a court of no record with an immediate appeal to a court of record with a licensed lawyer, et cetera, et cetera, and so an argument could be made that maybe we ought to let justice prevail, whatever that is.

HONORABLE KENT SULLIVAN: Are we talking about equity in law?

MR. ORSINGER: No, I think we're talking about justice, which is neither equity nor law necessarily.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: That's really what happens in that for the most part the justice of the peace are not lawyers and they don't know any more about the law than the jurors do, sometimes than the parties do, so it's kind of like a kangaroo court.

CHAIRMAN BABCOCK: Okay. Judge Wallace.

HONORABLE R. H. WALLACE: I'm going to shift direction. Back to this 30-day limit on the -- that the writ expires if not executed by the 30th day. I don't have any particular recommendation or precise language in ruling, but I do think that we should not discourage the landlord and the tenant from trying to work out some accommodation after they've had their eviction, because I don't know, but I would sort of assume that there's probably a lot of tenants who once they have gone through that process and once they know that they're going to be thrown out unless they pay the rent, they may find a way to pay the rent, and so I don't know what the proper way to do it to give the judge discretion, but I don't think we ought to do something that would discourage that process. I may be wrong. Maybe it's not, but I bet a lot

of that stuff --

MR. TUCKER: Right, no, I agree we don't want to discourage that. My only concern is that we also don't want to have a tenant who negotiates in good faith to do something like that to then be on the tightrope of 24-hour eviction for the rest of the time they live there.

HONORABLE R. H. WALLACE: No, I understand. I understand that.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I think there is a problem with the stale judgment and if the cases you're describing are cases about a year out, with the writ of possession. 30 days seems to me to be a pretty short time when you consider that you really haven't had a chance then to even have another month's rent come due, and so if you're going to give the parties the chance to work something out, maybe 30 days is too short, you should think about 60 days. By that point you know nobody is appealing and you can get a track record. So a year, yes, I think people would say that's a little bit long to go get a writ, but 30 days might be a little short.

CHAIRMAN BABCOCK: Kent. Kent Sullivan.

HONORABLE KENT SULLIVAN: Just circling back to the earlier point on the instructed verdict issue, I just want to say that I think that -- and I would be very

interested in the comments that our judges have here, but I would think that JPs are going to be pretty knowledgeable about this law. Number one, they see a huge volume of these cases, or at least I think most JPs would. I also assume that they would have CLE that is directed to them in terms of how to handle these cases. My recollection is in any event they've got a CLE type of vehicle that is constantly available to them, and Mr. Chairman, I would think it would be useful at some point maybe to -- for this committee to opine by way of a vote on whether or not there ought to be an instructed verdict mechanism. I would think in terms of impacting a volume of cases this is not at all inconsequential, but I defer to the judges that would know.

CHAIRMAN BABCOCK: Okay. Anybody else want to have a vote on this issue?

MR. LOW: No.

CHAIRMAN BABCOCK: Anybody want to second Kent's request for a vote?

MR. ORSINGER: Would the vote be those in favor of justice versus those that are in favor of the law?

CHAIRMAN BABCOCK: That's how I view it. That's how I'd put it for sure.

MR. ORSINGER: I'm prepared to vote on that.

CHAIRMAN BABCOCK: All right. Well, it doesn't seem like there's a lot of appetite to vote on it.

MR. TUCKER: Just one thing to also keep in mind in this situation, and you know, I generally come down on the side of fairness and justices in our courts and doing what's equitable. One thing to keep in mind on these type of cases where this is really helpful, like I mentioned, these are very emotional type of cases where it's fairly easy to influence a jury's behavior, especially when there's no way to charge them and say, "You must only consider XYZ," and also keep in mind when a landlord is trying to evict someone else, they can't go somewhere else. We have exclusive jurisdiction, so if we're going to say, "Sorry, landlord, if the tenant can just convince the jury that they're, you know, unfortunate, shouldn't be evicted," you know, the landlord is going to have to go through this process and be dragged out. They can't just initiate the eviction in a different court. That's something to at least keep in mind.

CHAIRMAN BABCOCK: Okay. We can either start on 750 or we can break for lunch. What's everyone's pleasure? Or we could vote. What's everybody's pleasure?

MR. HAMILTON: Break for lunch.

CHAIRMAN BABCOCK: Break for lunch.

HONORABLE R. H. WALLACE: Lunch, lunch.

CHAIRMAN BABCOCK: Okay. We'll have an hour lunch break. Thanks.

(Recess from 12:28 p.m. to 1:33 p.m.)

CHAIRMAN BABCOCK: All right. Rule 750, who -- just "may appeal," not "who may appeal," but just "may appeal." Whoever titled these things in the old days was a minimalist.

MR. TUCKER: Yeah, except it probably would have been even better if they had been more minimalist and just said "appeals."

CHAIRMAN BABCOCK: That's true. That's true. All right. Let's talk about "may appeal," as opposed to the June appeals.

MR. TUCKER: Okay. Not a lot of substantive change on "may appeal." Again, same thing, we changed the verbiage of "forcible entry and detainer" to "eviction," and then just kind of consolidated and renumbered the rules as far as where the appeal bond is and so on and so forth, but no change to that rule of any substantive matter.

CHAIRMAN BABCOCK: Okay. Any comments about this, about 750? Yeah, Lisa.

MS. HOBBS: Well, there's just the use of --

THE REPORTER: Speak up. I can't hear you.

MS. HOBBS: There is the use of the word

"damages" there that earlier you changed the word "damages" to specify what you could actually get.

MR. TUCKER: In 750?

MS. HOBBS: No, in --

MR. TUCKER: Yeah, I see what you're saying now.

MS. HOBBS: I don't know if it matters. I just point it out.

MR. TUCKER: Yeah, no.

MR. ORSINGER: It matters a lot.

MR. TUCKER: Yeah, it's an excellent point actually. Yeah, I'm trying to think off the top of my head how to word that without it being super awkward by putting "all costs and attorney's fees and back rent" or something, but I agree your -- we probably want to be consistent.

CHAIRMAN BABCOCK: Yeah. That's good. We spotted a problem, so now we can fix it. Richard.

MR. ORSINGER: I'm a little confused on which ones of these rules apply to eviction cases and which ones apply to past rent and hold over and damages, and when it says here "may appeal, appeals in eviction cases" are we talking only about the writ of possession, or are we talking about a money judgment for rent, or are we talking about a claim for damages to the premises?

MR. TUCKER: No, not damages to premise.

MR. ORSINGER: Not damages to premise.

MR. TUCKER: But, yes, cases for possession and any rent suit that is joined with that. The way that these work is really -- although technically they are two separate causes, they are joined together and brought as one case when there's back rent, so, yeah, this will apply to the judgment for possession and the judgment for rent.

MR. ORSINGER: And when the suits are combined do you call the combined suit an eviction case, or is the eviction case just half of it and the rental case is the other half of it and it has a different name?

MR. TUCKER: No. All of our courts would just be calling that an eviction suit. That's what it would be called.

HONORABLE RUSS CASEY: One of the things that may be a little bit confusing on this is the Property Code and a way the rules reflect a different procedure depending on cause of action, which may be not pled, but the determination of the court, that's what will dictate. Such as if the court found that the eviction was for nonpayment of rent then that has an appeal procedure that is different than if the eviction -- the cause of action was for illegal pet, so there is actually a different appeal procedure depending on what the determined cause of

action was, and this is not really spelled out well here, because it's spelled out in the Property Code so -- and we talked about this a little bit, that it may be good to kind of maybe reflect what the Property Code says in the rules or not. We tried not to add more work as much as we could, but the Property Code has its own appeal procedure, and there is the one here as well.

MR. ORSINGER: Well, now, are we expecting the pro se litigants to also look up the terms of the Property Code and figure out how to appeal?

HONORABLE RUSS CASEY: Which is why I thought it might be good to put it all together.

MR. ORSINGER: It seems to me that -- I think it's entirely reasonable that JPs may have photocopies of all of these rules or there will be a website that you can go to on how to defend an eviction case or something, and if we have one set of rules that applies to only part of the claims and we're not explaining that and we don't give them the other part, they're bound to screw it up, if it's possible. Maybe it's not possible to screw it up, but if it is, I would think they would get confused and do the wrong thing.

HONORABLE RUSS CASEY: I would totally agree about that.

MR. ORSINGER: Okay.

MR. TUCKER: Yeah, and that was part of what in the citation we direct them to Chapter 24 of the Property Code, and we contemplate that that would be available at the court and on the website as well.

MR. ORSINGER: Wow, so now they've got to read the regular rules of procedure, the special rules of procedure, and the Property Code and figure it out themselves.

HONORABLE RUSS CASEY: One of the things that we were kind of aware of is that generally speaking the rules committee has been against duplication, where something is said in the code of just stating it again in the rules, and I think in a few places we have maybe ignored that for the greater good, and I think this may be another situation where it may be appropriate.

MR. TUCKER: Yeah, but that was kind of the general thought, was we don't really want to reproduce things that are all in the Property Code here in the rules, that's duplicative, and then it raises the problem of what happens when the Property Code changes, and this rule still reflects that. Like Judge Casey mentioned, we did do that in a couple of spots where we thought it's extremely important that this information is in this document, and this very well may be one of those situations where it should be added.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: It says "appeal to the county court." We have a county court, but it doesn't do any litigation. That all goes to county courts at law. I know that the JP is the one that's going to send the transcript, presumably to the right court, but does that need to be explained, because the county courts generally don't do these. It's county courts at law.

MR. TUCKER: Well, a lot of counties don't have county court at law. At the start of the rules in the definitions page we define "county court" as including a constitutional county court or statutory county court that has jurisdiction of the appeals from our court.

MR. HAMILTON: Okay, but does the appellant have to know which court it's going to go to?

MR. TUCKER: No.

MR. HAMILTON: That's up to the JP to send it to the right court?

MR. TUCKER: That's right.

CHAIRMAN BABCOCK: Makes sense. Professor Carlson.

PROFESSOR CARLSON: As a practical matter, do you have in the justice courts some user-friendly pamphlet or something that you give tenants when they come in?

HONORABLE RUSS CASEY: No. Now, we've had a few things -- first off, we have been beaten over our head many times that we do not give legal advice, and what has constituted legal advice has been I guess debated an awful lot. At my own personal court I will hand out pamphlets to people who ask that are a tenants guide that were prepared by the Texas Young Lawyers Association.

PROFESSOR CARLSON: Uh-huh. Uh-huh.

HONORABLE RUSS CASEY: But that is a personal policy of my court that has no reflective of what each individual court does, but as a rule, the courts don't have anything.

CHAIRMAN BABCOCK: That doesn't have any forms, does it?

HONORABLE RUSS CASEY: No, it does not have forms.

MR. TUCKER: What we advise the judges that they can and can't do really is if there is a pamphlet that's put out by someone like TYLA or the State Bar, I know a lot of our courts give out like a State Bar --

PROFESSOR CARLSON: Right.

MR. TUCKER: -- small claims pamphlet or State Bar landlord's, we say that's okay. You know, we just -- sometimes we've had courts put things together on their own and then you run the risk of, you know, is it

being shaded kind of one way or the other and are they stating maybe something that shouldn't be stated, but, yeah, any pamphlet like that we certainly tell them they're welcome to do that.

PROFESSOR CARLSON: Because isn't there a State Bar committee that does things like that? They do pamphlets or -- I can't remember what it's called, State Bar committee for something.

MR. TUCKER: Yeah, I don't know either, but I know that those exist and a lot of our courts have those available.

HONORABLE RUSS CASEY: And I can say the ones that I have are out of date, and I'm not allowed to update them.

PROFESSOR CARLSON: Uh-huh.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Can you talk to me about the five days of after you post bond, like why is it five days? Why isn't it immediately?

MR. TUCKER: Show me exactly where, I'm sorry.

MS. HOBBS: After you post a bond you have five days to serve the other party notice of the bond.

MR. TUCKER: Okay. Right. The issue with that is, okay, once they post the bond, we're going to

send it up to the county court, and the county court is eventually going to set that for a hearing, you know, two to three weeks from then. They have five days to give that notice, just to make sure the other side has notice that there is going to be an appeal so they know to show up. That doesn't have anything to do with whether the appeal is perfected or not, but as you see in the rule, the consequence for not doing that is you can't get a default judgment up in county court if you didn't notice the other side that you're appealing.

MS. HOBBS: Yeah, this seems like it's not a notice of appeal, though. It sounds like it's a notice of posting bond. It doesn't actually tell them -- I mean, the way this is worded I thought you were talking about a notice of appeal and not really the notice of the bond.

MR. TUCKER: Right.

MS. HOBBS: But the way it's worded is just notice of bond.

MR. TUCKER: Yeah, and that was just the existing -- the existing language, and we didn't really modify that, and I think that --

MS. HOBBS: It seems what you want to tell them is this is going to another court now.

MR. TUCKER: Yeah, that's right.

MS. HOBBS: Not just I -- you know, not just

the bond is.

MR. TUCKER: Yeah, and I think changing the language to "filing of such appeal." "Within five days following the filing of such bond, party appealing shall give notice as provided in Rule 515 of the filing of such appeal to the adverse party." I think that would address that.

CHAIRMAN BABCOCK: Okay. Justice Gaultney.

HONORABLE DAVID GAULTNEY: So is there a statutory prohibition from using simply a notice of appeal to perfect the appeal? I mean, is it required that a bond be the vehicle for perfecting the appeal?

HONORABLE RUSS CASEY: Yes.

MR. TUCKER: Yeah, it has to be a bond or a pauper's affidavit of inability to pay the costs.

HONORABLE RUSS CASEY: And by statute the appeal is perfected when we get that as well.

MR. TUCKER: Yeah.

HONORABLE RUSS CASEY: So it causes all kinds of problems when they actually don't give us money.

CHAIRMAN BABCOCK: Any other comments? Okay. Moving on to 750 -- oh, I'm sorry. Eduardo.

MR. RODRIGUEZ: In reading the "either party may file" -- "may appeal from a final judgment" and then it says something about the judge -- the bond approved by

the judge. Do we specify which judge we're talking about? Is it the county court judge, or is it the JP judge?

MR. TUCKER: It certainly is intended to be the JP judge. I mean, I kind of see what you mean as far as it being kind of a little bit ambiguous. It's intended to be the JP judge.

CHAIRMAN BABCOCK: Okay.

MR. RODRIGUEZ: I would clarify and say that.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: So I echo that and then following -- we'll be the corner -- the grammarian corner here. Let's get rid of the word "said" and actually call it what it is. So Eduardo's comment is all judges.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Well, is the -- so the judge whose judgment is being appealed is the one that's approving the document that's being filed for appeal. Is there any -- has there been any problem with that in practice?

MR. TUCKER: Not particularly. Our -- the judges are trained that if there's -- if there's a question about it, if they -- you know, to go ahead and send it up to the county court and allow the -- allow the appellate court to -- at least allow that person to reach

the gate, and if the county judge says, "You know what, that's insufficient," then it's insufficient, but the training is, you know, err on the side of giving this person their day in the appellate court.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, when you're talking about setting a bond, can you cure that by just saying "the trial judge"? Putting instead of "judge," just "trial judge."

MR. TUCKER: That would make sense.

CHAIRMAN BABCOCK: All right. Any other comments about this? All right. 750a.

MR. TUCKER: Okay. This doesn't change a whole lot about the actual procedure, but it -- the rule as written now is all kind of just one giant wall of text. We tried to kind of split it out to allow people to kind of understand what's going on. We brought some of the same language from our regular rules as far as what needs to be in the pauper's affidavit, just gives a little bit more direction on exactly the process so people understand the process to file a pauper's affidavit and the process to contest the pauper's affidavit.

One thing that the committee did do that was substantive, the way that this works, if I am appealing and I file a pauper's affidavit, the court has no

authority to question that. Only the opposing party can question that. Okay. The opposing party has five days to question it. If they question it, our court has five days to have a hearing on it. If our court now says, "No, we're not going to accept your pauper's affidavit," they can appeal that decision interlocutorily to the county court, and then if the county court says, "We also say no," okay, the current rule says they get five more days to post a regular appeal bond. In this rule we changed that to one day because the situation is we're already looking at being two weeks or so past judgment, and so we're trying to kind of keep the -- again, the foot dragging process from going on too much further. So they -- you know, that's what the task force decided to do with that. That's the only substantive change.

CHAIRMAN BABCOCK: Okay. 750a. Any comments? Yeah, Carl.

MR. HAMILTON: Why do you have the court notifying the other party rather than the person filing the statement?

MR. TUCKER: Yeah. Good question. That's how it currently is, and I think that what he is mentioning, remember, on the appeal bond the party posting the bond has to notify the other side, "Hey, we're doing this." On the pauper's affidavit the court has a burden

to notify the other side by the next business day, and I -- my presumption is the reason why it was already set up that way and why we left it that way was, again, because of the five days that that side has to contest it. They need to be made aware immediately that this pauper's affidavit has been filed so they can contest it if they so choose. Allowing them to wait five days to even notify them, we would then have to extend the period for them to contest it, and again you start to drag out that appeal time, and that was something nobody really wanted to do.

HONORABLE RUSS CASEY: That's existing language. We didn't change that.

MR. HAMILTON: I know, but if the party filing the pauper's affidavit has to notify the other side the same day it's filed, that's a day sooner than the court has to do it.

MR. TUCKER: They don't. On the pauper's affidavit there is no requirement that that party notify. The court is supposed to notify.

MR. HAMILTON: I know, but I'm saying why don't we make the party do it and then it gets done a day sooner than the court doing it?

MR. TUCKER: Well, our thought was a lot of the time -- our thought was that people are going to -- if you leave it to the party filing pauper's affidavit

they're frequently going to fail, and the decision was, well, if they fail to do that there's no good outcome there. We either say, "Well, you blew it, you don't even get your appeal," or we drag out the process and unfairly prejudice the landlord, so we thought this was the best solution to that.

MR. HAMILTON: Okay.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: "By one day," the new provision that you added, do you mean by the next business day?

MR. TUCKER: Well, it will technically work out that way. We use calendar days for all of our days in these rules now, but obviously if it's on Friday, any time -- you know, the next day would be Saturday. Any time the time period ends on a Saturday, Sunday, or holiday we have to go to the next actual business day.

MS. HOBBS: Well, in this rule in paragraph (a) you use that the judge must notify them that a pauper's affidavit has been filed within the next -- by the next business day.

MR. TUCKER: Right.

MS. HOBBS: And then later you say "one day." I personally think that "the next business day" is more accurate. I mean, I think a person understands that better.

MR. TUCKER: Right.

MS. HOBBS: But either way it seems like it should be consistent.

MR. TUCKER: Right. No, that makes sense, and I think as implemented they're going to be the same, but I agree that the words should also match.

MS. HOBBS: But I also would go on record to say that I don't think allowing them five more days to get the money together is really that burdensome on the landlord, so I think the one day might be a little bit --

CHAIRMAN BABCOCK: Okay. Richard.

MR. MUNZINGER: In subparagraph (b), IOLTA certificate, is that new?

MR. TUCKER: It's new as far as being listed in these rules. It's in the -- it's in the district and county court rules right now for pauper's affidavits. We moved that into our rules since we were excluding those other rules from applying to our courts, but it's something that applies to our courts now but is not listed in this rule right now.

MR. MUNZINGER: And the content of paragraph (b) exists in a Rule of Civil Procedure today?

MR. TUCKER: Yes, sir.

CHAIRMAN BABCOCK: Okay. Any other comments about this rule? Richard.

MR. ORSINGER: Yeah, the form of the notice that the court gives, I notice your definition requires a delivery of a document to the party, and I'm wondering does that exist under current practice and how is it done? Does a constable hand-deliver a letter from the judge, or do they fax something, or how is it done?

MR. TUCKER: Yeah, what the current rules and law require is that they send it first class mail.

MR. ORSINGER: Huh.

MR. TUCKER: Yeah. What a lot of courts will do is they will place a phone call, also; and I've advised our courts that that's okay to call, there's no problem with that; but my advice is to still go ahead and send the mail also because the rule says you've got to do that; but I think in practice a lot of courts are picking up the phone and notifying a party, "Hey, this has been filed" because -- just because of the logistics of first class mail, it's going to take most of your five-day contest window just delivering it.

MR. ORSINGER: And that disturbs me, and what happens with those judges that don't call? Are people finding out in time to file a contest, or do they file them, or is the letter arriving too late?

MR. TUCKER: Frankly, a lot of landlords will not contest the pauper's affidavit regardless because

if you contest it then a hearing is now going to be five days later and if the result is contrary to what the tenant wants then we're going to have -- then they're going to be able to appeal that, and that takes five more days, and then if they don't like that they're going to have five more days to post an appeal bond. So for most landlords the cost benefit analysis is why contest it, let's just get up to county court, especially in light of the new provisions that say, well, if they appeal by pauper's affidavit and it's nonpayment of rent they're going to have to pay rent into the registry or we're going to get them at least moved out before the appeal even happens. So I think generally there's not a desire to contest the pauper's affidavit. Obviously sometimes there will be.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: As I read this, the court only has to give notice of the statement, but not a copy of the statement.

MR. TUCKER: That's right.

MR. HAMILTON: Why shouldn't the defendant get a copy of the statement? Does he have to get a copy of the statement?

MR. TUCKER: I think that's a fantastic point. I would agree that they should.

CHAIRMAN BABCOCK: You know, Lisa had a great point, but, now, that was a fantastic point. So I think you're slightly ahead of Lisa.

MR. HAMILTON: Slightly ahead.

MR. TUCKER: Is that on the official -- do we have a official stratum of compliments?

CHAIRMAN BABCOCK: Actually, we're going to have a board that will pop up here at the end of the day to see who has got the best points. Justice Gray.

HONORABLE TOM GRAY: I'm a little reluctant to make this suggestion, but since we were trying to clarify the use of the term "must" earlier, the statement "must contain the following information" is actually not in accord with the edicts of our high nine on the Colorado, and I think the word "must" should be changed to the word "should" since failure to include that information is not fatal to the statement, and I would just prefer it reflect what's needed.

HONORABLE RUSS CASEY: I would agree with that.

MR. MUNZINGER: But the Property Code says "must." 24.0052, "The affidavit must contain the following information."

MR. TUCKER: Yeah, and I would argue that it really -- it probably -- it is fatal to the statement "if

contested." I think if a landlord says, "I contest your pauper's affidavit because you didn't put these things that are required to be in there," as a judge I would say, "Yeah, you're right, and so I'm going to not allow the pauper's affidavit."

HONORABLE TOM GRAY: And you will get reversed.

MR. TUCKER: No, I won't, because it will be trial de novo.

CHAIRMAN BABCOCK: Man, there's a bunch of smarty pants here.

MR. ORSINGER: Throwing his weight around.

HONORABLE TOM GRAY: I only say that because I've been reversed for attempting to require it.

MR. TUCKER: Wow.

CHAIRMAN BABCOCK: Marisa.

MS. SECCO: In county and district court the rules provide for contests by clerks. Is that something that happens currently on appeals from --

MR. TUCKER: No. Not on these. The way that this -- it's currently implemented, the county and district court rules allowing a contest for a clerk, it's vague a little bit. A lot of courts think that that will apply to a pauper's affidavit with filing a lawsuit for the court costs for filing, but not for -- I think the

explicit provisions for these eviction pauper's affidavits say this is presumed to be true unless the other side contests.

MS. SECCO: Okay.

MR. TUCKER: Certainly the clerk can't contest these, debatable on if they can contest it when they file a lawsuit.

CHAIRMAN BABCOCK: All right. Anything else? Yeah, Richard.

MR. ORSINGER: I'm wondering if it would be of practical value to provide that the original petition should contain the fax number of the party or lawyer filing it and then your notice provision should allow the court to give notice by fax rather than first class mail.

MR. TUCKER: Yeah, I think that would be -- that would be a good option to say that the plaintiff -- I would say "may," "may include a fax number," and if they do include a fax number that the court must provide notice of a pauper's affidavit at that fax number.

MR. ORSINGER: And we certainly allow lawyers to give notices to each other in the district courts by fax, and it would seem to me that it would be a convenience and it would be more likely to get notice out.

MR. TUCKER: Right.

MR. ORSINGER: I could be wrong, but I think

if we offered that option I wouldn't be surprised if a lot of people don't take it.

MR. TUCKER: Yeah, and I don't see any drawback. I think, you know, for a court I don't think it takes them any more time or effort or money to fax that over to the party as opposed to getting a first class mail together and getting it mailed, so I don't see what any problem would be.

MR. MUNZINGER: Would it add three days to the time period involved as the fax --

MR. ORSINGER: We don't have a three-day --

MR. MUNZINGER: -- notification?

MR. ORSINGER: -- add-on for these rules.

MR. TUCKER: Yeah, no.

CHAIRMAN BABCOCK: Okay. Any more comments about this? Well, let's speed -- oh, Lisa, sorry. You're right in the line of sight there.

MS. HOBBS: I just wonder if we might want to consider allowing notice by e-mail in JP courts and what that might do, because if the Legislature is asking us to simplify this process and we're still talking about mailing notices for something that has to happen in five days or even faxing it, I'm guessing that the average Joe is way more likely to have an e-mail address than he is likely to have a fax number, and I just wonder what the

danger would be if they give you the e-mail and sort of agree to accept a notice by e-mail. You know, I can see where you would be worried about whether an e-mail address is valid, but if it's an e-mail address that you received from the person that you're e-mailing that they agreed would be suitable for receiving notice, it just seems like that's where we should be going in 2012 and not --

MR. TUCKER: Yeah. And that makes sense. I guess one issue that could be a possibility, I know at least one court, one county, when they would send me an e-mail from their county e-mail for some reason our server was marking that as spam, and so I wasn't getting their e-mails. So there could be issues like, well, this county doesn't -- you know, so that could be a possible problem. We do have in our regular justice court rules that we added as far as being able to serve documents on each other as parties, we do include in there that a party can include an e-mail address and if they -- that they wish to receive documents, and if they do then that's a valid way of exchanging information. So that might be something worth looking at here that a party could provide for purposes of notice of a filed pauper's affidavit either a fax or an e-mail address that they wanted notice at.

CHAIRMAN BABCOCK: Okay. Let's go to 750b.

MR. TUCKER: Okay.

CHAIRMAN BABCOCK: Moving right along.

MR. TUCKER: Moving right along. 750b, this is kind of one of those situations where it's a lot -- one of the things that Judge Casey was talking about. What we did is we imported a lot of this new provision from the Property Code dealing with nonpayment of rent appeals into the rules, just because this is a significant change, and it's something that occurs reasonably frequently when -- within the scope of appeals here, so we wanted to make sure this was included so that people understood that they do have to participate in this process. I kind of mentioned it already. Basically what it is, is if you appeal by a pauper's affidavit and it was a nonpayment of rent eviction, you have to put a month's worth of rent into the justice court registry, okay, before we're going to send your appeal up.

If you do that, then great. We're going to send your appeal up, and your appeal is just as it normally would be. As rent continues to become due you have to keep paying that rent, and that's always been the rule. However, if you fail to pay that rent into the registry, and the court has to tell you by when to do it, it could be no more than five days after you file the pauper's affidavit, then what's going to happen is the landlord gets their writ of possession now. They get to

take you out of the property. You still get to have your appeal. You're going to go to county court, and you're going to argue that you should be able to have possession, but you're going to be removed because you haven't paid for the right to stay there, and so we just took the Property Code provisions and put them in with the standard nonpayment of rent rule that was already there, just to make sure everyone was on notice of that significant issue.

CHAIRMAN BABCOCK: Yeah, Robert.

MR. LEVY: I have a couple of questions, and you might have talked about this last time. Are we going to make the numbering consistent? Because I notice some of the rules, the rule number, dot number, it's a mess.

MR. TUCKER: Yeah. We were told don't --

MR. LEVY: Don't worry about that.

MR. TUCKER: Don't stress too much about the numbering issue. That would be -- that would come out in the --

MR. LEVY: All right. So another question on this is this is really a qualification for the issuance of the pauper -- the bond -- the pauper affidavit rather than -- I mean, is this something they have to do before they actually are qualified to get it?

MR. TUCKER: No. No. What this -- what

this is, is I come in -- I get evicted for not paying my rent. I come in, and I say, "I want to appeal, and here's my pauper's affidavit," and what the statute and this rule say has to happen then is the justice court has to give you a notice that contains some warnings in bold and conspicuous type and tell you how much to pay, when to pay it, if it's a check or money order who it has to be payable to, and a warning that if you don't do it there's going to be a writ of possession with no hearing. So then -- oh, go ahead.

MR. LEVY: What really is going to happen is when you file the affidavit the clerk is going to give you the forms or the notices that we see.

MR. TUCKER: Yeah, they must under the statute.

MR. LEVY: Is it the clerk or the court, or is that not a meaningful distinction?

MR. TUCKER: It can be, but, yeah, we generally tried to go with "court" unless it was something that the judge has to do, but, yeah, it's acceptable for the clerk to do it.

CHAIRMAN BABCOCK: Okay. Yeah, Carl, and then Richard.

MR. HAMILTON: Is there someplace where it says that the judgment has to state the initial amount of

the deposit of rent?

MR. TUCKER: Yes, sir. In the Property Code it states that in any nonpayment of rent eviction part of the judgment must state what the rent is, how much the -- and how much it -- how much the rent is, when it is paid, and how much is paid by a governmental entity, if any, and so that's what the judge is supposed to use in determining how much has to be paid into the registry.

MR. HAMILTON: Okay, but there's not a -- there's not a judgment that says the initial deposit of rent is such and such of an amount, is there?

HONORABLE RUSS CASEY: Yes.

MR. TUCKER: Yeah, it does say. It says one month's rent in the Property Code.

MR. HAMILTON: That's the initial deposit.

MR. TUCKER: Yes, sir.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I don't -- surely we are in the process of weeding out "pauper's affidavit" throughout these rules, and in Rule 750a we call it a "sworn statement of inability to pay the cost of appeal," and so I'm wondering if we couldn't just say, "Defendant files a sworn statement" in Rule 750a. We have the same problem in the title of the next section, and there has been a move away from that term, right?

MS. SECCO: Uh-huh.

MR. ORSINGER: Looks like it, and wherever the sufficient language is, just change it.

CHAIRMAN BABCOCK: Okay. Anybody else on 750b? All right. Let's go to 750c.

MR. TUCKER: And as noted on the formalized, we actually have two 750c's. That came from inserting this one back in. Again, we had originally deleted immediate possession bonds, then they were put back and so this came in. Basically Rule 750c talks about what happens when someone files an affidavit of inability when we have an immediate possession bond on file, and this just goes back over the information that's covered in the immediate possession bond statute also that basically says if you want to remain in premises during the appeal and there's an immediate possession bond, you either had to post a counter-bond to the immediate possession bond or you now have to post an actual appeal bond. You're not going to be able to stay in during the appeal if there's an immediate possession bond filed and you don't post any sort of bond whatsoever to protect the landlord.

CHAIRMAN BABCOCK: All right. Any other comments on this?

MR. TUCKER: And one thing that we did do, because this had come up with some controversy, in one of

the areas in the Property Code it says, "The court shall immediately issue a writ of possession before sending the appeal up," and in other areas it talks about "upon request and payment of the fees." So we make sure and include "upon request and payment of the fees" because that's come up before, and while we gave this writ and now the landlord says, "I'm not paying for it," now what are we going to do?

CHAIRMAN BABCOCK: Okay. Anything else on this one? Carl. Sorry.

MR. HAMILTON: Second paragraph, first line. "However, the defendant must post a counter-bond as provided by Rule 742 if they" -- I think "they" should be "defendant."

MR. TUCKER: Okay. Makes sense.

CHAIRMAN BABCOCK: Good catch. Not great, but good.

MR. HAMILTON: Hey, I'm coming down the line.

MR. TUCKER: As I put in the notes there I submitted, obviously the first 750c would just be removed if the Supreme Court decided to eliminate immediate possession bonds.

CHAIRMAN BABCOCK: Okay. Anything other on 750c, the elder? Richard.

MR. ORSINGER: I may be confused. 750c is the "appeal perfected."

MR. TUCKER: Well, there's two 750c's unfortunately.

CHAIRMAN BABCOCK: There's an elder and a younger.

MR. ORSINGER: Okay. I'm missing page 43. That's my problem. I'll wait until we get to page 44.

CHAIRMAN BABCOCK: Okay. We're about to go there. All right. We're at page 44, Rule 750c, the younger, appeal perfected.

MR. ORSINGER: Okay. Do you want to explain that?

MR. TUCKER: Huh-uh.

MR. ORSINGER: Again, we've got the pauper's affidavit, but let me ask for some clarity here. This suggests to me that if you just file this sworn statement, this would suggest to me that the appeal is perfected, even if it's contested and the contest is upheld.

MR. TUCKER: That's right.

MR. ORSINGER: And so that's true. It still operates to perfect the appeal, even if it's invalidated and not overturned on appeal.

MR. TUCKER: No, I'm sorry, and this is, again, the same language that exists, and I think the

thought is "approved in conformity with that rule" contemplates approved through the process either by not being contested or by being contested and upheld. And there's language that kind of reflects that in the Property Code also that basically lists when an appeal is perfected.

MR. LEVY: Is -- if it's not contested, you don't have to pay the rent under b?

MR. TUCKER: You still have to pay the rent, but your appeal is perfected.

MR. LEVY: Well, this is confusing then in that respect, because it says 750a or b, so if you just do 750a but don't pay the rent.

MR. TUCKER: Yeah, and I guess -- and we could elaborate on that for sure, but I think -- I mean, there's two separate issues there. The paying of the rent into the registry has nothing at all to do with perfecting the appeal, because if you failed to pay the rent into the registry you still get your appeal, so the payment of rent is completely unrelated to perfecting the appeal. It's only related to whether or not you get to live there while you're having your appeal.

MR. LEVY: Ah, okay.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Gray.

HONORABLE TOM GRAY: I think the verb "is" would be preferable to "shall be perfected," because if you meet the requirements it is perfected.

MR. MUNZINGER: Is the rule going -- I'm sorry.

CHAIRMAN BABCOCK: Go ahead, Richard.

MR. MUNZINGER: We're looking at 750c, the second version of 750c, and you refer to 750a or 750b, and I assume it's applicable to the first version of 750c as well.

MR. TUCKER: Yeah, and the reason why we didn't include 750c is because 750 -- 750c, the first, doesn't contain any information about approving the pauper's affidavit. It just says this is -- even if you post a pauper's affidavit this is what you have to do to stay there, so a and b are the only two that talk about how the affidavit of inability actually gets approved, so that's why we only included those two.

MR. MUNZINGER: Yes, but this rule is addressing the question of when the appeal has been perfected.

MR. TUCKER: Yes, sir.

MR. MUNZINGER: Which would then give the county court at law jurisdiction over the appeal, if I -- I think that would be the case.

MR. TUCKER: That's right. Uh-huh.

MR. MUNZINGER: So what you have, though, is a rule that doesn't make reference to the situation where the pauper's affidavit is filed in connection with an immediate possession bond, et cetera, that whole process there.

MR. TUCKER: Yeah, and I guess my response to that and if -- certainly obviously if we want to add 750c I have zero objection, but I guess my thought on that is the pauper's affidavit that's discussed in the first 750c would have to have been approved under 750a or 750b before we ever got that to that point. That's why we didn't include it, perfectly happy to include it if you think that adds clarity.

CHAIRMAN BABCOCK: Yeah, Robert.

MR. LEVY: I'm sorry, I'm still a little bit confused about is it 750b(d) which is the part that creates a separate provision for perfect -- that would cause an appeal to be perfected? I'm just trying to figure out what part of 750b would perfect -- cause you to perfect an appeal that's separate from 750a?

MR. TUCKER: Yeah, I -- I think you're actually correct. I think that that's right. I think 750a is probably sufficient.

CHAIRMAN BABCOCK: Where Marisa -- is that

what you wanted to say?

MS. SECCO: Uh-huh.

CHAIRMAN BABCOCK: Stolen thunder. You get the point, she doesn't.

MR. TUCKER: Would have been a great point, too.

CHAIRMAN BABCOCK: Would have been a great point. Robert, that's a great point. Carl.

MR. HAMILTON: Well, I'm confused about, are you saying that we're going to choose one or the other of 750c?

MR. TUCKER: No, sir. No. The reason why the numbers are like that, when I drafted it and was numbering it we originally didn't have the part about the pauper's affidavit for immediate -- I originally put it in for the pauper's affidavit for immediate possession. There was then discussion about removing the immediate possession bonds entirely, so I scratched 750c, and the second what was 750d became 750c, appeal perfected, and then when I repasted that back in I neglected to go down and change that back to 750d.

CHAIRMAN BABCOCK: So if you run the post pattern and then you do an out --

MR. TUCKER: How much wood would a --

CHAIRMAN BABCOCK: -- you'll be open in the

end zone. Okay. Anything other on 750c, the elder as defined? The younger, I'm sorry. The second one. All right. Let's go to 751.

MR. TUCKER: Okay. We didn't do anything to that. That's as it exists right now.

CHAIRMAN BABCOCK: No comment on that. Anybody else have comments on it?

MR. LEVY: Is there any way --

CHAIRMAN BABCOCK: Elizabeth. I mean Professor Carlson. Also known as Elizabeth.

PROFESSOR CARLSON: AKA, yeah, it's one of my aliases. When you refer to the "preceding article," do you mean the 750c(c)? "Appeal bond authorized in the preceding article."

MR. ORSINGER: Probably an archaic reference to a statute there, "article."

MR. TUCKER: Right, and it's actually in the rules -- that's how it is right now, and the one before it is just "appeal perfected."

MR. ORSINGER: That's Luke Soules' fault.

CHAIRMAN BABCOCK: Yeah. That's right. Blame it on Luke.

MR. TUCKER: No, that's right, though, because "appeal perfected" contemplates -- I see what it says because appeal perfected says "appeal bond or

affidavit" and then 751 just says "appeal bond."

PROFESSOR CARLSON: And it says "in the preceding article."

MR. TUCKER: Yeah. Yeah.

PROFESSOR CARLSON: "Rule"?

MR. TUCKER: So should we just say "in Rule 750c"?

PROFESSOR CARLSON: Uh-huh, or c(c).

MR. TUCKER: Yeah. In rule whatever Marisa renumbers it as.

PROFESSOR CARLSON: Uh-huh.

CHAIRMAN BABCOCK: All right, good. Anything else on this one? Richard.

MR. ORSINGER: Yeah, there's that "cost and damages" again, and I'm not -- whatever the fix is we did before, would the same fix work here?

MR. TUCKER: Well, and I was actually just getting ready to get to that, because -- and where we're talking about damages as it relates to appeal, we might actually want to leave the word "damages" because I had forgotten momentarily that in Rule 753 on the trial of the cause in the county court, "The appellant or appellee will be permitted to plead, prove, and recover his damages, if any, suffered from withholding or defending possession during the appeal." So there are additional damages at

the county court level, so any reference to damages during appeal process is actually appropriate to call it damages.

MR. ORSINGER: So, in other words, the damages for the appeal bond are different from the damages for the immediate possession counter-bond. Or bond. No, counter-bond.

MR. TUCKER: Possibly, yes. On immediate possession, though, what we had contemplated was you're supposed to try to estimate what the damages are for withholding or defending the property. I guess the confusing part is those can be damages that are only recoverable in the county court and not at the justice court, even though the justice court is setting that bond. So that's the part that kind of feels awkward, I guess.

MR. ORSINGER: Well, then that makes me think that the earlier fix on "damages" maybe wasn't appropriate.

MR. TUCKER: Well, but when we fixed damages earlier we were talking about exactly what the justice court could award, and the only thing the justice court can award is attorney's fees and back rent as far as monetary damages in these cases. We weren't talking about it in the context of a bond. We were talking about it in the context of the judgment, and so in that situation "damages" is misleading. At the county court damages

encompasses those and any other damages for withholding or defending the premises, so there's extra damages at county court.

MR. ORSINGER: This is not just limited to evictions and suits for delayed rent or behind rent?

MR. TUCKER: Not at the county court level. They can add damages they've suffered because of the appeal.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Over in 742 we talk in the bond for possession the surety can be the same as the principal, so I don't know that that's really a bond, but it talks about "any surety," and over in this 751 it talks about "sureties," plural. There's no place where it tells us there has to be one surety or more than one surety, and I assume that if it's just one surety that even on this bond the principal as the surety can be the same. Is that right?

MR. TUCKER: You know, I don't know that I have an answer to that. I'm looking to see if the Property Code gives guidance on that.

CHAIRMAN BABCOCK: Depending on what the Property Code says you may be the leader in the clubhouse. Another potentially great point.

HONORABLE RUSS CASEY: You have to forgive

him. Like I said, we didn't really touch this a whole lot, so we weren't prepared to defend existing data.

MR. TUCKER: Yeah. These last few rules here we really left as they exist, at least in large part because they really reflect what happened at the county court, and we didn't know if that was really within our purview of addressing these cases just because they initiated in our court if we should get into what happens with the county court or not.

CHAIRMAN BABCOCK: That's a pretty good point. Unless what we've done in a previous rule makes this rule not fit --

MR. TUCKER: Right.

CHAIRMAN BABCOCK: -- in some way.

MR. TUCKER: Right.

CHAIRMAN BABCOCK: So that ought to be the scope of our inquiry probably.

MR. ORSINGER: You think so? Because this is probably the only time anybody will look at this for 50 years.

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

CHAIRMAN BABCOCK: Well, that's a good point. I defer to Justice Hecht and Marisa about that.

HONORABLE NATHAN HECHT: Well, we ought to

fix what we need to fix.

MR. ORSINGER: That sounds like a --

CHAIRMAN BABCOCK: That's a Delphic oral statement.

HONORABLE NATHAN HECHT: This only goes back to '75, though, right?

MS. SECCO: That's 47 years.

HONORABLE NATHAN HECHT: We have to blame this on Buddy.

CHAIRMAN BABCOCK: All right. We've identified that as a problem. Anything else?

MR. LOW: I went on in '76.

CHAIRMAN BABCOCK: Anything else on 751? Okay. Let's go to 752. Any -- any comments about 752?

HONORABLE RUSS CASEY: Can I start off on this one?

CHAIRMAN BABCOCK: Yes, absolutely.

HONORABLE RUSS CASEY: Okay. And I don't know if we really address it here, but 752 has a problem with the last legislative session when we were talking about writ of possession when rent wasn't paid, but 751 starts off of "When an appeal has been perfected the justice shall stay all further proceedings on the judgment," yet statutory we are sometimes required to do things after that because the appeal is perfected whenever

we receive the bond. There is the obligation to pay rent at times, which is still the appeal has been perfected, but if the rent hasn't been paid then we shall issue a writ of possession --

MR. TUCKER: Right.

HONORABLE RUSS CASEY: -- at our level instead of waiting a month for the county court to do it.

MR. TUCKER: Right.

HONORABLE RUSS CASEY: So I think we do need to address that wording on that because --

MR. TUCKER: "Except as provided by" --

HONORABLE RUSS CASEY: Yeah.

MR. TUCKER: We can either list the specific numbers or we can say "except as provided by statute or rule," blah, blah, blah.

HONORABLE RUSS CASEY: However the Supreme Court wants to address it.

MR. TUCKER: Exactly.

HONORABLE RUSS CASEY: But that is something that needs to be addressed.

MR. TUCKER: That's a great point. And there's also -- there's a number there that obviously needs to be changed. It says, "including sums tendered pursuant to 750b(a)." That would need to be modified, I think. I don't know if that's the right number.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Maybe we should just call this a record or a clerk's record or something other than a transcript since we don't really use that terminology anymore.

CHAIRMAN BABCOCK: Okay. Anything else on this one, on 752? Richard.

MR. ORSINGER: In the middle of the thing we talk about both the appellant and the adverse party, but then we talk about the notice must advise the defendant, and so it's -- the appellant might be the plaintiff, in which event the adverse party is the defendant, or the appellant might be the defendant, in which the adverse party is the plaintiff, right?

MR. TUCKER: Yes, sir.

MR. ORSINGER: And so what is happening is we are now telling the clerk of the county court at law about notices that they must give to the -- both sides of the case, right?

MR. TUCKER: Yes, sir.

MR. ORSINGER: And this is in a rule that applies only to justice courts, or does this apply to county courts as well?

MR. TUCKER: Well, and that's an interesting question, and it's -- this is how it exists now. It's an

interesting question. I'm sure, I mean, it's being followed, but it is an interesting question about, you know, what attaches this rule to a county court and imposes on them an obligation to follow it.

MR. ORSINGER: Well, it just -- we have a special set of definitions for these rules. I'm not sure whether they are or are not triggered by this language, but I'm wondering if we shouldn't mirror this in a -- in the rules for district court and county courts or if we not -- otherwise somehow ought to alert everybody that there are actually rules here that apply at least to the clerk of the county court.

MR. TUCKER: Right. And one thing about it is these are not in the section entitled "Justice Court Rules." These are in "Rules for Special Proceedings" is what it's called, so there's nothing that explicitly only makes them apply to a justice court. They're not in that subsection that only applies to justice court.

HONORABLE RUSS CASEY: But that's how it is now, but proposed they would be in the justice court rules, so --

MR. TUCKER: Well, no, because the title would still be the same. They would still apply to our courts, but they would still be Section 10 that's --

HONORABLE RUSS CASEY: Okay. You're right.

You're right.

CHAIRMAN BABCOCK: Okay. Anything else?

MR. ORSINGER: Yeah, maybe this detail is not warranted, but when you give notice to the defendant to file a response, is it -- is it as if he was served with a citation, or what is the answer day, or is there an answer day? Is it Monday following the 20th day after this notice is given? Is any of this defined anywhere, or how does it work?

MR. HAMILTON: It is defined. There's another rule that says if you file an answer in the JP court, that goes up and he doesn't have to file another answer.

MR. ORSINGER: Really? Well, that's not --

CHAIRMAN BABCOCK: That's what this says. If he's just done it orally then he's got to file something in writing.

MR. ORSINGER: I see. It's only if he's done it orally.

MR. TUCKER: Yeah. Rule 754 says, "If defendant made no answer in writing in justice court and if he fails to file a written answer within eight full days after the transcript is filed in county court the allegation of the complaint may be taken as admitted and judgment by default may be entered accordingly." So they

have eight days after it gets filed in the county court to file a written answer if they didn't do so in the justice court.

MR. ORSINGER: Okay. Okay.

CHAIRMAN BABCOCK: Okay. 753, damages on appeal.

MR. TUCKER: And that's the one I was talking about that says on the -- at the county court you can also, in addition to the things we talked about, recover additional damages for the appeal itself. So the landlord can say, "Well, I have suffered additional damages because you withheld premises during the appeal," and so the county court can award those, so that's why when we're talking about issues in the county court the term "damages" is probably not inaccurate. But note -- no substantive change there.

CHAIRMAN BABCOCK: Anything else on 753, damages on appeal? Yeah, Peter.

MR. KELLY: Here we finally say "reasonable attorney fees." It should probably be consistent throughout the earlier provisions dealing with awards of attorney's fees and just say -- don't specify reasonable, and also I think earlier you said attorney's, apostrophe S, fees, instead, and you have here "attorney fees."

MR. TUCKER: Yeah, definitely, yeah, needs

to be consistent.

CHAIRMAN BABCOCK: Okay. Anything else about 753? Yeah, Buddy.

MR. LOW: As I read it, it only calls for damages limited to loss of rental during pendency. What about move out -- oh, that -- well, no, that would already have occurred earlier, the move out, so there would be no other damages other than the landowner?

MR. TUCKER: Well, it says, "The appellant or appellee will be permitted to plead, prove, and recover damages, if any, suffered from withholding or defending" --

MR. LOW: Right.

MR. TUCKER: -- "which may include, but are not limited to loss of rentals during the pendency of the appeal and reasonable attorney's fees." So there could be any other --

MR. LOW: It says "not limited," but it looks like it's just favoring the person who owns the property there, but I take it literally and probably can't do anything about that.

MR. TUCKER: Yeah, and it was probably written from that perspective just because I would say the majority of the time --

MR. LOW: Yeah.

MR. TUCKER: -- by far the appellant is the tenant, but, yeah, certainly, I think it applies on its face to either side, and it's really going to be up to that county court to ultimately decide what was proven.

CHAIRMAN BABCOCK: Okay. Anything else on that? Okay. 754, judgment by default on appeal.

MR. TUCKER: Didn't touch it.

CHAIRMAN BABCOCK: Didn't touch it.

MR. ORSINGER: Would you like us to sit on opposite sides?

CHAIRMAN BABCOCK: I've got a camera on this phone, you know. Richard.

MR. ORSINGER: We're being recorded. I guess because this language is so old it's archaic, also because we're talking about the allegations of the complaint may be admitted, and under this new set of rules it's petition, and it really I think would be salutary to say "sworn petition," because we want a default judgment in the county court to be supported by a sworn petition, right?

MR. TUCKER: Uh-huh.

MR. ORSINGER: We're not -- they don't get a pass on it just because they moved from one level to another. So I would recommend that we say, "The allegations of the sworn petition may be taken as

admitted," and then the question is "may be" or "must be."

MR. TUCKER: Yeah, and our -- yeah, and that's the language that's there. I think that the thought is that that's -- they're going to have to do that, but again, we didn't touch that.

CHAIRMAN BABCOCK: Okay. What else? Carl.

MR. HAMILTON: I need to go back to 753. I'm still bothered by the fact that the landlord can be both principal and surety, and in 753 it talks about damages against the adverse party and recover against a surety, but if they're one in the same there can't be any recovery because there really aren't any sureties. There's just a principal. The landlord can be both principal and surety.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I think also the second to last word "entered" may be "entered accordingly." I think in modern parlance we talk about "rendering judgments."

CHAIRMAN BABCOCK: What rule are you on?

MR. ORSINGER: 754.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: You know, years ago we didn't distinguish entered from rendered, but we've been trying to the last 20 or 30 years, and then now then the first sentence there that it can be submitted to trial at any

time, subject to trial. Does that mean it aggregates the 45 days' notice under the general rules?

MR. TUCKER: Yes.

MR. ORSINGER: So you could go to trial on one day's notice or three days' notice?

HONORABLE RUSS CASEY: Yes.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Anything else? 754. Justice Bland.

HONORABLE JANE BLAND: Well, 754 really talks about taking a default judgment, not appealing default judgment, and so it really should be moved to the section that involves judgments. But they don't -- that's okay. I'm confused. I'm sorry.

MR. TUCKER: Yeah, this is if they don't show up for their trial de novo.

HONORABLE JANE BLAND: Yeah, you said that at the very beginning, and it just is --

CHAIRMAN BABCOCK: You okay?

HONORABLE JANE BLAND: No. I don't think -- well, I think we've already spoke, but I agree that we shouldn't have this rule in here.

MR. TUCKER: This rule, 754?

HONORABLE JANE BLAND: Yeah.

CHAIRMAN BABCOCK: Why do you not like 754?

HONORABLE JANE BLAND: Because I think it's confusing to the people that are going to be using these rules. And --

MR. TUCKER: Do you not like the concept or just the way it's written?

HONORABLE JANE BLAND: The concept and then also the way it's written.

MR. TUCKER: The daily double.

HONORABLE JANE BLAND: Because it -- so maybe something like "trial in the county court must be had" or "can be had any time after expiration of eight full days."

HONORABLE RUSS CASEY: I think one of the things in practice in regards to this is very -- I mean, it's less than half of one percent of cases that we actually get a written answer in the justice court, so it may in the best interest of justice to try to make it plain to tell them that they need to have a, you know, written answer now sort of thing, but --

MR. TUCKER: Yeah, I mean, I think the goal when they wrote this was to say once it goes to county court you have to file a written answer within eight days unless you filed a written answer with the justice court, and if you don't do so, you're going to get a default judgment against you.

HONORABLE JANE BLAND: Okay. So in Rule 753 when we first started talking about this, it starts off "on the trial of the cause in the county court" and in Rule 754 it does not. So as -- so I was confused about what a default judgment was.

MR. TUCKER: Right. Yeah, no.

HONORABLE JANE BLAND: So if I was confused, maybe someone else might be, even someone paying more attention than I obviously was.

MR. KELLY: The archaic language "said cause," if the rules are talking about causes in justice courts, that's generally "said cause," but we're talking about the new county court cause. Also, it fails the test of gender neutrality. We have "his appearance," and we also have another issue in the second sentence of "the same shall be given to constitute," and it's not clear precisely what the antecedent should be there, and I think the rule would be more clear and less archaically written.

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

MR. TUCKER: Yes.

HONORABLE RUSS CASEY: I agree with that.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: And so then just to piggyback on Jane's earlier comment, I mean, I think the

response you got seems right. If the main point of the rule is you didn't file an answer, you've got to file one now, otherwise you're going to be in default, and it could really matter, then we should say that in the first sentence, and maybe that's the only sentence we need.

MR. TUCKER: Yeah, right. Yeah. Cut to the chase and lose a lot of the superfluous language.

PROFESSOR HOFFMAN: Yeah.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, and then part of it is the flipping between the courts. "If the defendant filed a written answer in the justice court," so we're back in justice court, and we're talking about the answer there or not to answer there, and so -- and then we say, "The same shall be taken to constitute his appearance in county court," but we don't -- the problem is we don't ever talk about what the -- we should start out with the answer -- the fact is that he didn't answer in county court.

MR. TUCKER: Okay. Yeah. So to say, "If the appellant fails to" -- or the -- if the defendant fails to file a written answer in county court within eight days after it's filed, default judgment may be taken against them, unless they had previously filed a written answer with the justice court, which will be taken as

their answer in county court.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I can't hear you very well. Did you call me?

CHAIRMAN BABCOCK: Yes.

HONORABLE ANA ESTEVEZ: Thank you. We were just wondering what the "eight full days." We don't have the word "full" any other place.

MR. TUCKER: Yeah, and that again, was already in existence, so, yeah, like I said, we really didn't get into modifying these too much because we were slightly uncomfortable doing so, just because, again, it's really the county court procedure, but, yeah, eight full days, yeah, what is that? Yeah. I don't see any reason to leave "full" in there. I think "eight days" would make a lot more sense.

CHAIRMAN BABCOCK: Say "eight days a week."

HONORABLE KEM FROST: Sing it.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: And maybe for all of these if you could identify in the title that you're in county court now, this is a county court rule.

MR. TUCKER: Yeah, we actually added "on appeal" to the title of all of those to try to clarify that.

HONORABLE JANE BLAND: That added confusion, at least for me, when it was in connection with default judgments because I thought it was an appeal of a default judgment.

MR. TUCKER: Right. Yeah. No, I --

HONORABLE JANE BLAND: Not an appeal of the --

MR. TUCKER: Yes, not a default judgment of the --

HONORABLE JANE BLAND: Not a default judgment on appeal.

MR. TUCKER: -- but an appeal of the default judgment. Gotcha, yeah. That totally makes sense, and, yeah, that was what we added to try to clarify that, but obviously we need to tinker with that.

CHAIRMAN BABCOCK: Okay. Let's wrap this up with 755. Any comments on this?

MR. TUCKER: 755, again, we didn't touch much. We did add the last sentence there that brings in information from the Property Code that talks about how a judgment from the county court may be stayed, and we just used the language and directed them to the Property Code and the rules that dictate that.

CHAIRMAN BABCOCK: Okay. Good. Yeah, Kent.

HONORABLE KENT SULLIVAN: I want to go back

for a second to the default. It just occurred to me there's a real potential trap there for somebody. We've got a lot of pro se parties. Somebody maybe is uncomfortable with the idea of filing a written answer in JP court or otherwise, so they make a personal appearance. That's their answer in JP court. Say they actually win the case in JP court, someone else is going to appeal it. How are they going to know they have to file a written answer, unless, of course, they know to look at Rule 754, which a pro se party is not going to know that that's what they need to do? So they think they've made an appearance by way of their activity and presumably they actually tried the case in JP court and then they get defaulted in county court because they weren't aware of a rule that required them to file a written response. I think that's a real practical issue, given the number of pro se parties that participate in these proceedings.

MR. TUCKER: I agree.

MR. RODRIGUEZ: I think they can find it in Rule 741 because it sends them to go to www.therules.com, and I'm sure they can find those rules there.

HONORABLE KENT SULLIVAN: If someone knows to look for the rules, the specific rules, they're not going to have any problem.

PROFESSOR HOFFMAN: Actually, that website

doesn't work. I went there.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: So is there a provision that stays the writ or prohibits the clerk from issuing the writ of possession for 10 days? Or is it immediately -- is the judgment immediately executable?

MR. TUCKER: Yeah, this I have to pull up. Since I don't teach the county judges I'm not immediately familiar with it, but, yeah, there's a provision that basically says how long there is to -- let's see. It actually -- it doesn't say that it can't be issued within 10 days.

MS. HOBBS: Yeah, I think it's an omission. I mean, I think we need to be clear that it's automatically stayed for 10 days to allow you to seek a stay or permanently by filing a bond, but right now it's assumed I think but not stated, and I think it's important that it's stated.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: If I can answer Kent's problem, would you require the clerk then to notify them that since they haven't filed an answer they must file an answer in that court?

MR. HAMILTON: That's covered by 752.

MR. LOW: Well, if it's covered then why is

it a problem?

MR. HAMILTON: It's not.

CHAIRMAN BABCOCK: Carl never said it was a problem.

MR. LOW: Well, I was trying to answer his problem. Carl didn't tell me there wasn't a problem.

MR. TUCKER: I personally think it would make sense for the defendant to receive a written notice that if they fail to file a written answer in county court they're going to automatically lose. Where that should occur and who it comes from, pretty flexible.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: Yeah. I think it should come in Rule 750, and 750 says to give notice as provided in Rule 515, and I looked up 515, and it's repealed.

MR. TUCKER: It's in proposed 515.

CHAIRMAN BABCOCK: Proposed 515.

PROFESSOR CARLSON: Proposed 515.

MR. TUCKER: Sorry.

PROFESSOR CARLSON: Okay.

CHAIRMAN BABCOCK: Thought you had one there, huh?

PROFESSOR CARLSON: No, I was trying to figure out what the notice is that these people are getting.

MS. HOBBS: I think the notice is in the transcript provision of 752, right?

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Does the Property Code or some other statute require a separate answer in county court? Because wouldn't the perfection of the appeal from justice court notify everybody that you're contesting the judgment, and why would we require a summary answer at that point?

MR. TUCKER: I guess the thought is I think because in the county court we're going to be in a more formalized procedure that they're going to be -- we want to have a written answer, and someone did mention, yeah, 752. 752 actually does say that. The county clerk must notify both sides that the transcript has been received and such notice must advise the defendant of the necessity for filing a written answer in the county court when the defendant appeared orally in the justice court, so there is a requirement that they receive notice.

MS. HOBBS: Only if they pleaded orally, though.

MR. TUCKER: Right. If they filed a written answer, though --

MS. HOBBS: It's presumed.

MR. TUCKER: -- then it goes up. There's a

separate rule that says your answer in the justice court is your answer in the county court also.

CHAIRMAN BABCOCK: So we're totally cool with that.

MR. TUCKER: Copacetic.

HONORABLE DAVID GAULTNEY: So the notice gives them the deadline?

MR. TUCKER: Yes. Well, I guess it doesn't explicitly state that. It says "of the requirement." I would read that to say it should have the time frame, but it doesn't explicitly say that. If I were a judge I would certainly make sure it was on there, but --

PROFESSOR CARLSON: Where is that? I'm sorry.

MR. TUCKER: 752.

CHAIRMAN BABCOCK: 752.

MR. TUCKER: "Must advise the defendant of the necessity for filing a written answer." I think implicit in that is the necessity of when it has to be filed.

CHAIRMAN BABCOCK: Within eight full days.

MR. TUCKER: Eight full days, not partial days.

CHAIRMAN BABCOCK: Yeah, Lisa.

MS. HOBBS: I would suggest that a rule

discussing the clerk's record and what the JP needs to send up, what the docket is going to look like that goes up, is not the place to tell the county clerk what her obligations are for notifying the parties of their rights. I would also suggest that even though I think I understand what happens in JP court by reading these rules now or what happens in county courts on appeal from JP courts, I'm not sure that's the best way. I'm not sure we don't want everybody to just file another answer. I mean, I get why it was written where we would presume that your JP answer is your county court answer, but it makes for really confusing rules, and why not just tell the clerk, "You need to tell the defendant that he needs to file an answer, and he needs to do so by 10:00 a.m. on the 20th day" and make him file another answer?

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: Yeah, I would go one way or the other. I mean, either you've got to file an answer in county court or you don't need an answer. I kind of side with the you don't need an answer under the circumstances when you're already appealing and everybody knows you're in court, and I mean, what's the purpose of a written answer? Is it to assure the parties that you're really going to contest the judgment, or is it to show that you're going to participate?

MR. TUCKER: I think what parties would argue, especially parties that participate in complex commercial litigation in regards to the eviction context, would be this allows us to have some notice of what you're -- what you're doing, you know, are we going to -- theoretically we're in county court now so the rules like Rule 93 are going to apply. If you're going to file something that has to be written and sworn, that's going to have to be on file now with the county court, things like that.

MR. JEFFERSON: Can't you presume a general denial? I mean, if someone has already appeared in JP court and the appeal is perfected then everybody knows we're in county court now.

MR. TUCKER: Right.

MR. JEFFERSON: Why have just kind of a trap to where if you don't file another piece of paper you're subject to default, and if you're going to have it then I don't know why you would make a distinction between the guys who filed something in JP court and the guys who just showed up and said, "I contest what the other side is doing."

CHAIRMAN BABCOCK: Justice Bland, then Eduardo.

HONORABLE JANE BLAND: The problem I have I

think is that we're requiring an answer to what? To the petition that was originally filed in justice court that may have never been answered? And ordinarily if it is trial de novo, wouldn't we just start the process all over again? The appeal has been perfected, require a county court petition and a county court answer, but what I don't think you can do is require one side to file an answer in a de novo trial when there's no requirement that there's a petition.

MR. TUCKER: Well, the petition will go up, but, yeah, your point makes sense. I mean, to me having the same type of petition and answer format that we had in justice court in the county court would make sense. I just don't know and I don't want to speak for if it makes sense for the people who do litigation there, but that's a separate issue, I guess, but, yeah, that make sense to me.

HONORABLE JANE BLAND: And the idea that you can default your appellate right because you defaulted in the justice court, what are you defaulting from? You've already filed a piece of paper with the court saying you're contesting the justice court judgment.

MR. TUCKER: Uh-huh.

HONORABLE JANE BLAND: So --

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

MR. TUCKER: I think so.

MR. MUNZINGER: What would happen if the person who lost in the justice court concluded they didn't want to pursue the appeal further? In other words, the landlord is appealing an adverse verdict --

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: -- and the tenant says, "Oh, the heck with it, I'm just going to leave. I'm not going to participate further."

MR. TUCKER: So the landlord lost at justice court?

MR. MUNZINGER: He's appealing, but the tenant says, "I don't want to fool with it anymore. I'm just going to get out of here."

MR. TUCKER: So the tenant decides to just move out?

MR. MUNZINGER: Yeah. Or not contest the appeal.

MR. TUCKER: Right. Then it would be up to the landlord generally if they want to pursue -- to go ahead and finish the case to get a judgment and a writ of possession in the county court, which prevents any situation where the tenant then comes back and says, "No, you can't prove that I don't have a right to possession" and they have to go through the whole process again. So

that would kind of be an elective situation if they want to keep through the appeal process and get that writ of possession. Obviously neither side is going to be able to nonsuit the eviction if the other side is trying to get some sort of affirmative relief, and that issue has come up with the possible situation with the immediate possession bond and could -- the same argument could say that could happen.

In the current situation with the payment of rent into the registry, the thought is, well, I'm the landlord. Russ isn't paying his rent, okay, so I evict Russ. Russ files a pauper's affidavit and he pays -- he doesn't pay rent into the registry of the court. Okay. So Russ gets evicted. He gets removed, but he still gets his appeal, right? So the thought is, well, when we're on appeal, he's already out. Can I just nonsuit my appeal now? And really the answer is going to be "no" because he still has a claim for affirmative relief to be put back into the premises.

CHAIRMAN BABCOCK: Tricky.

MR. TUCKER: Yeah.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: At this stage of the proceeding we're now in county court and have to have lawyers, is that correct, for corporations?

MR. TUCKER: For corporations, yes.

HONORABLE TOM GRAY: So if your defendant happens to be a corporation and didn't file an answer in JP court, the -- who their advocate is at that point and all the contact information is provided by the written answer that they provide at that point?

MR. TUCKER: I would imagine that to be the case.

HONORABLE TOM GRAY: So that may be a reason to have an answer in county court that you don't have in JP court.

CHAIRMAN BABCOCK: What do we do? Do we give him a good or a great for that point?

MR. TUCKER: That is very solid, very solid point.

CHAIRMAN BABCOCK: A solid point.

HONORABLE TOM GRAY: New measure.

HONORABLE RUSS CASEY: Between good and great, I think.

CHAIRMAN BABCOCK: Workman-like and solid point. What about Rule 755? Any solid points to be made about that? Yeah, Pete.

MR. KELLY: I'll defer to Professor Carlson. I'm trying to read her papers here. On the idea of supersedeas, Texas Property Code 24.007 requires the

filing of the supersedeas bond and in very clear, direct language. Texas rule -- Supersedeas bond, not just suspension of judgment. Texas Rule of Appellate Procedure, following House Bill 4, allows for alternate security, reduction in the amount, caps in the amount, does not necessarily require a bond. You're allowed to have some sort of alternate security. Does -- what's going to govern on this 24.007, which requires -- specifically requires the filing of supersedeas bond or the more loose supersedeas suspension of judgment requirements of TRAP 24? If you see the conflict.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: Yeah, you know, TRAP 24 is not going to be applicable to the trial court proceeding. TRAP 24 is mandated by the Legislature in I think it's Civil Practice and Remedies Code 52.006, so now you've got two legislative provisions, right? This one, Property Code 24.007, and the Civil Practice and Remedies Code 52.006. So I would say the Property Code because it's more specialized to this situation, off the top of my head.

MR. KELLY: But then is the reference to TRAP 24 surplusage?

CHAIRMAN BABCOCK: That means we don't need it?

PROFESSOR CARLSON: No, we don't need it. I know what surplusage means. Yeah, I don't think we need it.

MR. KELLY: And that would mean the caps and limitations, present net worth, et cetera, apply of -- CPRC 52.006 apply to the supersedeas bonds that are required in Property Code 24.007.

PROFESSOR CARLSON: You have two legislative provisions, so now you get down to legislative intent. 52.006 doesn't have any language that I recall that says it trumps any other statute, but I could be wrong. I know it says that the rules cannot be inconsistent, the Rules of Appellate Procedure cannot be inconsistent, so I would really have to look at the face of the statute again to see, and it would ultimately be a question of legislative intent. How's that for a law professor answer?

MR. KELLY: Just asking the question.

HONORABLE R. H. WALLACE: Probably in the book *The Law in the JP Court*.

CHAIRMAN BABCOCK: I bet it's in there. They wrote that before House Bill 4, I don't know.

All right. Is that it for that? Well, great. Everybody may think, if they weren't here last meeting, that we're done with these, but you'd be wrong because we skipped like a gazillion rules to get back to

these, and I don't know why we did that, but somebody thought it was a good idea. So I would entertain requests, Bronson and Judge, on where to go, but my suggestion would be go to Section 9 on page 28. But we're going to do all of these rules, so it doesn't really matter.

MR. TUCKER: Is Section 9 the -- yeah, Rule 737?

MS. SECCO: The task force did not edit those rules at all.

CHAIRMAN BABCOCK: Didn't edit these rules?

MR. TUCKER: We made one -- we only made one modification which applies to 737.1 and 2, and the only thing we wanted to change -- because those are newly promulgated we assume they reflect the will of the Supreme Court. What we just would want to do, the time frame on those is 6 to 10 days from service of the citation just like evictions are. We would want to modify those to be the same time frame as whatever the eviction time frame is modified to. So if it is 10 to 21 days from filing of an eviction suit, to change those to 10 to 21 days from filing also just to make those congruent.

CHAIRMAN BABCOCK: That makes sense. That's great. Well, that's helpful. And, Marisa, where do you think we should go now?

MR. ORSINGER: Well, Chip, before we leave the topic entirely, there's a representation of parties rule, 737.5, and that would apply in the justice court, right?

HONORABLE RUSS CASEY: No.

MR. ORSINGER: No?

MR. TUCKER: This only applies to these cases, one category of cases. These rules apply to cases where you're my landlord, I've done what I'm supposed to do to get you to make a repair, and you've failed to do that. I now have a right to come get judicial remedy, so the 737 rules only apply to that very limited scope of cases.

MR. ORSINGER: And is there statutory authority to deviate from the rule about representation of corporations not appearing pro se, et cetera? Or no?

MR. TUCKER: Not that we're aware of, but, you know, separate task force --

MR. ORSINGER: So when it says the parties may represent themselves, if the landlord is a corporation then I don't want to provoke any of the earlier discussion that was so heartfelt about this subject, but are we not authorizing corporations to appear through representatives other than lawyers without express legislative authority?

HONORABLE RUSS CASEY: That legislative

authority appears in Government Code for Chapter 27.

MR. ORSINGER: For this type of proceeding?

MR. TUCKER: Because it's in justice court also.

HONORABLE RUSS CASEY: But there's nothing separate from -- there's nothing separate -- there's nothing to separate out these proceedings from the other proceedings because they're all under Chapter 27.

MR. ORSINGER: So the argument we had earlier either -- does it or does it not apply to this rule?

HONORABLE RUSS CASEY: These set of rules here are only for specific types of situations of the repair and remedy situation.

MR. ORSINGER: Right.

HONORABLE RUSS CASEY: When I made my comment earlier when we were talking about parties in eviction suits, the language here in 737.5 specifically says that this does not authorize a person to go into the practice of law.

MR. ORSINGER: Right.

HONORABLE RUSS CASEY: And so if you were concerned about that situation of parties in those suits, this is, you know, language that was effective January 2010. You guys came up with this then. I thought you

might want to look back at it if you wanted to see what it was like or if you wanted to reflect that language in the other parts of the rules as it is.

MR. TUCKER: Right. Yeah, the task force ultimately had debated that. It was raised -- of course, the issue in 737.5, on those cases if you want your authorized agent to represent you, you have to not be there basically. If you're there, you're either pro se or you have an attorney. You can't just show up with your brother Jim Bob, who is not a lawyer, and he represents you while you're there, under 737.5. It was discussed whether we wanted to do that in eviction suits also. The task force ultimately decided not to, but obviously that's something you guys could consider if you want to continue that idea.

CHAIRMAN BABCOCK: Okay. So, Bronson, are there other rules that your task force did deal with that we have not discussed yet?

MR. TUCKER: That we did deal with? I'm trying to -- I frankly -- I can't recall all the ones from the 500 but did we -- which ones --

CHAIRMAN BABCOCK: We skipped some, yeah. We did --

MS. SECCO: Only -- I think at the first meeting we only went through Rule 506, and we did not even

address 506, so --

CHAIRMAN BABCOCK: Yeah, we went through 505 is what my notes suggest.

MS. SECCO: Yeah.

CHAIRMAN BABCOCK: So we would pick up with 506.

MR. TUCKER: Okay.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Can I just go on record saying that was a lot of rules for a small slice of cases of trying to get a landlord to repair and remedy something in a residential -- I mean, that is so complicated I am not sure I understand exactly what it -- I don't know why it's different than other rules. It's just that's a lot -- I mean, if we're talking about simplifying this, that seems ridiculous.

MR. TUCKER: And, I mean, those just came into effect two years ago, so, you know, we obviously weren't going to mess with that. But, yeah, I mean, literally 90 percent of justice courts have never had one of those cases.

MS. HOBBS: Okay.

HONORABLE RUSS CASEY: One of those things that that addressed is except for really right there in the repair and remedy justice courts have no injunction

relief. We do not have injunctive powers. So let's say the landlord decides to take your front door off the apartment until you pay the rent. I could not tell him to put the front door on the apartment. So there's --

MR. TUCKER: You could.

HONORABLE RUSS CASEY: To put a front door back on? Okay. The whole idea was to get injunctive relief. The landlord won't fix bad plumbing. The landlord won't, you know, repair the broken window, whatever you want to say. We could get -- it allows the JP to take that action there, and it is my opinion that the whole number of those rules was to try to make sure that it was limited to exactly that type of scope.

CHAIRMAN BABCOCK: Lisa, Justice Hecht tells me you were the rules attorney that came up with those complicated rules.

MS. HOBBS: Was I really?

CHAIRMAN BABCOCK: I didn't think so, but --

MS. HOBBS: That was Chris Griesel.

CHAIRMAN BABCOCK: You would have scotched them if you had been the rules attorney, I'm sure. All right. 506, exclusion of witnesses. Are you with us?

MR. TUCKER: Yeah. Yep, I'm here. 506, basically, again, you know, we mentioned when we talked last time that what we ultimately decided was that the

Rules of Evidence are not going to apply to justice court, and we had some good language that we'll have included in the document that I submitted that the committee really liked as far as the judge will evaluate what you have and decide what evidence goes to the -- is evaluated by the judge or jury, so since the rules don't apply we wanted to incorporate the Rule. We thought that was important enough, so we explicitly put the Rule in there to allow exclusion of witnesses.

CHAIRMAN BABCOCK: I think we should have a sentence that says this rule shall be known as "the Rule."

MR. TUCKER: The unrule. We don't have rules except "the Rule."

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Look at subparagraph (3) of this rule. You say that the people that can stay would be include "a person whose presence is shown by a party to be essential to the presentation of the party's cause." Do you mean that the person's presence in the courtroom is essential to the presentation of the cause or if the party can't win the case without that witness?

MR. TUCKER: My -- and that's directly from the Rules of Evidence. My interpretation of that has always been that that means their presence in the courtroom.

CHAIRMAN BABCOCK: Does that mean experts? Typically you let experts.

MR. ORSINGER: Especially if it's experts.

MR. TUCKER: Yeah.

PROFESSOR CARLSON: *In re: Drylex*, no.

CHAIRMAN BABCOCK: What?

PROFESSOR CARLSON: *In re: Drylex*, not necessarily.

MR. PERDUE: I had a judge interpret the Rule, "I don't care if it says 'spouse,' she can't sit in here."

CHAIRMAN BABCOCK: Really?

MR. PERDUE: Yeah.

CHAIRMAN BABCOCK: Wow. Okay. Yeah, Richard.

MR. ORSINGER: Here's another use of the word "shall," which I guess comes right out of the Rules of Evidence, but I don't know if we mean "shall" here or whether we mean "must" because I think the court has -- or does the court have discretion, even if they meet -- no, the court doesn't have discretion, so it should be "must." Does that rule apply to county?

CHAIRMAN BABCOCK: "Must."

MR. ORSINGER: Maybe we ought to change the other rule of evidence while we're at it.

HONORABLE NATHAN HECHT: Well, Buddy's working on that.

MR. ORSINGER: Hopefully Buddy's making a note of that.

MR. TUCKER: Yeah, take notes.

HONORABLE NATHAN HECHT: We're restyling the Rules of Evidence like Federal courts have, and that project should be finished soon.

MR. LOW: I hope so. Have you talked to him lately?

HONORABLE NATHAN HECHT: Yeah.

MR. ORSINGER: On the expert rules are we adopting their language or are we just adopting their titles of structure?

HONORABLE NATHAN HECHT: We're just using their styling and our substance.

MR. ORSINGER: Good. Good, good, good.

CHAIRMAN BABCOCK: Not everybody agrees with that. Professor Hoffman.

PROFESSOR HOFFMAN: So I'm looking at Rule 267 of the Rules of Civil Procedure, and, you know, it's the exact same language right here that they've got in 506 except the Rules of Civil Procedure have two additional provisions that aren't here. Were these left out on purpose? One talks about if a person violates the rule

they can be punished for contempt of court, and the other one says, "Witnesses when placed under Rule 613 of the Rules of Civil Evidence shall be instructed they're not to converse with each other or read any reports," et cetera.

MR. TUCKER: Yeah, I don't think that was an intentional exclusion by the task force. Frankly, I think it came from when we were grabbing the language from it we grabbed it from the Rule of Evidence rather than this rule, but, I mean, those provisions seem reasonable to include, I would think.

HONORABLE NATHAN HECHT: But can the justice of the peace hold someone in contempt?

PROFESSOR HOFFMAN: Right.

MR. TUCKER: Yeah.

PROFESSOR HOFFMAN: Was the answer "yes" to that?

MR. TUCKER: Yes. They have limited contempt powers. They can hold you in contempt for a fine of up to a hundred dollars and up to three days in jail.

HONORABLE RUSS CASEY: When we were putting this together our intention was that the justice would be able to apply whatever Rules of Civil Procedure he needed to under certain situations, so I think this is one of those situations where we were talking about instead of repeating every single thing that may come up, that we

would have a reference back to the Rules of Civil Procedure --

MR. TUCKER: Right.

HONORABLE RUSS CASEY: -- if we needed to. So it was -- it was intentional that we left it out but not unintentional -- or it was intentional that we left it out. We did not mean for it not to apply.

MR. TUCKER: Perfectly stated. Exactly right.

PROFESSOR HOFFMAN: Well, I mean, that's -- okay. I guess my suggestion would be if this is another rule of procedure specific to these cases, if you leave it out I think the witness is going to say, "You can't hold me in contempt. Look, you had that power in 267. You don't have it here." So if you want to enforce these rules, I would think you would want that provision. And then as to that section (d) of 267 about witnesses aren't supposed to converse with each other, et cetera, I mean, if you don't want that to happen then we ought to put that in here, too. It's not a Rule of Evidence.

MR. TUCKER: And I agree, and that's something we'll have to note as we go through these, and just as Judge Casey mentioned, when we drafted these we drafted them with the intention that the judge could use other Rules of Civil Procedure where appropriate. The

committee last time when we discussed that really didn't like that provision, and so some of these things would probably need to be explicitly put into these rules or some other way for us to be able to use them, but nobody really liked that provision that the judge could use other rules where necessary.

HONORABLE RUSS CASEY: But we were trying to keep things as brief as we possibly could, and even as much as we did there is quite a few people who thought we had too much as it was, so --

CHAIRMAN BABCOCK: Okay. We're good? 506.1, subpoenas.

MR. TUCKER: Okay. Again this is directly lifted from pre-existing Rules of Civil Procedure that we wanted to have located in these rules, but no substantive from how it exists right now.

CHAIRMAN BABCOCK: Any comments about 506.1? Going once.

PROFESSOR HOFFMAN: The only question I would have is statutorily do JP courts have the same subpoena powers and range as county court judges do?

MR. TUCKER: Yeah. 150 miles.

PROFESSOR HOFFMAN: I mean, just as a general observation, if we're copying the rule verbatim, you know, then the short thing to do is say "see the other

rule," don't put all this stuff in there.

MR. TUCKER: Yeah.

PROFESSOR HOFFMAN: Unless there's a reason, if we're tweaking it.

MR. TUCKER: One of the things with this, what we really wanted to do is make these rules one stop shopping as much as we could so a party can see these rules and this is what's going to apply. Now, obviously there are going to be some things that hopefully what we wanted to do is have those things be things that are very rare, but some things are not going to be explicitly listed because that just gets massive, but we thought this was important enough to have located within these rules so if a party pulled up just the justice court rules they have that information.

HONORABLE RUSS CASEY: For example, on subpoenas that's something our clerks get asked a lot, what do I do about a subpoena, what if I want to bring someone, and we wanted to have it there.

MR. TUCKER: Yeah.

HONORABLE RUSS CASEY: But like, for example, on what happens if the person doesn't obey the judge, we really didn't figure that that was something that had to be there.

PROFESSOR HOFFMAN: I mean, that makes

sense, and that's a sensible -- that's right that's a sensible compromise. My only follow-up would be the one I had about 506, just make sure if you are planning on taking the whole rule, take the whole thing. If you take less than that it looks like that's the choice, you left it out on purpose.

MR. TUCKER: Like I said, we were trying to copy the Rule of Evidence not the Rule of Civil Procedure, so that was just an oversight, not realizing that there was a separate rule that had that other information.

MR. LEVY: Does this rule track what is in the regular rules?

MR. TUCKER: Yes, sir.

CHAIRMAN BABCOCK: Anything else on this one? Judge Estevez.

HONORABLE ANA ESTEVEZ: I have a question just on ramifications if subpoena -- if they don't come when they're subpoenaed. You just told me that the JP has a different contempt than the district court or the county court, but here all three of them can give contempt. So I guess shouldn't you state what the contempt could be here and also what the fine would be, because I believe the fine is a hundred dollars in district court, and I know our contempt is up to 500 and up to 180 days in jail, but you just said the JP would have a hundred-dollar fine with

three days, and I think that's important for them to know.

MR. TUCKER: Okay. Yeah, and that's perfectly reasonable. That's located in the Government Code, but it's -- it's a valid point that it might be beneficial to have the specific consequences there in the rules, though.

CHAIRMAN BABCOCK: There's a provision in here that says, "If a subpoena commanding testimony is directed to a corporation, partnership, association, government agency, and the matters on which examination is required is requested or described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known reasonably available to the organization." Right, and it further says in the previous paragraph that "If the witness is a party and is represented by an attorney, the subpoena may be served on the witness' attorney of record." So I've got a corporate defendant and we're going to trial, and I get a subpoena served on me that says, "I want you to produce somebody that knows what Joe Blow knows," and Joe Blow is a manager who is in the Schenectady -- Schenectady, New York, office of the corporate defendant. Are you telling me that you can subpoena that guy down here that way? And is this the same as the civil procedure rules?

MR. TUCKER: Yes, sir.

CHAIRMAN BABCOCK: I don't know about that.

MS. HOBBS: It is. I'm looking at it.

PROFESSOR CARLSON: It's in the discovery rules.

MR. MUNZINGER: What's the rule number?

MS. HOBBS: 176.

MR. MUNZINGER: 1-7 what?

MS. HOBBS: 176.

CHAIRMAN BABCOCK: Yeah, Judge Estevez.

HONORABLE ANA ESTEVEZ: My understanding, also, is that if someone doesn't obey a subpoena I cannot hold them in contempt as a district judge. I can only fine them. I can do a writ of attachment. He can come back. After a hearing, then I can determine what happened, but I don't know that this -- and it could be different in JP court, but it says if the district court can do it, and the district court can't do it because the district court holds somebody in contempt when they have violated a court order, and the subpoena is not issued by a judge. It is not an order.

MR. TUCKER: But that's straight -- I mean, that's straight from the Rule 176.

HONORABLE ANA ESTEVEZ: I just -- I don't know if there's case law. I don't know why, but I've

never been -- we have subpoena issues all the time, and we do writ of attachment, and they show up, and they have a whole statute of what we are allowed to do with them, and it does not include holding them in contempt because they didn't appear when they didn't answer a subpoena.

CHAIRMAN BABCOCK: Hang on for a second. You say this language --

HONORABLE ANA ESTEVEZ: So it may be a conflict.

CHAIRMAN BABCOCK: -- that I'm talking about is 176 what?

MS. SECCO: The language Judge Estevez is talking about is 176.8(a).

CHAIRMAN BABCOCK: That's contempt.

MS. SECCO: Yeah.

CHAIRMAN BABCOCK: Yeah, but these are discovery rules.

PROFESSOR CARLSON: Right.

CHAIRMAN BABCOCK: These are discovery rules.

MR. ORSINGER: But that's where the subpoenas for hearings and trials are, in the same set of rules, and I think that the depositions of a organization have the same provision about getting notice to the organization.

CHAIRMAN BABCOCK: Sure, but then you've got to go -- you've got to go to Schenectady to do that.

MR. ORSINGER: Well, they're only 150 miles.

MR. TUCKER: Right.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: So if you subpoena a corporation that has a local office here and the headquarters is in New York, I'm not sure that they have an obligation to fly someone from New York down.

CHAIRMAN BABCOCK: That's my point.

MR. TUCKER: No, I would agree with that also. It's only 150 miles.

CHAIRMAN BABCOCK: So they can't compel my Schenectady guy to come to trial in Texas, right?

MR. TUCKER: No, I don't think so.

MR. ORSINGER: I think the business is still required to specify a representative to testify on subject matter, but they can't say it has to be someone from New York.

CHAIRMAN BABCOCK: But they -- right. Well, of course, if it said, "I want to know what Joe Blow knows," maybe, but let's say they say, "We want to know the guy who designed the widget that is at issue, we want testimony from the guy who designed the widget based in Schenectady." They can go up and take his deposition,

can't make him come to trial.

MR. TUCKER: The question would be which provision trumps. Is it the 150-mile provision that trumps or the provision here that talks about that when a corporation has to name somebody and produce them that has knowledge?

CHAIRMAN BABCOCK: Well, the 150-mile provision is in the statute. It's not only in the rule.

MR. TUCKER: Yeah, so, I mean --

CHAIRMAN BABCOCK: So that --

MR. TUCKER: That would be my thought also. That would be -- that would control over the requirement for the corporation to produce.

CHAIRMAN BABCOCK: Yeah, Judge Wallace.

HONORABLE R. H. WALLACE: The discovery rule is used to get somebody who can come and testify, not on personal knowledge but that has an obligation to actually go out and find out the answers to these things.

CHAIRMAN BABCOCK: Right.

HONORABLE R. H. WALLACE: And then in a deposition they can come in and say, "Well, I know such and such because Chip Babcock" --

CHAIRMAN BABCOCK: Told me.

HONORABLE R. H. WALLACE: -- "told me that such and such happened." You can't do that at trial.

CHAIRMAN BABCOCK: That's hearsay.

HONORABLE R. H. WALLACE: That would be objectionable. So you wouldn't have to bring the guy from Schenectady, and you wouldn't be able to get that evidence in at trial unless you did.

HONORABLE RUSS CASEY: We have no hearsay rule in small claims court which would apply here.

HONORABLE R. H. WALLACE: Yeah, but that's what I'm wondering, but, yeah, so but that wouldn't mean you would have to bring the guy from Schenectady. If the hearsay rule doesn't apply then they can come in and testify as the -- I would think, however they learned that information.

CHAIRMAN BABCOCK: Yeah, and obviously if I'm the corporate defendant and I need the guy from Schenectady, I can just bring him down. The question is whether or not the -- whether the plaintiff can compel the guy from Schenectady to come down.

HONORABLE R. H. WALLACE: No, I don't believe he can.

CHAIRMAN BABCOCK: I don't think he can either, but -- and 176 makes a distinction about discovery. You can go up and take the corporate rep, you can go up and take Joe Blow who lives in Schenectady if you want, but you can't make him come down here, and this

506.1 doesn't make those distinctions. That's my point.

MR. TUCKER: Right, and I guess my thought is neither does 176.6(b), which has the exact same language.

MS. SECCO: 176.3 does make a distinction on range between discovery and witnesses at trial, and that's omitted from this rule.

CHAIRMAN BABCOCK: Right. Yes. Thank you. Now, is that a solid point, a good point, or a great point?

MR. TUCKER: All the above.

CHAIRMAN BABCOCK: Or maybe an extraordinary point.

HONORABLE RUSS CASEY: I think that that's an extraordinary point.

CHAIRMAN BABCOCK: Thank you.

HONORABLE RUSS CASEY: And we were trying to -- and, of course, you know, what we put on there was basically to try to just throw in something on subpoenas for people to take -- you know, I want to get my landlord here sort of thing, but yet again, we have -- these Rules of Civil Procedure, the Rules of Evidence, you know, these are based upon hundreds of years of trial experience, and we wanted to be able to have some information here, but then be able to fall back upon a greater pool of

information --

CHAIRMAN BABCOCK: Right.

HONORABLE RUSS CASEY: -- which we were talking about, and, of course, if we're going to limit it to just what's there, we need to try to make it as comprehensive as we can.

MR. ORSINGER: But there is a 150-mile limitation in here. Is that what we're talking about?

MS. SECCO: No.

MR. ORSINGER: What are we talking about?

MS. SECCO: 176.3 distinguishes between a person who can be required to, you know, appear within the range and a subpoena during discovery where you can get a deposition of anyone, anywhere.

MR. ORSINGER: But this rule --

MR. MUNZINGER: Can y'all speak up?

MR. ORSINGER: This rule that applies to the justice courts says that "A person may not be required by subpoena to appear in the county that is more than 150 miles from where the person resides or is served," so why isn't that the protection you need?

CHAIRMAN BABCOCK: Because a corporation is a, quote, person and down here you say -- you say that you can serve on a party -- you can serve the party's attorney, and then the next paragraph says you can -- you

can direct a subpoena to a corporation, and if you tell them with reasonable specificity they've got to produce somebody, and if the corporation is in Schenectady and that's the only place they have people, without the limitations of 176.3 making it clear that that applies to discovery and not trial, you might be -- you might be inadvertently pulling somebody down from Schenectady to testify in a JP case.

MR. TUCKER: And I guess my feeling is that 176.3 is kind of -- is an enlarging because it says, okay, for a subpoena only 150 miles. However, if we're talking about a deposition, that can be larger.

MS. SECCO: That's true.

MR. TUCKER: And for this here we're just saying this is only subpoenas, so it's only 150 miles, and then later we're going to talk about discovery, which is entirely within the purview of the judge to allow or deny.

MR. ORSINGER: And I would point out I believe there is another discovery rule that a person cannot be forced to appear for deposition that's a nonparty outside of the county of their residence, so there's not 150-mile subpoena limitation on the deposition. You can take it in any county in Texas where the witness is. I don't see the 150 miles as a discovery limitation. I see it as a trial court limitation. It's

based on 150 miles from where the case is pending.

CHAIRMAN BABCOCK: Yeah, I agree with that.

MR. ORSINGER: So if a corporation has a branch office, like let's say it's a brokerage company like in a small town.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: And they may keep their documents in Washington state. So you subpoena the organization locally, they're within 150 miles. They have to produce their records even if they're kept in another state, but I don't think that they have to bring a custodian down from Washington. They can just send over a local representative saying -- so I'm not sure I see that there's a way around 150-mile geographical limitation merely because you subpoenaed in it.

HONORABLE RUSS CASEY: And yet again, the whole idea of this is the Rules of Evidence is to allow -- you know, we don't necessarily have to have a custodian of records there to testify that those are good records. The judge can be able to determine that. You know, like I said before, I know what a Wal-Mart receipt looks like. I don't need someone from Wal-Mart to testify that's a receipt.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: So I'm looking at this rule

and I'm the judge and I have Chip's case. The company has its headquarters and the appropriate person now. X company has received a subpoena saying "Provide somebody who will testify to subject Y," and the company has an office within 150 miles of the justice court, but the person with knowledge is in Schenectady or wherever, and there isn't anybody locally. This rule allows the company to be forced to fly the knowledgeable person from Schenectady here, and the reason that it does, because it says a person cannot be commanded to come for 150 miles. It doesn't say anything about a party or a corporation or an organization.

I'm the judge, I say, "Wait a minute, I'm not compelling a person to come from Schenectady, Judge." I'm just reading this rule here, it says "Give me testimony on subject A," and it is directed to the corporate witness. Not a party, it's a corporate witness. That is not a subpoena directed to a, quote, person, close quote, whose residence is anywhere. It's talking to a corporation. So I think the problem that Chip mentioned is real in this rule. That's not to say it may not have pre-existed --

CHAIRMAN BABCOCK: Sure.

MR. MUNZINGER: -- your draft of the rule, but it is a problem.

MR. TUCKER: Yeah, and I think it would be within what we anticipated how that would be applied to put on there, "The organization must designate one or more persons to testify on its behalf as to matters known or reasonable to its organization," comma, "provided one is located within 150 miles of the trial court," or something along those lines just to specify that this 150-mile provision does apply to these witnesses as well. I mean, I think the way that this applies together it has to already -- I mean, it's still a subpoena for a person is what we're asking for, so I think the 150 miles applies, but I think it would be perfectly reasonable to include a provision in that part about corporations that the 150 miles applies to that person as well.

MS. SENNEFF: Judge Wallace.

HONORABLE R. H. WALLACE: The Chair recognized me.

CHAIRMAN BABCOCK: Richard, go ahead.

MR. ORSINGER: I don't think that this interpretation that you can specify for a corporation to send someone from another state applies. This happens in my practice occasionally as a family lawyer where I have to get records from third parties, and they typically will designate representatives who may not have personal knowledge, but who speak on behalf of the entity, and so I

think that there's an assumption being made that a corporation has to specify someone that has personal knowledge of a fact, and in reality there's a -- what I would call institutional knowledge, and they have to send somebody down that can speak knowledgeably about where the records are located or how they were generated or how -- you know, how the committee meets that promulgates these internal rules or whatever.

I don't -- I've never seen, and maybe just because it's never happened to me personally, someone argue that I can make an eyewitness come from some other state in response to a subpoena by that rule. All that means, though, is that the corporation can't send a representative to a deposition that you ask them a question and they say, "Well, I don't know about that, that's not my department," if you specify they're required to send somebody that can speak for the entity, but that doesn't mean they have to speak on personal knowledge. So I've never seen it used that way. I don't think it can be used that way.

CHAIRMAN BABCOCK: Yeah. Well, I agree with you, and I don't think the discovery rules have got this problem, but I do think that when we cut and paste from the discovery rules and put them into a trial rule, which is what this does, then we may have a problem.

MR. ORSINGER: But it's a trial rule in the district court, too. If the problem exists in the JP court, it exists in the district court.

CHAIRMAN BABCOCK: No. Judge Wallace.

MR. ORSINGER: Because we only have one subpoena rule, and it's 176.

HONORABLE R. H. WALLACE: Thank you. No, I've never seen a trial subpoena issued like that.

CHAIRMAN BABCOCK: No.

HONORABLE R. H. WALLACE: Where you command somebody --

MR. MUNZINGER: But it exists. The authority exists.

HONORABLE R. H. WALLACE: Well, here, to follow Richard, on what Richard was saying, is I understand the rule, that rule of discovery came about to alleviate the problem of me taking Chip's deposition and asking, "Who made this widget," and he says, "I don't know."

"Well, who would know?"

"Well, maybe Richard would know." So I go depose Richard. Richard says he doesn't know, but maybe Carl will know.

CHAIRMAN BABCOCK: Right.

HONORABLE R. H. WALLACE: Okay. So we say

we're going to cut through that, and you -- the burden is on the corporation, as he put it, that has the institutional knowledge to designate someone to testify. Don't have to have personal knowledge, but because they don't have personal knowledge is the reason you don't use it in a trial, and if you gave the JP court the authority to use this, you're -- they're doing something you couldn't do in the district court, I don't think. So I think it doesn't belong here, that particular provision.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I just want to spend a second to clean up the record a little bit. I apologize. The problem when you're general jurisdiction is sometimes there's a conflict between criminal law and civil law, and I just wanted to state that so when the justices read this that under Texas Code of Criminal Procedure 24.05 the only thing we can do when someone violates a subpoena is a fine up to 500 for a felony and a hundred dollars for a misdemeanor. Apparently you can do more if you're sitting as a civil judge, so just to clean up the record so it's not confusing.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: I did want to echo your point. Maybe it's already been beaten down enough, but the putting in the provision here that a party can simply

order a corporation just to appear as in the sense of a 30(b)(6) witness would be a problem, and it could be abused for the trial.

CHAIRMAN BABCOCK: Yeah. Okay. Well, sorry, I didn't mean to get us started on all of that, but anything else on 506.1? Since Marisa is now sensitized to this issue. She thinks. Anything else? Okay. Let's go to 507.

MR. TUCKER: Okay. 507, the directive from the Legislature told us basically to keep it along the lines of small claims court, and the way small claims court currently works is discovery is permitted to the extent that the judge decides that it's necessary and reasonable, and so we kept that -- that thought there in pretrial discovery in Rule 507, saying that that must be presented to the court by written motion before it's being served on the other party, and then the judge will issue a signed order approving that if they consider it reasonable and necessary. The judge controls completely the scope and timing of discovery. So we're not limited by the existing discovery rules. The judge is going to be able to have discretion, and it contains a warning that if you fail to comply it could result in sanctions, including sanctions proving fatal to a party's claim. So the idea there is just to have the party have to come to the judge

and have the judge approve discovery.

One thing that was discussed in the -- with the task force was to have requests for disclosure be prima facie approved just automatically, that that's something that a party could automatically submit, since that's a very straightforward and unobjectionable basically. The majority of the task force didn't want to include that in there, but that was something that we did want to have a discussion on, whether a request for disclosure would really need to be approved by the judge.

CHAIRMAN BABCOCK: Okay. Any comments? Richard.

MR. MUNZINGER: Is there a service rule where somewhere you say these people have to serve the motions that they file on their adversary? Because this rule talking about getting discovery, I am assuming the judge is going to hold some kind of a hearing where the guy wanting the information makes his case and the guy who may not want it to get there makes his case and the judge decides and issues the discovery request. Is that what the rule contemplates?

MR. TUCKER: No. I think the rule contemplates the judge will make that decision as is presented ex parte, and that's currently how it's done in small claims court.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: This last line about "sanctions that may prove fatal to a party's claim," I might be a little bit more specific there and suggest that you might get some language in 2015.2 about sanctions that a district court and county court can order if you don't follow their orders. Specifically section five, which talks about striking pleadings or dismissing the claim.

MR. TUCKER: And again, that's another of those situations where we assumed the judge would be able to refer back to the other rules and then that kind of changed.

MS. HOBBS: I just don't know that "prove fatal to your claims" is -- that might be a little bit too casual of a word. I think you should say, "Your claim might be dismissed or you might get a default judgment rendered against you" or be specific.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: This is one of the provisions that we had a lot of input from people about in our letters; and most of the input was -- or some of the input was to not adopt this provision; and at the other end of the spectrum we're looking for ways to reduce the time, cost, and expense of litigation; and one of the ways to do that is to reduce drastically or perhaps even

eliminate discovery, but here in the justice courts we're contemplating setting up a process for discovery. My suggestion is that we do not adopt 507 and allow for pretrial discovery. There is a trial de novo in county court that will be governed by the rules of procedure and evidence, and people can, if they need to, conduct discovery there, but this court it seems to me ought to be the kind of court where people bring their evidence to court and put on their trial and call it a day.

MR. JEFFERSON: Seconded.

HONORABLE KENT SULLIVAN: Yeah.

HONORABLE R. H. WALLACE: Yes.

CHAIRMAN BABCOCK: Okay. Marisa.

MS. SECCO: I'll just note that the statute authorizing these rules does say that discovery should be limited to that considered appropriate and permitted by the judge. So it at least contemplates that there will be discovery of some sort as permitted by the judge, and I think that's what influenced the task force's drafting of this rule.

MR. TUCKER: Yeah.

MS. SECCO: I just wanted to throw that out there.

MR. TUCKER: Yeah. I agree, and I think the concept of trying to make it speedy and quick, I agree

with that. I think that's part of what this was aimed at is saying, look, we're not going to allow parties to bog it down with a whole bunch of discovery, but if there's something more the judge can look at and say, "Yeah, I can see where you need to know that before we go to trial" then that would be appropriate.

CHAIRMAN BABCOCK: Peter.

MR. KELLY: Just the mechanics of the way the rule is constructed, I think the first two sentences are redundant, saying the same thing in a slightly different way. Conceptually I would think you would want to start and be more clear, start with, "The judge may completely control the scope" -- or does, "shall completely control the scope and timing of discovery." Next sentence, "The court shall permit such pretrial discovery that the judge considers reasonable and necessary for the preparation of trial," and only then go to the mechanics of "any request for discovery shall be not served on a party unless the judge issues a signed order approving a discovery request." So that way it sort of narrows down from the general proposition of total control to what the court -- what specifically the court may authorize.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: I think what

Justice Bland may have been referring to, there was a letter from a group of the JPs in Tarrant County about Rule 507, and it said, "This rule implies that the judge will review and approve all discovery. Some courts have hundreds and even thousands of filings that currently include discovery. It will be impractical, if not impossible, for the judge to accomplish this." I don't know if that's the case or not, but apparently they are concerned about it.

HONORABLE RUSS CASEY: No, I'm a judge in Tarrant County, and I am familiar with that letter, and I do not think that that accurate -- that that letter is accurate.

HONORABLE R. H. WALLACE: You were not a signatory then?

HONORABLE RUSS CASEY: What they're referring to is credit card cases, which normally the -- especially in a matter of assigned claims, the plaintiff will serve admissions on a defendant in hopes of using that to prove up their claim, and that's what the great number of cases are talking about. I think that we have discussed those particular issues in our credit card rules. That doesn't really -- I don't think that it will be -- I don't think discovery will be an issue under the rules.

CHAIRMAN BABCOCK: I'm wondering -- could I jump in, Jane, just for a second? I'm wondering if this Rule 507 ought not to say that you go to the judge, and, of course, you've got to serve on the other party whatever you go to the judge on. This first sentence is misleading in that regard, but you go to the judge and ask for a pretrial discovery and then the second sentence could be lifted right out of the statute to say, "Discovery is limited to that considered appropriate and permitted by the judge." Why wouldn't you do that?

MR. TUCKER: I think what we were trying to do with the two sentences is the first sentence was trying to say you have to bring it to the court. You can't go to the other party first, and then the second part says you can't even serve it on them until the judge issues an order saying "yes," so if I want to do interrogatories on Russ, I can't just file it with the court and file it on Russ at the same time. I have to bring it to the court, then get a signed order, and then give it to him. That's what we were trying to communicate.

CHAIRMAN BABCOCK: It's like you want a motion for leave to conduct discovery, and here is the discovery we want to do.

HONORABLE RUSS CASEY: Exactly.

CHAIRMAN BABCOCK: Justice Bland. Sorry.

HONORABLE JANE BLAND: So if Marisa is correct that we have to have something about discovery in these rules then my no discovery at all is not going to work, but it seems like the way we've drafted this we're encouraging discovery, because we're requiring the court to permit discovery. It says, "The court shall permit such pretrial discovery that the judge considers reasonable and necessary."

CHAIRMAN BABCOCK: An excellent point. Richard.

HONORABLE JANE BLAND: And could we water that down?

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: If I understood them correctly, this is supposed to be an ex parte proceeding, so the party desiring discovery files a motion, asks for discovery. The court gives them discovery, without hearing from the other side, and the discovery proceeds.

MR. TUCKER: Yes, sir.

MR. MUNZINGER: So if I want to object that it's an invasion of privacy; it's a violation of attorney-client privilege; it's immoral, ugly, and not fair, whatever. I don't get any objection, the discovery comes to me. That doesn't seem to be the way to treat parties properly.

CHAIRMAN BABCOCK: That outrages you, doesn't it?

MR. MUNZINGER: Yeah, it does.

MR. TUCKER: I think what we contemplated is that the party would then object when it's served on them, just like they would right now. If you serve interrogatories on me, I'm going to object when you serve them on me.

MR. MUNZINGER: Well, but the rule doesn't say that, does it?

MR. TUCKER: No, it doesn't.

MR. MUNZINGER: The rule doesn't say that I get to object.

MR. TUCKER: The other rules that we anticipated would apply to this court do say that.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, Richard has a point because when you look at this rule it contemplates sanctions based on the judge's order of the discovery that was ex parte that you haven't had an opportunity to object to, and at a minimum the statute doesn't require that we allow discovery sanctions in JP courts, so at a minimum I think that should come out.

CHAIRMAN BABCOCK: Yeah, wouldn't you want to set it up so that you file a motion for leave to

conduct discovery, and you say, "Here's the discovery I want." You serve that on the other side, so that they can come in and say, "No, judge, don't let them do that. This is a simple case. We're in JP court, for crying out loud."

MR. TUCKER: I think the thought process was if you serve it on them before giving it to the judge, the judge may reduce or eliminate a lot of the things that are then complicating the case by people receiving these discovery requests and they don't know what to do.

CHAIRMAN BABCOCK: No, no, no, but I understand what you're saying. What you're saying is you've got to draft 30 interrogatories and 15 requests for production, and you just send that to the judge and say, "Judge, here's what I want to do," and you don't, quote, serve that on the other side so that they -- the clock starts running on replying in 30 days. What I'm saying is why don't you simplify it? Why don't you say, "Judge, I want to send no more than 30 interrogatories and 15 requests for production, please let me do that," serve the other side with that request, that motion for leave to do discovery? That way if the opponent wants to object to it and say, "Judge, don't let him do that" for whatever reason then they've got the due process rights to come in and do that and then the judge does whatever he does. He

says, "Yeah, go ahead and serve the discovery." Then they serve the discovery, and then the opposing party would have all the rights they would have under the rules to say, "No, that invades attorney-client privilege," or "No, it's not relevant or reasonably calculated" or whatever they might say.

HONORABLE RUSS CASEY: I like that.

MR. TUCKER: Yeah, my -- our only thought was that the specific requests should go to the judge to approve rather than a blanket you get 20 interrogatories, because it's hard to say --

CHAIRMAN BABCOCK: Sure.

MR. TUCKER: -- that it's reasonable and necessary without knowing what you're actually asking.

CHAIRMAN BABCOCK: Well, and you could do it that way, but if you do it that way, you darn sure should send it to the other side because one of your requests might be "Hey, give me all your attorney-client communications" and the other side would have the right to point out to the JP, "Hey, you know, you can't do that because that's privileged," blah, blah, blah. Marisa.

MS. SECCO: Maybe I'm not remembering correctly, but I think that when this was discussed the task force at least talked about they didn't want the -- the judges didn't want anyone mini trials on whether or

not discovery was allowed, so sort of leaving this as an ex parte request to the judge to just serve the discovery and then allowing the opposing party to object in the normal course would not add this additional contested hearing about whether or not discovery should be allowed in the first instance.

CHAIRMAN BABCOCK: But you've got a party in the case and you're going to allow -- the rules are going to allow an ex parte approach to the judge?

MS. SECCO: Well, under the rules in district and county court, you know, any party can serve discovery without any -- so it's not less --

CHAIRMAN BABCOCK: But, I mean, the only time we ever allow ex parte is when, you know, it's a TRO and there's some emergency, and even then most places you've got to say, "I've tried to approach the other side and give them notice and everything."

MS. SECCO: But that's because you don't even need leave to serve discovery in district and county court, so here you're actually adding an additional burden for the person promulgating the discovery.

CHAIRMAN BABCOCK: Okay. Bobby. We haven't heard from you today.

MR. MEADOWS: Yeah, we haven't come to anything this important. My concern -- the statute

requires you to approach the judge about what discovery would be permitted. My concern is the way the rule is written is it seems to relax what the statute permits. I mean, the statute says you can -- that we are not to write a rule that allows discovery of the type we see in civil -- our Rules of Civil Procedure, and the only discovery that can be permitted is that which the judge determines must be followed to ensure that the proceeding is fair to all parties, and the way the rule is written is that the discovery permitted would be that what is reasonable and necessary to prepare for trial, which is a much different standard in my view.

CHAIRMAN BABCOCK: Yeah. Judge Peeples had his hand up.

HONORABLE DAVID PEEPLES: Yes, yes, I did. I want to second and support the things that have been said about these ex parte hearings. I think it's extraordinary to allow an ex parte approach to a judge. Yes, we allow it in some circumstances. We should not do it unless there is very good reason, and I think there's not good reason here. That's point one.

Point two, this seems inefficient because it will -- there will be two appearances before the judge, and in criminal cases, I may be wrong about this, but there's very limited discovery, but you -- you have to get

permission from the judge and both people are there and the judge then decides if there's not an agreement how much there will be, and so maybe this would make more sense just to say you've got to, yes, go to the judge first with the other side there, talk about it and convince the judge what discovery there should be and then -- I mean, you would have a chance to make your objections and so forth. I think two approaches of the judge is inefficient, and any ex parte approach to the judge ought to be supported by good reasons, which I don't think are present here.

MR. TUCKER: One possible problem with requiring them to be there, there is also a situation, for example, where I want to give request for admissions to the other side and they aren't responding, they don't want to show up. So that might be part of what I'm trying to do is to get them request for admissions, and if they're not willing to -- if they're not participating in the proceeding then that's eliminated as something that I can do.

MR. MUNZINGER: Yeah, but your rule doesn't give them the opportunity to appear and participate, and therein lies its vice. Due process is to give someone the opportunity to be heard and present their case. This does not do so, in all due respect, and, in fact, seems to

encourage it not to do so. It provides nothing regarding an appeal of it, and it is ex parte, and as David says, it's not, I mean, the American way.

CHAIRMAN BABCOCK: Kent. Okay. Judge Peeples.

HONORABLE DAVID PEEPLES: As we try to simplify, it's a good thing when somebody wants to make it complicated by getting discovery, either side, to know they've got to go convince the judge to get it, and that's a good thing to throw up roadblocks like that as we try to simplify these cases.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: I wanted to speak in favor of the Bland doctrine. I think that we are opening Pandora's box here, and I think that the extent -- it seems to me the statutory language was clearly designed to limit discovery, not to facilitate it, and we ought to say something in the rule to the effect of "Discovery is disfavored in these cases," and number two, "Discovery is allowed only to the extent that it is shown to be essential to the presentation of the party's case at trial." I mean, I would use that kind of language, and then I wanted to second Judge Peeples' point, and that is the notion of ex parte, routine ex parte hearings, is a complete disaster.

CHAIRMAN BABCOCK: Jane's doctrine is more colorful than you might imagine. Go ahead, Justice Bland.

HONORABLE JANE BLAND: Okay. So here's what we could say: "No discovery is allowed," comma, "unless the judge permits it in a written order. A party seeking discovery must notify the opposing party, set their request for a hearing, and obtain the order."

CHAIRMAN BABCOCK: That sounds like a doctrine to me. Jim.

MR. PERDUE: With the recognition that this is Justice Bland's second effort at judicial activism to ignore the language of the statute today, I would like to fully join that language.

HONORABLE JANE BLAND: You're not helping me, Jim.

CHAIRMAN BABCOCK: Well, listen, this has been great fun, but why don't we take a little break because Dee Dee's fingers are falling off here. Back in 15 minutes.

(Recess from 3:46 p.m. to 4:06 p.m.)

CHAIRMAN BABCOCK: Okay. We're on to 507.1, post-judgment discovery. Or maybe not. Come on, Lamont, let's go. Bronson, let's talk about post-judgment discovery. They'll start listening.

MR. TUCKER: Okay, well, we decided that.

CHAIRMAN BABCOCK: And move on.

MR. PERDUE: Let's keep going.

MR. ORSINGER: You need a spoon and a metal plate to bang on. Is there an alarm on your phone?

MR. TUCKER: Also, just to wrap up 507, I would just like to just reiterate the way that 507 is laid out is the way that things are currently in small claims. It's obviously not the way things are currently in justice court. In justice court we're under the regular discovery rules right now. In small claims it's similar to the 507. My concern with having a hearing for every one of those, keep in mind we're talking about even things like a request for disclosure, we're going to have to have notice and a hearing and bring people in just to say, yeah, you can do a request for disclosure. I definitely understand the concern. I would rather than a hearing every time would much think it would be much better to implement for courts if we make explicit in there that a party has the right to object and then will get a hearing if they object and put that in the rule, but I think having a hearing every time even on things like request for disclosure is really going to be burdensome on courts and parties.

CHAIRMAN BABCOCK: Okay.

MR. HAMILTON: Chip.

CHAIRMAN BABCOCK: Justice Bland, and then

Carl.

HONORABLE JANE BLAND: In my view the Legislature is trying to strictly limit discovery; and although its burdensome to go to a judge and request permission to conduct discovery, that's what the statute says you must do; and by not having a party who wants to do discovery have to do that, we place the burden on the party that's resisting the discovery to object, to I guess request a hearing, and I think that that's the opposite of what the Legislature intended; and also it's not what we really should be fostering in these courts as a matter of policy. It should be difficult to get discovery in justice court.

MR. TUCKER: No, I agree with that. Maybe I misspoke. I definitely think the party that wants discovery should have to go to the court and get permission for it. I just don't think that we should have to have a contested hearing with both parties present every time the judge wants to sign off on it. I think I as a plaintiff could say, "I want to serve these five interrogatories on Russ. Judge, will you sign an order that I can serve these five interrogatories on Russ?"

"Yes, I think these are reasonable and necessary, I'm going to sign them." Now I can make him answer the question, rather than the judge, say, "Well,

okay, let's send a notice here and bring Russ here and bring you here in 30 days and talk about it," because I agree it should be less burdensome, and I think having a contested hearing every time I want to request discovery is more burdensome.

HONORABLE RUSS CASEY: And I think we may accomplish both by clearing up the language of showing that the -- that even approved discovery may be contested, and because I think that that was one of the objections on that, is that we are implying that it cannot be, and I think that enforcing it should be, and so we may do that. Now, the language in small claims court under current Chapter 28 is basically exactly what the Legislature wrote. That's what's there. There's not any more or less, and so we -- you know, I think we were trying to clarify that a little bit, and maybe we didn't do that the best way we could.

CHAIRMAN BABCOCK: Carl, then Judge Evans, then Justice Gaultney, then Eduardo.

MR. HAMILTON: Well, there's two things in the statute. One is that discovery is limited to what the judge considers appropriate and permitted, but then it also says in the second part is that the Supreme Court cannot adopt rules requiring the discovery rules or Rules of Evidence, except to the extent that the JP determines

that those rules will be followed. So as I read this, all the JP has to say is we're either going to follow the discovery rules or we're not going to follow them. He doesn't have to decide whether these interrogatories are good or bad or whatever until the discovery is done. Then we have the regular -- regular disputes over it if there is any, but he can say from the outset, "We're not going to have any discovery."

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: I'm opposed to ex parte discovery. I think it places an impression on the recipient that there's already been a judicial review of the propriety of the discovery and will chill valid objections to it and should only be upon leave on good cause stated as along the terms of what the Legislature has provided would be, and they have to show that it's reasonable and needed under the circumstances of that case.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I want to join the Justice Bland doctrine but with an addition, and that is that as I understood the doctrine there's no discovery as a starting point, and then, again, I want to voice opposition to the concept of an ex parte hearing. I think that's inappropriate, but it should be on motion, but

there should be -- it should be limited to exceptional circumstances. So on motion, showing exceptional circumstances, and there shouldn't be a hearing every -- multiple hearings. There should be one hearing, so one hearing on motion based on exceptional circumstances.

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: Yeah, is there any way that we could craft a set of mandatory disclosures like we have in district courts that if it's appropriate they could be set? I mean, I think we're making -- trying to make a mountain out of a mole hill. We're in this court to make it easy for people to get their day in court, and we're trying to make it more difficult it seems, so can we not draft a set of mandatory questions that could go out if one of the parties wants it? Just a suggestion.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Two things. It seems to me that if we require these hearings are going to be adversary, there will be fewer of them. I think if you invite people to visit with the judge ex parte, there will be more of them; and second, and more important than that, it's very tempting when there's an ex parte discussion with the judge to expand the discussion from discovery to something else. You're at the bench, maybe nobody else is there, might be tempting for the judge to ask, "Tell me

about this case" or something, tempting for the lawyer to get in a few digs, and I don't think we ought to lead either side into temptation in that way.

MR. TUCKER: Would it address your concern if we made it where they could only do it by, say, written submission so there is not this face-to-face discussion?

HONORABLE DAVID PEEPLES: It takes away the problem I just mentioned about expanding the discussion. I do think, though -- this is an empirical guess on my part. If I'm a lawyer and I have an opportunity to see the judge one-on-one just with me and her, that's not scary to me. To have to go in there and fight with the other side and convince the judge, that's not something I'm looking for nearly as much as the ex parte opportunity. I think there will be much more of these ex parte visits than there would be adversary hearings if we require them.

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: This is just kind of an off the wall idea that popped in my mind when David was talking, and I don't have the statute in front of me so I don't know if it would comply with the statute, but a justice of the peace court hearing is a very different animal from a district court hearing because you are going to have that trial de novo. What if you said that the

only person who could request an order of discovery is the judge so then it is the judge that decides? You know, it's almost like in Europe where the judge is making the inquiry and the judge needs more information to make the decision, the judge then orders discovery, but if the judge says, you know, "We've got a contract here and I don't see there's any need for anything else," and you haven't said anything that you need anything else. I don't know, just throwing that out.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I wasn't going to propose this until Alex suggested that, but what I just jotted down, it's got too many commas in it right now. "The trial court must order only that discovery, if any, limited to that considered appropriate and permitted by the judge to be exchanged no less than 48 hours before the trial." And then it's everything from the judge's perspective, like she says, of it's -- he's got to develop the trial, the evidence of the case. This is what the judge orders, and it uses the terminology of the statute, provides a deadline by which to exchange it.

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: But it's almost like -- how's the judge going to really know until you're at the trial?

HONORABLE TOM GRAY: That's the beauty of it, you don't order anything.

PROFESSOR ALBRIGHT: Oh, okay. I was kind of thinking more like you're in the middle of trial. You know, there's no discovery until trial, and you're at the trial and the judge says, "Well, you know, I can't decide this because I need to know X, so I want y'all to go off and find X, come back tomorrow." I don't know. The two days before, I just think it's in -- then it gets more like discovery, but I guess what you're saying is maybe the judge would never do it.

HONORABLE TOM GRAY: Where I could see there being something that the judge would have a standing order, like in the credit collection cases.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: You know, any record of payment that you think you have you've got to produce it to the other side. Anything that you contend is owed, documentary evidence, you have to produce it to the other side. You know, I could see a standing order in a JP court on something like that.

CHAIRMAN BABCOCK: Got it. Peter.

MR. KELLY: It seems like we might be going towards something, which makes more sense to me, is 507, pretrial discovery, "The discovery shall" -- "The judge

shall completely control the scope and timing of discovery. Any disputes will be handled by motion pursuant to Rule 508." Get rid of the ex parte problem. Different JPs can have different rules depending on the type of cases they're handling. You can have standing orders for credit card cases and standing orders for other types of cases. Just say it's under the control of the judge and that shifts it to the European inquisitorial system closer than the adversarial system and seems to solve a lot of these problems.

CHAIRMAN BABCOCK: Okay. Let's move on to 507.1, post-judgment discovery.

MR. TUCKER: Okay. What we tried to do with this is two things. Number one, we decided to not have it be required to be filed with the court because now we have parties that are in the position of judgment creditor and judgment debtor, so the judgment creditor we thought had stronger arguments to be able to get this information, and we also outlined an objection procedure for the party who is receiving that, just because, you know, these type of discovery requests I think your average layperson is going to be more likely to be uncomfortable with or object to because often these are financial things. You know, give us your past three years of tax returns, give us your bank account information, give us how much money you have

there, tell us what stocks you have, things like that.

So we laid out the procedure that they can file an objection. Then the judge would have a hearing to determine if it's valid, and if it -- if the objection is overruled then the judge orders them to respond. If it's upheld the judge can either modify the request or dismiss it entirely, and the reason that we thought that a hearing was okay here, this is going to be something that's much less frequent in our courts. Our busy courts are going to have a lot of pretrial discovery still filed. Post-judgment is going to be less frequent and also it's going to be a little bit more contentious.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: How is post-judgment discovery handled right now in justice courts?

MR. TUCKER: The same as it is in county and district court. In justice court. In small claims court it's silent. The Rules of Civil Procedure don't apply to small claims court. It says the judgments are enforced as they are in justice court, and there's some debate over does that include post-judgment discovery or not. So small claims courts, vague and amorphous. In justice court it's under the regular rules right now.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I might be fitting things

together that don't belong, but under section 5.02 of House Bill 79 it says that the Supreme Court may not adopt rules that require that discovery rules be adopted, except to the extent the JP hearing the case determines that they must be followed to ensure that the proceeding is fair to all parties. Now, the proceeding may be over. I mean, someone might argue the proceeding is the trial, but what bothers me generally is that there's a specific preclusion of rule-making authority to require any discovery, and yet we're allowing one party to issue discovery on the other side and then it's up to them to object before they come to court and we find out whether the JP allows it or not, and are we going too far? Should we not require the JP to allow the discovery before it's sent rather than just rule on an objection afterwards?

MR. TUCKER: Yeah, and that's a possibility. As far as the policy that's certainly debatable. We thought it didn't violate the statute because the statute says you can't require the specific Rules of Civil Procedure that deal with the discovery to be followed, and we're not. We created a separate standalone post-judgment discovery proceeding, so that's not -- it's not like we said, "Follow Rules 194.5" or whatever it is. We said these are the things that you -- you know, you file it, so we don't think it violates the statute. Obviously if it's

the best solution is up for debate.

MR. ORSINGER: Well, what discovery is allowed under this rule? You have to go back to the regular civil rules to find out you can send interrogatories. You certainly can't set a request for disclosure post-judgment, right, but you could send a request for production, but all of that is in the rules of procedure, so if you have a rule that's saying the plaintiff can just issue this discovery against the defendant and it's up to the defendant to come in and object and then the judge decides what's allowable, aren't you -- aren't you putting a discovery mechanism in place in contrary to the -- before the judge has said it's okay and isn't that what's banned?

CHAIRMAN BABCOCK: Justice Bland, then Bobby.

HONORABLE JANE BLAND: I agree with Richard. I understand why you split out post-judgment discovery and made it separate, but it seems like you ought to have one discovery rule, and that discovery rule ought to require discovery only when ordered by the judge. Because the only discovery allowed is that considered appropriate and permitted by the judge, and since -- since that's what the statute says, this post-judgment discovery scheme really does allow for discovery that hasn't been approved by the

judge.

MR. TUCKER: You know, I think that's a valid and fair point. I think the task force, you know, made a distinction at least in part, again, because you know, you're really in a bad spot if you get this judgment and the judge has said, "Well, no, I'm not -- I'm just not going to forward this on, I think that's oppressive." When I'm in a different position now, plaintiff versus defendant versus judgment creditor versus judgment debtor, but, I mean, it certainly is a very, very valid argument that it could be read as violating what the Legislature requested.

HONORABLE RUSS CASEY: I think that the task force interpreted it -- right now we have different rules for pre- and different rules for post-, and so I think that we interpreted -- and in small claims court.

CHAIRMAN BABCOCK: Bobby. I'm sorry, Judge. Bobby.

MR. MEADOWS: The point I want to make is that I don't believe the statute permits a license to write new rules. I mean, the way I read it, it says there's a prohibition against requiring the discovery rules adopted under the Rules of Civil Procedure and Evidence, unless the judge determines otherwise, in which case the rules, he determines the rules must be applied.

So we can't require them. Discovery can only be permitted if the judge makes a determination that it's required to -- so that the proceedings will be fair to both parties, in which case, the rules -- he has to grab from the rules that we can't require for the -- to ensure that the proceeding is fair. So I don't think it's a license to just write something new. I think it's a require -- you can reach up and grab a discovery rule if the judge determines that rule is necessary.

CHAIRMAN BABCOCK: Okay. Any other comments on 507.1? Moving right along. 508, pleadings and motions.

MR. TUCKER: Okay. The current rule allows for oral pleadings and motions in justice court. That's kind of an antiquated procedure. It's pretty difficult to kind of notate these things in the docket, write someone's answer down verbally and things like that, so what the task force did is said, no, everything needs to be written and signed other than oral motions during trial or when all parties are present. So if we're at a hearing and one side wants to make an oral motion and the other side is there to understand what they're saying, we thought that was fine, but otherwise any submissions need to be in writing.

CHAIRMAN BABCOCK: Okay. Any comments about

this? Carl.

MR. HAMILTON: So this is in conflict with Rule 525, and which one controls?

MR. TUCKER: Current Rule 525 or proposed Rule 525?

MR. HAMILTON: Current Rule 525.

MR. TUCKER: Yeah. We scrapped that.

MR. HAMILTON: And that will be deleted?

MR. TUCKER: Yeah.

CHAIRMAN BABCOCK: All right. Any other comments? Okay. Let's go to 509, petition.

MR. TUCKER: Okay. Again, to try to make things very simple for pro se litigants, try to kind of expand this out and give them a walk through of what they're supposed to be doing, lay out what has to be in the petition. Notice here -- that's where we have e-mail contact information where the plaintiff consents to accept service of the answer and any other motions or pleadings, not required to accept it. Then (b) we talk about paying filing fees and service fees and what has to be in the statement of inability to pay, so on and so forth, and then provide a mechanism where the defendant can contest the affidavit of inability to pay within 20 days of the day your answer is due.

CHAIRMAN BABCOCK: Okay. Comments?

Richard.

MR. ORSINGER: Is this a pre-existing list that already is out there, or did y'all write it?

MR. TUCKER: No. We created it.

MR. ORSINGER: I would suggest that you consider adding that if the lawsuit is based on a contract that a copy of the contract be attached to the petition, whether it's a lease or --

HONORABLE RUSS CASEY: I think we have a lot of objection to that.

MR. ORSINGER: You would, why?

HONORABLE RUSS CASEY: Okay, back to the credit card cases, a lot of times they have absolutely no copy of that.

MR. ORSINGER: I see what you're saying. So a lot of these plaintiffs can't produce an original document.

MR. TUCKER: Right. Or we could be under a verbal contract.

CHAIRMAN BABCOCK: Speak up, guys, because nobody down there could hear that. There would be objection to attaching a contract to the pleading because a lot of times people don't have the contracts. Is that a fair summary of what you just said?

MR. TUCKER: Yeah, or it would be verbal,

verbal contract.

CHAIRMAN BABCOCK: Okay. Any other comments about the petition? Going once, going twice. 510, venue.

MR. TUCKER: Okay. There was a lot of discussion in the task force about how we wanted this to look. There was a partial feeling of, look, we don't need to reproduce things that are elsewhere. There was also a feeling that this doesn't reach every possible scenario, and there was also the thought of, well, these are supposed to be a play book for someone that has no legal training, shouldn't we include in the play book where you should file your suit, and so what we have here was kind of a compromise between that.

We have a general statement of what venue is proper, and that's (a), (b), (c), (d) there, and then we have the disclaimer that comprehensive laws regarding that are found in Chapter 15 of the Civil Practice and Remedies Code, which is available for examination, a clause on whether they're a nonresident or an unknown resident, and also a notice if the plaintiff files in an improper venue that a motion to transfer may be filed, and if that happens, you're going to have to pay filing fees in the new court and not get a refund of what you already paid, just as kind of a heads up, you need to pay attention to what you're doing, these are the consequences if you

don't.

CHAIRMAN BABCOCK: Okay. Comments? Richard? Carl? Justice Gray.

HONORABLE TOM GRAY: I need to back up to (b)(1) -- 509(b)(1). I just noticed that it had a form of the jurat for the statement of inability to pay, and there is the new statute that authorizes a sworn statement without a notary, and that just needs to be harmonized with that new statute, that you can make a statement on oath and not be before a notary, it would seem to me. Unless you -- unless you expressly intend to require it not to be under that new statute.

MR. TUCKER: Yeah, in the second paragraph there it says "shall be sworn before a notary or other officer or signed under penalty of perjury."

HONORABLE TOM GRAY: Oh, I'm sorry. I missed that part. Apologies.

CHAIRMAN BABCOCK: Okay. Any other comments? Okay. Let's move on to 522, motion to transfer venue.

MR. TUCKER: Okay. This one may also be controversial here. We have a lot of parties that end up falling in the trap door as far as venue because they don't know when I file a general denial I just accepted the plaintiff's venue if I don't object right now. You

know, that's something that happens a frequent amount. So what we decided to do was expand the time frame where a defendant can file a motion to transfer venue, and so we give the defendant 20 days after they file their answer to contest venue, contain a sworn statement that the venue chosen by the plaintiff is improper, and say what county and precinct it should be transferred to. Current JP rules say the defendant has to specify the county and precinct or the motion is defective. What we put in this is they have to specify that, but if they fail to do so the court has to give the defendant -- to inform them and give the defendant the 10 days to cure that defect. Then if they fail to cure, we're going to go ahead and deny their motion.

We then outline the procedure for a hearing on the motion to transfer venue and that they can present evidence and legal arguments at the hearing. We also allow appearance by telephone or electronic communication system by permission of the court, and no interlocutory appeal for that, and that no trial can be held until at least 15 days after the judge has ruled. Once it's granted the court should transfer it and then the plaintiff gets notified that they have 10 days to pay the filing fee in the new court or they get their case dismissed without prejudice.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: Questions, one, could you seek to transfer venue from within a county to another precinct?

MR. TUCKER: Yes, sir.

MR. LEVY: So is that clear in this? I think you might be able to spell that out that that's an option, and then is it a defect if you're not sure which precinct it is if you don't include that? That would seem to be a little onerous.

MR. TUCKER: Yeah, and that's why we tried to -- tried to make it less Draconian. Like I said, right now if you did that and you filed it and you just didn't know the way the rule is right now, too bad, so sad, you just accepted venue. That's why we wanted to at least give the defendant time to cure that and, you know, have a chance to get it to the proper venue.

MR. LEVY: But it's the court -- you know, it puts a lot of burden on the court to figure that out. Shouldn't that be the opposing party to raise that issue?

MR. TUCKER: Well, but the problem is if no one opposes it, where does the court transfer it to?

HONORABLE R. H. WALLACE: He doesn't.

MR. TUCKER: If he doesn't specify what court to transfer it to where is the court supposed to send it? If they say it should be Harris County, there's

16 JPs in Harris County. Which one are we supposed to give it to? So that's the issue of why we really need a precinct specified, but at least now we're giving them a chance, and we'll warn you, hey, you have to give us a precinct, and if you can't do that -- basically if they really can't argue what precinct is correct then it kind of defeats their argument that -- you know, you're not telling us where it should be.

MR. LEVY: Well, you might know it needs to go to Lubbock County but how would you know what precinct, and I guess you could figure it out by going to a precinct map.

MR. TUCKER: Right. Yeah.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: This doesn't apply in eviction cases?

MR. TUCKER: Right. No, it's not going to apply in eviction cases because there's -- right, the Property Code statutorily sets jurisdiction in eviction suits where they have to be in the precinct where the property is located, and so if your argument as a defendant was, look, the property is not in this precinct, it wouldn't be a motion to transfer venue. It would be a plea to the jurisdiction saying, "Court, you have to dismiss this."

HONORABLE NATHAN HECHT: And how many motions to transfer venue -- how common are they?

MR. TUCKER: Not hugely common, frankly. I think a lot of people are unaware. I would anticipate it would be slightly more common under this proposal because it's more clearly laid out and we're giving the defendant the chance to do it after their -- for a brief period after their answer. I think sometimes people answer and then they don't realize and so now they can't make a motion.

HONORABLE NATHAN HECHT: But is encouraging more of them a good thing? Are defendants being taken advantage of here?

MR. TUCKER: On occasion. I don't think it's a widespread problem, but I don't think -- I think it's a good thing to have more of the cases heard in what the proper venue would be, yes.

HONORABLE RUSS CASEY: I think one of the -- I would say that the plurality at least of motions to transfer venue I receive are prepared by attorneys, and a good portion of those do not have a precinct named because they're unfamiliar with the JP rules, and it really embarrasses an attorney when you tell him that his motion has failed.

MR. TUCKER: Have to polish up the old

malpractice insurance.

CHAIRMAN BABCOCK: Maybe, maybe not.

MR. TUCKER: One other thing why this is important in our courts, too, is we have a lot of lay plaintiffs. A lot of lay plaintiffs just go file it in the JP court where they live, and so there's a lot of time where it's not just I live in Harris County, but I'm in precinct seven and they're suing me in precinct six. It's I live in Houston, and they live Midland, and they just sued me in Midland. Yeah, so, yeah, I think it's the precinct.

CHAIRMAN BABCOCK: Judge Wallace, and then Elaine.

HONORABLE R. H. WALLACE: It seems to me it should be clear. If we're going to say that the court must inform the defendant of the defect, as I understand what you're saying is the court needs to tell him, "You need to name a specific precinct and county," period.

MR. TUCKER: Yes, sir.

HONORABLE R. H. WALLACE: The court is not going to get into deciding which precinct and county, all that it might be.

MR. TUCKER: Absolutely.

HONORABLE R. H. WALLACE: I think that -- I think it should state something that if the motion fails

to specify the county and precinct the court must inform the defendant to specify the precinct and county and give him 10 days to do so, so that it's clear that the judge is not giving him legal advice.

MR. TUCKER: Yeah, no, I think that's a very good point. Any language that we can put in to clarify. The judge should absolutely not say, "Oh, you need to put precinct four on there" or anything like that. It's "You need to tell us what precinct you want to send it to." Absolutely.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: So a defendant, let's say you've got a defendant represented by counsel, could get some rulings by the court and then if we're not happy with the rulings we could still move to transfer venue, and would those rulings made by the first court be binding on the subsequent court? Would it maybe be better to put more notice on the citation to the defendant if you think that the place where the suit has been brought is improper you must raise that along with your answer?

MR. TUCKER: Yeah, you know, that's a valid point and something that could be considered. I think what frequently happens is people just will kind of do a little bit of homemade legal research or they know somebody who knows a lawyer and they'll just say, "All you

need to do is file a general denial" and then that's done and then it's oops, but --

PROFESSOR CARLSON: I understand the problem, but I just think that it's subject to abuse. I mean, that's why we have the due order of pleadings, I guess, so you can't get rulings and say, "Well, I don't like this court, but I've got this ace in the hole venue change."

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Rule 522, your motion to transfer venue is made because the venue you've chosen is improper, and 510 gives a list of where proper venue would be. 509, the petition, as I read it, does not require the plaintiff to say why venue is proper, so I guess the defendant would have to just say, "Well, I don't live here" or "The accident didn't happen," just refute all the listed proper places of venue.

MR. TUCKER: Yeah, or, you know, yeah, the defendant could say, "This is not where I live or where the accident happened, and it needs to be in Harris County precinct five."

HONORABLE DAVID PEEPLES: Well, but there are four -- in 510 there are four different bases for venue. I guess you would have to deny all four of them, but I guess my question really is we don't want the

plaintiff to have to say in the petition why venue is proper in the precinct. That might be a lot, but since the plaintiff doesn't have to say that, the defendant will have to refute everything in 510?

MR. TUCKER: I wouldn't think so, but, I mean, that's possible. I mean, like (c) is -- only applies to contract case.

HONORABLE DAVID PEEPLES: Yeah.

MR. TUCKER: So if this is a tort, I don't think I have to say, well, there's not a contract.

HONORABLE DAVID PEEPLES: "I don't live here, and this didn't happen here, and the contract is proper."

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: I like the idea of having the venue required in the petition, but that's not actually why I raised my hand, and now I'm forgetting why. Oh, when you do your JP education I assume you educate them on venue, like that's something you might cover.

MR. TUCKER: Yeah.

MS. HOBBS: Do you have a list of -- that's more exhaustive than these four, or is this basically what you teach them, these four things?

MR. TUCKER: Well, we teach them where they can find that. There are some of the things that are

mentioned, but, I mean, we don't -- we don't generally have a four-hour -- because a lot of the venue things are very nuanced and specific, and when we have limited classroom time, you know, that's not always the best use of that time is to address things that are literally a one in 500,000 case thing.

MS. HOBBS: Yeah, and I didn't mean to challenge your --

MR. TUCKER: No, no, no.

MS. HOBBS: Really, what I was getting at, do you have like a cheat sheet that you use that has a more exhaustive list than these four things?

MR. TUCKER: No, I would say those four pretty much cover what we teach as the basics, yes.

CHAIRMAN BABCOCK: What -- you say you don't think there is much abuse, but how would the abuse occur? If a plaintiff was trying to gain an edge in the case, how -- what would be some of the factors they would be thinking about in filing in the wrong venue?

MR. TUCKER: I, frankly, don't think it's generally done for abuse. I think it's generally done as just a lack of knowledge. I think someone says, "This guy owes me money, I'm going to go to the JP court and file a lawsuit and get my money," and they go to the one where the plaintiff lives rather than the one where the

defendant lives because that's what's convenient for them.

CHAIRMAN BABCOCK: But you could file in, you know, south of the Trinity River in Dallas as opposed to Plano, and if you're going to have a jury you would have a much demographically different jury.

MR. TUCKER: And I think that occurs from time to time, but I honestly think it's generally when the plaintiff files something that it's generally done out of just this is what's closest to me, this is what's convenient, I don't understand that's not where I'm supposed to file it.

CHAIRMAN BABCOCK: Okay. Anything more on 522? We good? Lisa, your hand down? All right. Let's move to the next rule, which is 523, fair trial venue.

MR. TUCKER: Okay. And this is a tricky one. The Supreme Court has recently said that the recusal rules don't apply to justice of the peace court, Rule 19 doesn't apply to JP court, so that means a party can't go to the JP under the recusal rules and say, "Recuse yourself under Rule 19. Instead what we have to follow is Rule 528, which is in our current rules. Rule 528 has several things that we feel are problematic with it. Number one, how -- current Rule 528 says if a party feels that they can't get a fair trial before a judge or in a precinct, they file an affidavit with the court along with

the affidavit of two credible persons, and then the court will automatically move it to the nearest justice of the peace in the county.

Okay. Well, that creates several problems. Number one, sometimes there's not a nearest justice of the peace in the county. We have several counties where there's only one justice of the peace in the entire county, so what happens then? Another issue is eviction suits. What happens when I file this motion in an eviction suit and the rule says "shall transfer to the nearest justice of the peace in the county," and guess what? Now that court has no jurisdiction over that eviction case because the eviction jurisdiction is only for that specific precinct. So we tried to modify that to address those problems.

The first thing we did, we took away the two credible persons requirement. I think that's pretty much just perfunctory. They have to file a sworn statement stating they can't get a fair trial, and we added a requirement that they specify if they're objecting to the location or the judge, and they have to file that at least seven days before trial unless the sworn statement shows good cause why they didn't file it seven days before trial. So maybe they're driving in for their trial that morning and they cut off the judge in traffic and flip him

off, and now they're like "Uh-oh, I need to transfer this because this guy hates me now."

So if they're seeking a change in the judge the process is the judge shall exchange benches with another qualified justice, or if one's not available, the county judge shall appoint a visiting judge to hear the case. Exchange of benches is already authorized under the Government Code, so that's just -- I don't want this judge -- we don't need to move the case. I'm not objecting to the precinct. We just need to exchange benches and have a different judge come hear the case. If the party seeks a change in location, the case shall be transferred to any other precinct in the county requested. If no specific precinct requested, to the nearest justice. If there's only one justice then the judge shall exchange benches or the county judge shall appoint a visiting judge, and then we have add the caveat, "Where exclusive jurisdiction is within a specific precinct the only remedy available is a change in presiding judge."

We're not going to move it out of that precinct because it can't be moved, and we say you can only do this one time in any given lawsuit because what's been hypothesized before is you could just file one of these with every judge in the county, and in the current rules it's just automatic that it has to keep being moved.

CHAIRMAN BABCOCK: So you can just file a sworn statement and say that, you know, I don't -- "I don't get along well with Martians and the judge is from Mars and he's got to transfer it"?

MR. TUCKER: Under the current rule if you do that and have the affidavit of two credible persons, then yes.

CHAIRMAN BABCOCK: Well, I get Hecht for one and Marisa would be the other. Justice Bland.

HONORABLE JANE BLAND: It looks like all a party has to say is "I believe I cannot get a fair trial. Signed, the party." And it seems like this would really be used for forum shopping by parties that in particular appear in justice courts all the time.

MR. TUCKER: Yeah.

HONORABLE JANE BLAND: And I'm wondering if the solution does more harm than any one particular case staying right where it is and the parties exercising their right on appeal.

MR. TUCKER: Yeah. I mean, I, frankly -- and I'm not really speaking for the task force now, just I'm speaking personally as trainer for the -- I mean, I would have no real problem eliminating this as a remedy or having some sort of review of the statement, but yet it's -- and that's how it is right now. There's no review

of the statement. There's no test of the credibility. There's nothing. It's just an automatic transfer. So we tried to -- we tried to preserve that right to a fair trial while trying to eliminate some of that, but I would agree that that's a fair statement that it does -- it does open up an avenue for forum or judge shopping.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Yes, the way this is written, I mean, the judge doesn't dispose of the case on the first day it comes before him, if it's reset or if there's delay for discovery or whatever. As long as it's seven days before trial you can just basically peremptorily strike the judge. I think that's the way this works, and so we -- I don't think that that's a responsible way to run a judicial system if the people that are elected to perform this judicial function just are going to be knocked out for any reason. Either we ought to get rid of it or we ought to have someone else decide whether the judge should be recused, but allowing pro se litigants to get rid of a judge before they meet him or after a hearing if the trial is reset, to me that's an intolerable way to run it when these people are elected to do this job by the people.

CHAIRMAN BABCOCK: Buddy, and then Judge Casey.

MR. LOW: And the thing that bothers me the

most is on the venue that you can't get -- you could just file an affidavit and say, "The service station manager there has been badmouthing me, and I don't think I can get a fair trial there," and that's all he has to do. That might be true, and are you saying by statute that he has to transfer it then or get another judge?

MR. TUCKER: Yeah, that's how the rule is right now, and if you look at the recusal rule -- it doesn't apply to us, but the recusal rule, they can file that up to 10 days before the trial, so we thought if it's 10 days for these courts, 7 days for us is pretty reasonable as far as the time frame. I mean, we would also be amenable to being able to utilize that recusal rule, but we didn't think that was an option.

CHAIRMAN BABCOCK: Judge Casey, and Justice Bland.

HONORABLE RUSS CASEY: Just personally, I would not have a problem if you decided to change Rule 18 where it did include justice of the peace.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Was there a perceived problem with Rule 528?

MR. TUCKER: Yes. Two major problems. Number one, it says "the nearest precinct in the county or the nearest justice." Sometimes there's only one, and

also when you -- you mandate transfer out of that precinct, you could lose jurisdiction for eviction suits. So if I'm a tenant being evicted, I'm just going to file a Rule 528 motion. Nobody gets to deny it, and now my eviction suit gets moved to a court that has no jurisdiction and must be dismissed.

HONORABLE JANE BLAND: I meant with respect to the requirements for seeking --

MR. TUCKER: Ah.

HONORABLE JANE BLAND: -- the transfer, not with the kind of effect of the transfer. In other words, were people saying too difficult to get two credible witnesses, or were JPs saying, I'm -- too difficult to determine when I need to recuse? In other words, why are we making it very easy to transfer a case out when it doesn't look like there were a lot of complaints about the process up until now?

MR. TUCKER: Right. The thought process when we discussed it in the meeting was if this is automatic then really, I mean, what is the benefit of having these other two statements when it's just an automatic rubberstamp thing. If there was some sort of review process where someone is -- another judge, for example, is going to review this then it makes sense to have these other affidavits, but when these other

affidavits are basically fodder, I mean, you know, it's just not very -- we didn't feel it was very helpful, but I mean, we have no objection to adding that back in if that would somehow chill frivolous motions under this rule.

CHAIRMAN BABCOCK: Judge Casey.

HONORABLE RUSS CASEY: Well, I mean, just personally, if someone gave me a motion to recuse myself and only had one credible person, I'm still going to recuse myself. You know, it was one of those things that if that motion is valid then by all means let's get them a new judge. Let's not try to make it any difficult -- let's not try to make it meet some specific criteria. Get a new judge. Make it as simple as possibly can be. "I can't get a fair trial here, I want a new trial," okay, get a new trial.

MR. LOW: But that assumes the motion is valid.

CHAIRMAN BABCOCK: Yeah.

MR. LOW: You don't even know the person and he files it, does that make it valid?

HONORABLE RUSS CASEY: Under the current rule I can't question it.

MR. ORSINGER: What happens if they file a motion against the replacement judge and then the one after that?

MR. TUCKER: In the existing rule that's a current problem, and that's why we added that they can apply for this relief under this rule only one time in a given lawsuit, because that's another method that has been used, is to transfer from every court in a county. Now they're all barred and disqualified, and every time it's just a mandatory transfer, so that's why we tried to cap that at once.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Okay. I think I made my point -- I made my position clear earlier. I am totally against this automatic recusal. I think it's an awful idea, and it may be not as bad in practice as it is in my imagination. The other problem is you can't get a fair trial in a specific precinct means to me you can't get an unbiased jury. Is that what that is supposed to be?

MR. TUCKER: Sure. Yeah.

MR. ORSINGER: And are the jurors from just the precinct, or are they from the county?

MR. TUCKER: Precinct.

MR. ORSINGER: So if you go out and grab six guys that are out in front of the vehicle -- you know, Department of Motor Vehicles trying to get their licenses how do you know what precinct they're from? Do you look at their voting card, or how do you know that you're

pulling a panel from the precinct?

MR. TUCKER: Yeah, county level electronically that's how it's done. It's a valid point when you have to just go and do the juror round-up. That's pretty rare, the juror round-up.

MR. ORSINGER: It is? Man.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: It also seems a little bit odd that if the defendant wants to do this very easy procedure he gets transferred to the precinct requested by the defendant, and it just seems like there should be a straight default to the closest precinct, which is the default if no specific precinct is requested.

MR. TUCKER: Yeah, and I think that makes sense. The reason we didn't do it that way, the thought process was there is that there could be some other issue explicitly with the nearest judge and then when it gets moved to that court I'm barred because I can only do this once. So I can't move it out of that court, and you know, if the committee and the Court wanted to say, well, too bad, you didn't decide which poison is worse, that's fine, too, but that was the thought process in not just doing the closest, is that the closest judge may also have some recusal grounds to -- for that defendant.

CHAIRMAN BABCOCK: Okay. Yeah, Professor

Carlson.

PROFESSOR CARLSON: I don't recall whether the constitutional disqualification of judges is limited to district courts, or is that applied to all judges?

MR. TUCKER: It applies -- disqualification applies to our folks, just not the recusal process.

PROFESSOR CARLSON: Okay. Thank you.

HONORABLE ANA ESTEVEZ: I just agree with Richard and Justice Bland. I don't see any need to make it so easy to get rid of a judge and forum shop.

CHAIRMAN BABCOCK: Could you talk up just a little bit, please?

HONORABLE ANA ESTEVEZ: I agree with Richard and Justice Bland. I don't believe there's any reason to make it this easy for people to forum shop. I think it's -- I think it's a bad rule.

MR. TUCKER: What hurdles would be good to impose?

HONORABLE ANA ESTEVEZ: I don't know. Let me think about that for a few minutes.

MR. ORSINGER: See, the problem is if you have a presiding judge like Judge Peeples, we've now just added God knows how many of these recusals for him to have to do in his daily work, and so rather than put in an elaborate due process structure on this I would rather

just give this up, and if somebody doesn't get a fair judge then they can appeal it to the county court and start all over again. Admittedly maybe the first trial wasn't totally fair, but how often is a justice of the peace going to even know his litigants and --

CHAIRMAN BABCOCK: That depends on the county.

MR. ORSINGER: -- are you going to be able to prove that if you can go across one precinct line that you're going to get a fair jury, but if you're like -- if you're one house this side of it you can't get a fair jury. That's not making much sense to me, none of this.

MR. TUCKER: The JPs are very familiar with their litigants in a huge majority of the counties actually.

MR. ORSINGER: Oh, really?

MR. TUCKER: You think about it, you have some counties that may have 30,000 people, and they've got four precincts, so your precinct has 7,000 people. The judges are active in the community. They're elected.

MR. ORSINGER: I don't know my JP. I don't even know what precinct I'm in.

MR. TUCKER: What county you live in?

MR. ORSINGER: Bexar County.

CHAIRMAN BABCOCK: Well --

MR. TUCKER: If you lived in Kerr County you probably would, or if you lived in Culberson County you certainly would.

MR. ORSINGER: So that means anybody that lives in that county can just get rid of their elected justice of the peace just because they filed this piece of paper? I'm not getting that.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: How about something like if the judge believes -- I like Richard's idea about let's not have an elaborate recusal procedure for these cases, but Judge Casey makes the point that, look, I'm going to get off cases where I have a conflict or I think I can't be fair, and I think that most judges in the justice courts will do that, so if we want to have a statement in the rule that says something like "The judge can transfer the case," fine, but we shouldn't -- we shouldn't invent an elaborate -- or really it's not elaborate at all. All it is is somebody filing in the court that they want to be somewhere else.

MR. TUCKER: Right, and --

HONORABLE JANE BLAND: Go somewhere else, and so to me that causes more harm than it -- because I think it's probably the exception that a judge would stay on a case when he or she could not be fair.

MR. TUCKER: Yeah, I think it's generally the exception also, but, I mean, the situation certainly exists. There could be a situation, for example, say Judge Casey and I -- or Judge Casey is going to recuse because he's a very good judge, but I have a personal dispute with a judge and then get sued in his court and they're not going to transfer it because this is my chance to get back at this person. I mean, to say you have no way at all of at least raising the issue and having it evaluated by somebody is somewhat troublesome. I mean, I'm not completely opposed to it by any means, but those are just things to consider.

CHAIRMAN BABCOCK: Munzinger, and then Buddy.

MR. MUNZINGER: Just if you put a limitation on it you can do this one time, each party gets to do this one time, one time only, that at least is some limitation on it and does account for the situation where someone is -- knows that they can't or believes sincerely that they can't get a fair trial; and if you're a plaintiff and you're in the justice court all the time, it seems to me the way this rule is drafted you could file in there and then file a motion asking to be transferred; and if the transfer is automatic then you know you're going to go to the guy, whoever it is, which creates a problem as well

because that may be your cousin or your best friend or whatever it might be. So you could manipulate the system that way as well, but I don't know that there's a perfect cure to it, but at least one simple one is to say everybody gets to do this once. We have similar limitations on recusals.

CHAIRMAN BABCOCK: Which have their own problems, but Buddy.

MR. LOW: My question is, if the statute, if this follows the statute, how do we get around the statute? I don't like it, but how do we get around it? If the statute says that --

MR. TUCKER: It's just a rule. It's not something statutory.

CHAIRMAN BABCOCK: It's derived from a statute, but I don't think the statute exists anymore.

MR. LOW: Oh, okay. All right.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: This is an automatic objection to either the judge or the precinct or both. Automatic. All you've got to do is say, "I believe I can't get a fair trial." And remember, there's trial de novo. We're talking about cases where there's trial de novo, and I will just say to exchange benches or appoint a visiting judge is a cumbersome procedure. It's much more

work than you think to actually get to exchange benches. You're talking about going from, you know, this is my courtroom, I go to work there. Well, today I'm going to go sit for someone else. That's got all kinds of problems. This is just horrible.

MR. TUCKER: I agree with the trial de novo idea, but just bear that in mind, if I get sued in a precinct where I really do have a judge who's not going to be fair with me, and I get a 10,000-dollar judgment against me, I'm going to have to put up $20,000 for that trial de novo.

HONORABLE DAVID PEEPLES: But don't we have Rule 528 right now? It's automatic. It goes to the nearest justice. You've got to have two people join you, which sounds okay to me.

MR. TUCKER: But when it goes to the nearest justice that can cost our court the jurisdiction because of eviction suits, and there's sometimes not a nearest justice. There's sometimes only one judge in the county.

MR. ORSINGER: What do you do, you go to another county?

MR. TUCKER: I don't know. That's why we tried to change the rule.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: The rule provides

for the county judge appointing a visiting judge under some circumstances. Did you consider the possibility of having a recusal motion go to the county judge for decision?

MR. TUCKER: Yeah, our thought was that the county judges would be very angry with us for doing that. But, I mean, that may ultimately be what needs to happen.

MR. MEADOWS: We appreciate that kind of candor.

CHAIRMAN BABCOCK: We like to end these meetings on a high note, so we'll be in recess until tomorrow morning at 9:00, and charge your batteries tonight because we've got, by my count, 50 rules to get through tomorrow.

(Recessed at 5:02 p.m., until the following day as reflected in the next volume.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 28th day of September, 2012, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 2,012.75 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 15th day of October, 2012.

D'Lois L. Jones

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