

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

* * * * *

MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

May 18, 2002

(SATURDAY SESSION)

* * * * *

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 18th
day of May, 2002, between the hours of 9:10 a.m. and
11:37 p.m., at the Texas Law Center, 1414 Colorado, Room
101, Austin, Texas 78701.

COPY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX OF VOTES

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

<u>Vote on</u>	<u>Page</u>
FED	6598
FED	6601
FED	6603
FED	6665
FED	6677
FED	6681
FED	6698

--*--*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CHAIRMAN BABCOCK: Welcome, everybody.
Thanks for sticking with us here. We are a select group.

MR. GILSTRAP: We won't say what the
selection process is.

CHAIRMAN BABCOCK: We won't say what the
natural selection process is here.

MS. SWEENEY: But Darwin would have some
input.

CHAIRMAN BABCOCK: Darwin would be very
happy. Judge Lawrence, by my calculations we're onto Rule
748, but you may have a different view than I do.

HONORABLE TOM LAWRENCE: Well, what I would
propose that we do is go back to kind of -- we've gone
through 750, although we didn't vote on it yesterday.

CHAIRMAN BABCOCK: We didn't? Okay.

HONORABLE TOM LAWRENCE: No. We discussed
it, but I think what the subcommittee would like to do is
to come back in June with 748, 749b, and 750. We need to
look at a couple of things and make sure everything is
meshing on that. So we would like to take those off the
table today if we could --

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM LAWRENCE: -- and come back on
that. We have a few questions, and then what I would like

1 to do is go to Rule 4 and do those five rules and then
2 start at 744 and then just work through to 755. I
3 don't -- well, I shouldn't say this, but I don't think
4 it's going to be that lengthy to do this.

5 CHAIRMAN BABCOCK: Okay.

6 HONORABLE TOM LAWRENCE: Having said that,
7 I'm sure --

8 CHAIRMAN BABCOCK: More than 30 seconds, the
9 Hatchell 30 seconds?

10 HONORABLE TOM LAWRENCE: Rule 4 --

11 MR. HAMILTON: Where do we find Rule 4?

12 HONORABLE JAN PATTERSON: It's at the end of
13 your materials after 755.

14 HONORABLE TOM LAWRENCE: There's a separate
15 three-page handout that has Rules 4 through 245, and Rule
16 4 deals with the computation of time. There are some
17 rules that are in the forcible rules that -- that we need
18 to add and some take out because of the way we've
19 recodified this. What we want to do is take out 749(b)
20 and 749(c) and then add 740, 744, 750, and 754. So that's
21 all we want to do, is to recodify we need to change which
22 rules are in and which rules are out of Rule 4, and the
23 committee would move the approval of that.

24 MR. HAMILTON: Second it.

25 CHAIRMAN BABCOCK: Is this just a mechanical

1 change?

2 HONORABLE TOM LAWRENCE: Well, essentially,
3 yes, because what we're -- what we're saying is because
4 we've renumbered some of these rules that we need to
5 change this.

6 CHAIRMAN BABCOCK: Okay. All right.

7 HONORABLE TOM LAWRENCE: We're not changing
8 any substance.

9 CHAIRMAN BABCOCK: Any discussion? Yes,
10 sir.

11 MR. FUCHS: Mr. Chairman, what it will do is
12 with respect to the jury trials in justice court, which
13 now gives you -- which now gives you the five days and you
14 exclude Saturdays, Sundays, and holidays. This will mean
15 you're going to count Saturdays, Sundays, and holidays in
16 determining the five days to request a jury in justice
17 court.

18 MS. SWEENEY: How do you feel about that?

19 MR. FUCHS: It makes it awfully short, is
20 all I'll say.

21 HONORABLE TOM LAWRENCE: Well, the reason we
22 had to do that is if you look to the note to the committee
23 under that, and I'm going to skip down to the third line,
24 "However, under Rule 44, the defendant can request a jury
25 trial in five days of service, and under Rule 4 you can

1 not count holidays, Saturdays, and Sundays in that
2 five-day calculation."

3 So if the tenant was served on Wednesday,
4 you would count Thursday and Friday as day one and two,
5 exclude Saturday and Sunday, then count Monday as day
6 three, Tuesday as day four, Wednesday as day five.
7 Therefore, a defendant can come in on Wednesday to timely
8 request a jury trial under Rule 744 one day after the
9 trial could have been set under Rule 739. So the problem
10 is that five days is longer than six days, if you don't
11 include that, if you don't put 744 in Rule 4. And then
12 it's even worse if it's, you know, one of the Christmas or
13 Thanksgiving where you've got Thursday and Friday off.

14 MS. SWEENEY: Wait a minute. I was
15 listening two thirds of the way, but I got stuck on five
16 days is longer than six days. Will you do that math
17 again?

18 CHAIRMAN BABCOCK: If you exclude Saturday
19 and Sunday.

20 MS. SWEENEY: Yeah.

21 MR. GILSTRAP: For the five days.

22 MS. SWEENEY: Okay.

23 MR. YELENOSKY: But you don't exclude it
24 from the six-day period.

25 HONORABLE TOM LAWRENCE: I've actually had

1 this happen before.

2 MR. YELENOSKY: Six minus two is four.

3 MS. SWEENEY: Okay. Go ahead.

4 MR. EDWARDS: Sounds like my kids.

5 CHAIRMAN BABCOCK: Okay. Are we -- Fred, in
6 your view are we changing something here that was a right
7 that existed before for defendants but we're cutting a day
8 out of them now?

9 MR. FUCHS: I think you're cutting two days
10 out, essentially, that falls over the weekend.

11 CHAIRMAN BABCOCK: From what our past
12 practice --

13 MR. FUCHS: If you -- yes, as I understand
14 the rule now.

15 CHAIRMAN BABCOCK: Judge, do you agree with
16 that, that we're shortening it by two days from what the
17 existing rule is?

18 HONORABLE TOM LAWRENCE: Well, I would have
19 to think about the two days. 744 is going to be shorter
20 now because we're putting it under Rule 4, but if you
21 don't then it doesn't make any sense because somebody can
22 request a jury trial after their case has been set for
23 trial under 739. That's why we have to do that.

24 MR. GILSTRAP: Could you go through that
25 with a little more detail? I'm not -- I mean, I know

1 you're right, but I'm just not seeing how it's right.

2 HONORABLE TOM LAWRENCE: Okay. Well, on the
3 note to committee, which is under the rule, Rule 4, a
4 defendant is served with citation for an eviction on a
5 Wednesday. So under Rule 739 the trial can be held as
6 early as the following Tuesday, because it's 6 to 10 days.
7 So six days would be the following Tuesday. Rule 744 is
8 currently not under Rule 4, so the defendant can request a
9 jury trial within five days of service. The service is
10 Wednesday. Under Rule 4 you cannot count the holidays,
11 Saturdays, or Sundays in that five-day calculation, so if
12 the tenant was served on Wednesday, you would count
13 Thursday and Friday as day one, exclude Saturday and
14 Sunday, and then count Monday as day three, Tuesday as day
15 four, and Wednesday as day five.

16 CHAIRMAN BABCOCK: You say this has happened
17 to you.

18 HONORABLE TOM LAWRENCE: Yes.

19 CHAIRMAN BABCOCK: What do you do when it
20 happens?

21 HONORABLE TOM LAWRENCE: Well, I -- the one
22 time it happened I didn't grant the jury trial. I mean, a
23 judge is forced to make a decision, which rule do you
24 follow, Rule 739 or Rule 744 now, because they are
25 inconsistent in this scenario. And if Thursday and Friday

1 are holidays like the Thanksgiving and Christmas then it's
2 even more pronounced.

3 CHAIRMAN BABCOCK: Well, the guy showed up
4 on Tuesday for trial, right?

5 HONORABLE TOM LAWRENCE: No. He showed up
6 on a -- I think he showed up on Wednesday and demanded a
7 jury trial after his --

8 CHAIRMAN BABCOCK: But what had happened on
9 Tuesday?

10 HONORABLE TOM LAWRENCE: I rendered a
11 default judgment against him because he didn't show up,
12 but he shows up on Wednesday and says, "But I have five
13 days to request a jury trial under Rule 744." I said,
14 "But I've already rendered a default," and I can't grant a
15 new trial so he had to appeal.

16 MS. SWEENEY: It sounds like a bad idea to
17 me to make that scenario any more possible than it already
18 is. I don't think we should shorten the time.

19 HONORABLE TOM LAWRENCE: So if you put 744
20 in Rule 4 then that won't happen, and you still have --
21 I'm not sure why it shortens the time because you still
22 have five days from the date of service. Now, if you say
23 shorten the time because of the Saturdays and Sundays, I
24 mean, if the fifth day is a Saturday or Sunday you still
25 have the following Monday, so, I mean, I can't see how

1 it's a big imposition on the tenant.

2 MS. SWEENEY: Wouldn't the notices
3 automatically all be served on Friday?

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

5 MS. SWEENEY: You say they would?

6 HONORABLE TOM LAWRENCE: I didn't understand
7 your question. I'm sorry.

8 MS. SWEENEY: Wouldn't somebody wanting a
9 procedural advantage automatically serve the notice on a
10 Friday?

11 HONORABLE TOM LAWRENCE: Well, but the
12 people that do the service are the -- you know, the
13 constables or the sheriffs or whoever, and they don't -- I
14 mean, they serve it whenever they can get it served. The
15 plaintiffs don't -- you know, wouldn't control that now.

16 MR. YELENOSKY: Well --

17 CHAIRMAN BABCOCK: Well, what happens under
18 your scenario? The case is set for trial on Tuesday, and
19 presumably when the person is served they get served with
20 notice that there's a trial on Tuesday, right?

21 HONORABLE TOM LAWRENCE: Right.

22 CHAIRMAN BABCOCK: So he just didn't show up
23 on Tuesday, even though he was told to show up, right?

24 HONORABLE TOM LAWRENCE: Right.

25 CHAIRMAN BABCOCK: If he had shown up on

1 Tuesday and said, "I want a jury trial" --

2 HONORABLE TOM LAWRENCE: Then I would have
3 reset it under that scenario.

4 CHAIRMAN BABCOCK: Fred, what do you think
5 about that?

6 MR. FUCHS: Well, I think one way of dealing
7 with the problem is that a justice court gives you at
8 least seven days to file an answer instead of using the
9 shortest period of six, and then there's not a problem.
10 The conflict if you keep this rule the same on giving five
11 days and not counting Saturdays, Sundays, and holidays.

12 MR. YELENOSKY: Because seven minus two is
13 five.

14 MS. SWEENEY: Cut it out.

15 CHAIRMAN BABCOCK: Explaining that to Paula?

16 MR. FUCHS: And that -- in Travis County
17 they give you seven days. In Williamson County you get 10
18 days to answer. In other counties, 7 to 10 days. Some
19 are six. It just really varies over the state.

20 CHAIRMAN BABCOCK: Larry, what do you think?

21 MR. NIEMANN: Well, I would like to make a
22 general statement that I think Rule 4 is going to be the
23 tail. The dog is whether you dispense with jury trials
24 under some circumstances, whether you adopt the one-step
25 or allow a one-step or two-step or just one-step, and so I

1 sort of think you-all are addressing this subject that
2 maybe you may have to change it again depending on what
3 you decide later on on these other issues.

4 CHAIRMAN BABCOCK: Yeah. We still have that
5 issue pending, don't we?

6 MR. NIEMANN: Yes.

7 CHAIRMAN BABCOCK: Yeah.

8 HONORABLE TOM LAWRENCE: Well, depending on
9 what happens in a possession trial we may have to change
10 this, but that won't change a nonpossession trial issue,
11 which is what we're talking about here.

12 MR. NIEMANN: Well, it might, depending if
13 you go one step or two step. Isn't that right, Fred?

14 MR. FUCHS: Could. But they've already
15 voted on that.

16 HONORABLE TOM LAWRENCE: Yeah. We voted on
17 739.

18 MR. NIEMANN: Okay. All right. You've
19 decided on that. Okay.

20 HONORABLE TOM LAWRENCE: But if we've got --
21 I mean, if we -- just to limit the discussion today, I
22 guess, if we have a nonpossession bond matter then I think
23 744 needs to be within Rule 4 or we've got an
24 inconsistency in the rules. I mean, I guess we can leave
25 it like it is, but we need to understand that we're going

1 to have that result on occasion. It just doesn't make
2 sense to me to leave it like that.

3 CHAIRMAN BABCOCK: Yeah. Stephen.

4 MR. YELENOSKY: Well, I remember a similar
5 problem with rules like this with the Federal court where
6 they had a 10-day period that triggered something, and as
7 a result they had an illogical result, and what they did
8 was they changed it from 10 to 11 days so that they no
9 longer triggered that illogical result, and so one option
10 is, in fact, to do that, is to move it from the minimum
11 from six to seven.

12 PROFESSOR CARLSON: Which doesn't seem like
13 much, but it is. It's another day before you can get to
14 trial.

15 CHAIRMAN BABCOCK: Yeah, Larry.

16 MR. NIEMANN: Sometimes, Judge Lawrence,
17 you've used a requirement that something be done the day
18 before trial. Would that solve your problem? Instead of
19 saying five days from service, say one day before trial.

20 HONORABLE TOM LAWRENCE: Well, how does --
21 let's see. I don't know. I'll have to think about that.

22 MR. NIEMANN: In my draft the jury trial
23 must be requested one day before the trial rather than
24 five days after service, and I think that solves a lot of
25 problems.

1 HONORABLE TOM LAWRENCE: Well, I don't know.
2 I would have to think about that. Off the top of my head
3 I'm not sure, but, I mean, we can hold this until June if
4 you want to.

5 CHAIRMAN BABCOCK: It's up to you. Whatever
6 you think. That would mean that the person would have to
7 file their jury demand by Monday, in his -- in the judge's
8 scenario. It's served on Wednesday. The trial is on
9 Tuesday. You've got to serve a demand --

10 MR. NIEMANN: But if he's served on Monday,
11 there would never be a trial on Tuesday.

12 CHAIRMAN BABCOCK: If you served a jury
13 demand on Monday there would never be a trial on Tuesday?

14 HONORABLE TOM LAWRENCE: Well, there
15 wouldn't be a jury trial the next day.

16 MR. NIEMANN: Are you talking about serving
17 a citation on Monday and having the trial the next day?

18 HONORABLE TOM LAWRENCE: No. He's talking
19 about the jury, the demand for the jury.

20 CHAIRMAN BABCOCK: Demand for the jury, I'm
21 sorry. Under Judge Lawrence's scenario you get served on
22 Wednesday. You're going to go to trial on Tuesday, and
23 what you say is let's have the jury demand filed by the
24 latest on Monday, right?

25 MR. NIEMANN: Yes.

1 CHAIRMAN BABCOCK: Okay. And you say, Judge
2 Lawrence, that that means that that would delay the
3 Tuesday jury -- the Tuesday trial would be delayed then?

4 HONORABLE TOM LAWRENCE: I'm sorry. You
5 lost me.

6 CHAIRMAN BABCOCK: I maybe didn't
7 understand. What your scenario is, you get served on
8 Wednesday.

9 HONORABLE TOM LAWRENCE: Yes.

10 CHAIRMAN BABCOCK: And there's going to be a
11 trial on the following Tuesday.

12 HONORABLE TOM LAWRENCE: Could be as early
13 as the following Tuesday. That is correct.

14 CHAIRMAN BABCOCK: What Mr. Niemann says is,
15 well, why don't you make the jury demand requirement be
16 that you've got to demand the jury no later than Monday,
17 the day before the date you're set for trial.

18 HONORABLE TOM LAWRENCE: Well, the
19 subcommittee really didn't even think about that. I guess
20 the reason that -- is that the five days, within five days
21 of service has been the law for a long time, and it seems
22 to work okay, so we just didn't see any reason to change
23 it. We can certainly look at doing that if the committee
24 wants us to do that.

25 CHAIRMAN BABCOCK: Well, Fred, what do you

1 think about that?

2 MR. FUCHS: I think that might work. Still
3 would be a little shorter, but I think that might work.

4 JUSTICE HECHT: But does that mean if the
5 trial falls on a Monday you have to request it on Friday?

6 MR. NIEMANN: Yes.

7 HONORABLE TOM LAWRENCE: Then we're going to
8 have to write that somehow so it's clear that if the day
9 before is a Saturday, Sunday, or legal holiday then it's
10 got to be the next preceding. I mean, that's going to get
11 a little complicated, but I guess we can do that.

12 MR. NIEMANN: I think that would be easier
13 for people to understand, though.

14 MR. EDWARDS: How often are juries asked in
15 these things?

16 HONORABLE TOM LAWRENCE: Not very often.

17 MR. EDWARDS: I mean, are we talking about
18 something that comes up once in a blue moon and --

19 HONORABLE TOM LAWRENCE: Well, no.

20 MR. EDWARDS: -- we're sitting here spending
21 hours on it or is it --

22 HONORABLE TOM LAWRENCE: Once in a full moon
23 maybe.

24 MR. YELENOSKY: Like we've never done that
25 before.

1 MR. EDWARDS: I'm just checking to see what
2 I'm spinning my wheels on.

3 HONORABLE TOM LAWRENCE: I mean, to me it
4 seems a lot simpler just to include Rule 744 in Rule 4
5 than to do this other method, but, I mean, whatever the
6 committee wants us to do we'll draft.

7 MR. YELENOSKY: Couldn't it just say "the
8 previous business day," parentheses, "Monday through
9 Friday."

10 HONORABLE TOM LAWRENCE: Well, I don't know.
11 I mean, it sounds -- I mean, off the top of my head, I
12 think "yes," but, you know, not having given this much
13 thought, we need to think about it.

14 MR. NIEMANN: Well, my goal, frankly, may
15 hurt us in some respects, but I think it would help us
16 sometimes, too, if we make it easy for a layman to
17 understand. Going back and forth to Rule 4 and the
18 eviction rules is an impossibility for laymen.

19 MR. EDWARDS: If they get to --

20 MR. NIEMANN: And we have trouble with it as
21 lawyers.

22 MR. EDWARDS: If they even get to Rule 4,
23 they're going to be able to find -- I mean, if they get
24 that far in this without knowing what they're doing, Rule
25 4 is no step for a stepper like that.

1 HONORABLE TOM LAWRENCE: Let me pose --

2 MR. NIEMANN: Well, one of my goals, quite
3 frankly, is to make sure that the JPs are not shanghaied
4 on the morning of trial with a jury request.

5 HONORABLE TOM LAWRENCE: Well, let me ask
6 you, if we say "the day before trial," if there's a
7 continuance does that mean you've got another opportunity
8 between that next trial date to ask for it?

9 MR. NIEMANN: No. Mine said the day before
10 the originally set trial. If there's a continuance,
11 tough. You've lost it.

12 HONORABLE TOM LAWRENCE: It just seems more
13 complicated to me to do it like that, and I don't know
14 what we're gaining by it.

15 MR. EDWARDS: Well, there's something nice
16 about having the computation of time the same for
17 everything. Chances are if somebody is going to ask for a
18 jury they're going to have a lawyer, and if they have a
19 lawyer, the lawyer is going to be thinking in terms of
20 Rule 4 and five days, and it looks to me like one time
21 limit on service for everybody for everything is more
22 usable and more understandable than having it --

23 CHAIRMAN BABCOCK: Carl, you had a question.

24 MR. HAMILTON: Well, if we fix it this may
25 not be applicable, but if we're going to have 744 in

1 there, I think we need 739 also, because 739 says the
2 citation tells them they have five days to request a jury.

3 HONORABLE TOM LAWRENCE: Well, but 739 also
4 talks about -- well, I guess --

5 MR. HAMILTON: 6 to 10.

6 HONORABLE TOM LAWRENCE: 6 to 10, but that
7 wouldn't be the five.

8 MR. HAMILTON: That's not a five-day period,
9 so I think you need 739 in there as well.

10 HONORABLE TOM LAWRENCE: Okay. Well, I
11 think we looked at that, but the actual -- I mean, the
12 actual rule is 744 where they demand the jury, and we
13 thought that was the one that needed to be in there. I
14 mean, there's a reference to it in 739, but 744 is the
15 actual rule to demand a jury.

16 CHAIRMAN BABCOCK: But I'm sitting out there
17 as somebody who went to law school, and I get served a
18 citation that says, "You've got five days to demand a
19 jury," and I go back to Rule 4 because I know that's how I
20 compute my time. I've got my piece of paper in my hand,
21 and I go back to Rule 4, and I see that Saturdays and
22 Sundays don't count. There are some rules that are
23 exempted, but not this one, so I go ahead and just -- and
24 am confident that I don't have to count Saturday and
25 Sunday, make my demand and find out I've been defaulted.

1 HONORABLE TOM LAWRENCE: Yeah. From the
2 standpoint of --

3 CHAIRMAN BABCOCK: That doesn't seem right.

4 HONORABLE TOM LAWRENCE: -- the
5 administration of justice, I, as the trial judge, I want
6 to know as early as possible that there's going to be a
7 jury demand. I mean, you want to tell the other side not
8 to show up, there's been a demand. The day before trial
9 is -- I mean, there's a little bit of gamesmanship in
10 that. You wait until the day before trial to request it
11 because you've inconvenienced parties. I just don't think
12 that's in the best interest of the administration of
13 justice either.

14 CHAIRMAN BABCOCK: Well, if you're going to
15 give the defendant the right to demand a jury, you've got
16 to give him some time to do it.

17 HONORABLE TOM LAWRENCE: Well, you're --

18 CHAIRMAN BABCOCK: I mean, even if it
19 inconveniences people.

20 HONORABLE TOM LAWRENCE: But you're giving
21 him five days after service, which has been the rule for a
22 long time, and I've not -- other than this time problem I
23 don't know that there's been any problems with that.

24 MR. EDWARDS: Well, you're telling them it's
25 five days. Now if it's going to not include holidays and

1 Sundays and Saturdays, the citation ought to inform this
2 person who that's probably the closest thing they ever
3 came to a law book is the citation. It ought to say that
4 they -- you can demand it no later than five days, not
5 including Saturdays, Sundays, and holidays, if that's what
6 you're doing, in the citation. Then you don't have to
7 worry about sending this poor fellow or lady to Rule 4.
8 Rule 4 takes care of it, but you're told in the citation.

9 HONORABLE TOM LAWRENCE: Yeah. That would
10 be -- it would put the defendant on greater notice to do
11 that than to --

12 MR. EDWARDS: A whole lot greater notice.

13 HONORABLE TOM LAWRENCE: Yeah.

14 MR. EDWARDS: I mean, it would even let them
15 know.

16 HONORABLE TOM LAWRENCE: Okay. That's fine.

17 CHAIRMAN BABCOCK: Larry, what do you think
18 about that?

19 MR. NIEMANN: I have no problems with
20 clarity and letting people know what the law is.

21 CHAIRMAN BABCOCK: Fred, what do you think
22 about that suggestion?

23 MR. FUCHS: That's a wonderful suggestion.
24 I'm embarrassed I didn't think of it.

25 CHAIRMAN BABCOCK: Elaine, what do you and

1 Tom think?

2 PROFESSOR CARLSON: Sounds good.

3 HONORABLE TOM LAWRENCE: That's good. I
4 like that.

5 CHAIRMAN BABCOCK: So can we work on that?

6 MR. NIEMANN: If we do that, you might
7 consider shortening it to four days so Judge Lawrence
8 would have two days to know it's going to be a jury trial
9 and to contact the parties, tell them to call off the
10 dogs, no trial because of the jury request.

11 MR. EDWARDS: Oh, we can't write
12 gamesmanship out of these rules. My god, we'd have to
13 tear out three quarters of the pages.

14 MR. NIEMANN: Not everybody --

15 CHAIRMAN BABCOCK: So will you work on that?

16 HONORABLE TOM LAWRENCE: Yeah. All right.
17 So the plan is to put 744 in Rule 4 but then change 739 to
18 make the citation reflect that language, right? Is that
19 the consensus?

20 CHAIRMAN BABCOCK: That's your proposal
21 right, Bill?

22 MR. EDWARDS: Yeah. And I agree with it.

23 CHAIRMAN BABCOCK: Okay.

24 HONORABLE TOM LAWRENCE: Okay. All right.
25 Okay. We'll have that ready for June. 143a, cost on

1 appeal to county court. This is the rule that we have
2 talked about and already actually voted on, but we didn't
3 specifically vote on changing 143a. We voted on changing
4 the perfection of appeal, and this is where when you
5 appeal from a judgment in justice of the peace or small
6 claims court the appellant has 20 days to pay the court
7 costs in county court. Now, on forcibles we've changed
8 that so that they've got to pay the filing fee to perfect
9 the appeal to the JP court. So, consequently, we need to
10 change 143a to reflect that.

11 PROFESSOR CARLSON: We're just carving out
12 forcibles from the application of 143a.

13 HONORABLE TOM LAWRENCE: We're carving out
14 forcibles from the application of 143a.

15 CHAIRMAN BABCOCK: Any comments on that?
16 Bill.

17 MR. EDWARDS: I just -- you know, somebody
18 made a suggestion we call these things eviction rules just
19 to get a little bit modern, and we never did discuss that,
20 and every time I see "forcible entry and detainer" it
21 tongue ties me. "Eviction" is a lot easier.

22 CHAIRMAN BABCOCK: And we thought you were
23 silver-tongued.

24 MR. EDWARDS: I am, but have you ever tried
25 to untie a silver thread?

1 CHAIRMAN BABCOCK: Not that easy. I
2 think --

3 MR. EDWARDS: Just a thought I had.

4 CHAIRMAN BABCOCK: I don't think we were
5 trying to not talk about it. I think we were trying to
6 defer that until we got everything --

7 HONORABLE TOM LAWRENCE: Yeah. We can talk
8 about that at the end of this.

9 CHAIRMAN BABCOCK: -- put together and then
10 do a word search and see what we want to do.

11 MR. EDWARDS: Then see if there's a problem.
12 Okay.

13 HONORABLE TOM LAWRENCE: So I move adoption
14 of this rule.

15 CHAIRMAN BABCOCK: Any second?

16 MR. HAMILTON: Second.

17 CHAIRMAN BABCOCK: Anybody opposed? Passes
18 unanimously. Okay. Chair not voting.

19 JUSTICE HECHT: Chair not voting.

20 HONORABLE TOM LAWRENCE: Now, Rule 190.
21 Yeah, Rule 190, we probably want to hold this and see what
22 the ad hoc group comes up with, but what we had said is
23 "discovery control plan required." I mean, the rule now
24 says you've got to have a discovery control plan in
25 everything. Now, I don't know very many of the 118,500

1 some-odd eviction cases, I bet there weren't too many
2 discovery control plans. So we were going to exempt the
3 discovery control plan or exempt forcibles from that, but
4 I think we ought to just hold off on this and see what the
5 ad hoc committee does.

6 CHAIRMAN BABCOCK: Yeah. Let's defer that.
7 Okay. What's next?

8 MR. HAMILTON: Chip, let me make one
9 comment.

10 CHAIRMAN BABCOCK: Yeah, Carl.

11 MR. HAMILTON: The Court Rules Committee is
12 sending up their 500 series of rules shortly, and one of
13 their suggestions is that discovery in JP court be limited
14 to request for disclosures unless for good cause shown the
15 JP orders other discovery, for whatever it's worth.

16 MR. GILSTRAP: Yeah. I think there was some
17 discussion at the end of the day yesterday just informally
18 about dealing with this discovery issue by putting it in
19 the 500 rules and that way keeping it out of the eviction
20 rules.

21 HONORABLE TOM LAWRENCE: Well, I think just
22 off the top of my head, I think I always want to separate
23 discovery in forcibles and discovery in justice court
24 suits. I mean, there's just not the time pressure in a
25 justice court suit. So, I mean, I wouldn't want to have

1 the 500 rules control what happens in forcibles. I think
2 -- I think we want to keep those separate, would be my
3 feeling, but anyway, I think 190 needs to be referred.

4 All right. 216, requested fee for jury
5 trial. This -- yeah. "No jury trial should be had in a
6 civil suit unless written notice 30 days in advance."
7 This was a -- county court at law judges requested this,
8 and, you know, this means that in an appeal that they feel
9 like they may have to wait 30 days, and that's been --
10 that's a problem, and so we have changed Rule 754 to talk
11 about the demand for a jury and we'll get to 754 later,
12 but we need to exempt forcibles from this Rule 216, really
13 not just for county court at law; but, I mean, it
14 conflicts with Rule 739, too, so that's why we need to
15 exempt forcibles from 216 because we've got 739 and 754
16 which talk about it in our rules.

17 MR. GILSTRAP: Now, these exceptions that
18 you've got in 190 and 216 apply both -- they except out
19 forcibles both in the justice court and in the county
20 court.

21 HONORABLE TOM LAWRENCE: Right.

22 PROFESSOR CARLSON: And there was some, I
23 think, case law on this last year where the appellate
24 court was struggling with whether 216 would apply and --

25 HONORABLE TOM LAWRENCE: Yeah. Larry

1 probably knows about that. Wasn't there a law on --
2 wasn't there a case last year, and didn't you tell me
3 about that?

4 MR. FUCHS: Out of the Texarkana Court of
5 Appeals.

6 MR. NIEMANN: Texarkana Court.

7 HONORABLE TOM LAWRENCE: I don't remember
8 where, but it dealt with this, didn't it?

9 MR. FUCHS: With the tension here between
10 discovery and the right of jury trial.

11 MR. NIEMANN: And the court blew off speed
12 in favor of what they said was fairness.

13 MR. FUCHS: Right.

14 HONORABLE TOM LAWRENCE: So, anyway, the
15 subcommittee moves adoption of this.

16 MR. GILSTRAP: Quote "fairness," close
17 quote.

18 CHAIRMAN BABCOCK: Second on that?

19 PROFESSOR CARLSON: Second.

20 CHAIRMAN BABCOCK: Any discussion? Anybody
21 opposed? It passes unanimously, the Chair not voting.

22 MR. YELENOSKY: Can we have a running "Chair
23 not voting"?

24 CHAIRMAN BABCOCK: Everybody may be
25 wondering about this. Sarah Duncan said that it was

1 inappropriate for the Chair to vote unless there was a
2 tie.

3 MR. EDWARDS: You don't have to not vote
4 unless she's here.

5 CHAIRMAN BABCOCK: And also that if I was
6 voting I should declare what my vote was since everybody
7 else is raising their hand. So I told her that what I
8 would do is I wouldn't vote unless I really cared about
9 it, whether there was a tie or not, and then --

10 PROFESSOR CARLSON: I see.

11 CHAIRMAN BABCOCK: And I would declare what
12 my vote was.

13 HONORABLE TOM LAWRENCE: Okay. Rule 245 is
14 assignment of cases for trial. This is a similar problem
15 to 216, and the county court at law judges brought this to
16 our attention. We're exempting -- this 45-day notice,
17 "Court may set contested cases on written request of any
18 party or on the court's own motion with reasonable notice
19 of not less than 45 days to the parties of the first
20 setting for trial," and that, you know, once again,
21 doesn't fit with the timetables in either 739 or 754, so
22 we're exempting forcibles from 245 and then we're covering
23 it in 739 and 754.

24 HONORABLE JAN PATTERSON: I so move.

25 CHAIRMAN BABCOCK: Second?

1 MR. HAMILTON: Second.

2 CHAIRMAN BABCOCK: Any discussion? Anybody
3 opposed? Passes unanimously, Chair not voting.

4 HONORABLE TOM LAWRENCE: All right. The
5 next one we want to go to is 744. This is the demanding
6 of jury. We had some comments from Larry Niemann, and I
7 can't remember if anybody else made a comment, but we had
8 some comments about some problems, and this kind of goes
9 on with 747 also, we'll talk about in a second. But --
10 well, I tell you what. Let's just hold that 'til 747. I
11 don't think 744 needs to -- let me strike that. That's a
12 747 issue.

13 744, what we're doing here is we're cutting
14 out the jury fee of \$5 and saying "a jury fee as required
15 by law to request a jury trial in justice court." The
16 Legislature changes these fees from time to time, and then
17 we say, "This rule will not apply to trials conducted
18 under Rule 740," and we may need to see what happens on
19 740, but if you-all want to wait on 744 until we see what
20 we do on 740, we can. We had actually put this in there
21 because the way that we had drafted 740 now, both versions
22 the committee had, we would need to exclude 744 from that,
23 but we can hold on this if you want to and see what we do
24 on 740.

25 PROFESSOR CARLSON: Let me translate. When

1 we get to 740 on the possession bond and the issue is
2 whether we are going to have a jury trial or not, I
3 believe, to clarify.

4 CHAIRMAN BABCOCK: Makes sense to me to hold
5 it then.

6 HONORABLE TOM LAWRENCE: All right. We'll
7 hold on that one.

8 MR. EDWARDS: On 44, how does that five days
9 there fit in with what else we're talking about? Is
10 that -- am I missing something? 744 says you can have if
11 you make the request before --

12 HONORABLE TOM LAWRENCE: Well, this is
13 why -- yeah, this five days is what we're talking about on
14 the Rule 4. This is what we wanted to put in Rule 4.

15 MR. EDWARDS: You're talking about changing
16 the citation to say "excluding" and I'm thinking maybe on
17 the five days here you want to put the same language to
18 make it parallel with the citation language.

19 PROFESSOR CARLSON: We could do that.

20 HONORABLE TOM LAWRENCE: We can do that.
21 Let me make a note of that.

22 All right. Rule 745, we have talked about
23 this before, but we have not voted on it, and the current
24 rule says that you can reset a case for good cause shown,
25 support of affidavit, the trial may be postponed, not

1 exceeding six days; and that's a real problem for a lot of
2 the JPs because many JPs have their docket, their forcible
3 dockets, one day a week; and if you need to reset
4 something, you want to give the judge flexibility to reset
5 it from this Wednesday to the following Wednesday. So
6 that was one of the problems we wanted to fix in 745, is
7 to be able to reset it at least seven days.

8 The other thing that we looked at is that
9 there are often situations, and it comes up quite a bit,
10 where the plaintiff and the defendant may want to continue
11 the case. They may want more time, and that happens quite
12 a bit, more so maybe in commercial cases than residential;
13 but, you know, it's happening more and more frequently in
14 residential. So we wanted to give the opportunity to
15 reset it for a longer period of time.

16 The first sentence that we added is "upon a
17 showing of exceptional circumstances supported by
18 affidavit of either party or the court's own motion the
19 trial may be postponed for an additional seven-day
20 period." Then the next sentence, "The trial may be
21 postponed for a longer period upon the agreement of all
22 parties provided such agreement is made in writing and
23 filed with the court or the agreement is made in open
24 court."

25 Now, the Texas Apartment Association,

1 Houston Apartment Association, both objected to the second
2 sentence of 745 where the -- upon exceptional
3 circumstances it can be postponed for an additional
4 seven-day period. They feel like that that's just too
5 much -- too much in the way of a continuance, and the
6 subcommittee really had put that in there more for a -- we
7 have a situation where somebody wanted a continuance and
8 both parties don't agree, the court could on their own
9 motion or the motion of one party go ahead and reset it
10 for an additional seven-day period.

11 I think we would like to give the court the
12 flexibility to reset it when the court feels like there's
13 a genuine reason to do it. So maybe a way to do this is
14 to strike the second sentence which starts "Upon a showing
15 of exceptional circumstances" and then add some language
16 to the last sentence, "The trial may be postponed"; and
17 the language would read, "The trial may be postponed for a
18 longer period on the court's own motion," comma, "or upon
19 the agreement of all parties," etc., and then finish out
20 that sentence. That gives the court on its own motion or
21 the motion of only one party where it's not agreed to
22 continue it for a longer period of time. So that would be
23 a suggested change to that rule.

24 MS. SWEENEY: What if there are exceptional
25 circumstances?

1 HONORABLE TOM LAWRENCE: Well, I think the
2 court -- this says "for a longer period," so I think the
3 court on its own motion if it feels that -- or on the
4 motion of one party if it feels that there are
5 circumstances that justify it can continue it. One of
6 those circumstances could be discovery, you know, which we
7 have been discussing for a while.

8 MR. EDWARDS: Well, what you're really
9 saying is that upon -- that upon motion the court may
10 extend and the parties by agreement may extend.

11 HONORABLE TOM LAWRENCE: Right. That's
12 right.

13 MR. EDWARDS: That's all you're saying.

14 HONORABLE TOM LAWRENCE: That's right.

15 CHAIRMAN BABCOCK: Larry.

16 MR. NIEMANN: We agree with part of what
17 Judge Lawrence has said. We would prefer that you change
18 the first sentence to say "on the court's own motion or
19 upon good cause shown by affidavit of the parties the
20 trial may be postponed for seven days" and then continue
21 on, "The trial may be postponed by agreement of the
22 parties for a further period of time"; but the way Judge
23 Lawrence's language would read, it would allow the parties
24 to get a -- either party could have an affidavit and get a
25 seven-day postponement, then they could come in with a sob

1 story and get another postponement on the court's own
2 motion. We would rather the court's motion be concurrent
3 with the party's motion to postpone on affidavit.

4 CHAIRMAN BABCOCK: What you're saying is you
5 don't want the separate --

6 MR. NIEMANN: So either the court or the
7 parties can postpone it the first time for up to seven
8 days, but don't stack another seven days on top of the
9 original seven days.

10 MR. EDWARDS: By the court.

11 MR. NIEMANN: By the court.

12 MR. EDWARDS: You don't care if the parties
13 agree.

14 MR. NIEMANN: I don't care if the court
15 postpones it or an affidavit postpones it initially seven
16 days.

17 MR. EDWARDS: You don't care if the parties
18 postpone it however long.

19 MR. NIEMANN: And I don't care about the
20 parties however long. What I don't want is an affidavit
21 of the parties' postponement for seven days and then the
22 court's postponement for seven days; and, quite frankly,
23 we've had some judges in some part of the case -- in the
24 state that will postpone it for any drop of a pin.

25 MR. FUCHS: I think the landlords may rue

1 the day if you do that. I think Judge Lawrence's proposed
2 language giving flexibility to the justice court upon a
3 motion of the party or the court's own motion to grant a
4 second continuance is needed flexibility. I mean, there
5 are times when the landlord is ill and the court may --
6 the landlord may want the postponement. It cuts both
7 ways, and I think the flexibility is really something the
8 justice court ought to have, and if a justice of the peace
9 is not following the law, there are other remedies.

10 CHAIRMAN BABCOCK: Of course, the landlord
11 can always get a postponement by --

12 MR. NIEMANN: Well, there really are not.

13 CHAIRMAN BABCOCK: By nonsuiting.

14 HONORABLE TOM LAWRENCE: That's right.

15 CHAIRMAN BABCOCK: The landlord can get a
16 postponement by nonsuiting if they want to.

17 MR. FUCHS: That's correct.

18 MR. NIEMANN: That's right.

19 HONORABLE TOM LAWRENCE: I don't want to
20 take the discretion from the court because there are
21 situations where it's necessary to reset the case for a
22 longer period of time, and the judge needs to have that
23 discretion, and I just don't think you want to take that
24 discretion away from the court.

25 It doesn't -- I mean, as far as abuses by

1 individual judges, you can't write these rules in such a
2 way to prevent that. I mean, it's just not possible. I
3 mean, there are judges that are, you know, not following
4 the rules now that are very restrictive, so I don't think
5 we can legislate out misconduct.

6 MR. GILSTRAP: But this is a major change.
7 I mean, before it was 7 days and now it can be 14.

8 CHAIRMAN BABCOCK: Right. And the way this
9 is going to work, it seems to me, is even though a party
10 for the second seven-day period doesn't have the --
11 doesn't have the right to file their own motion, the only
12 reason the judge would do it on his own motion is because
13 he's gotten some feedback or some input from the parties.

14 HONORABLE TOM LAWRENCE: Or a conflict in
15 the judge's schedule.

16 CHAIRMAN BABCOCK: Or the judge may have a
17 conflict, but more typically it's going to be the
18 defendant is going to come in and say, "Judge, you know, I
19 know I can't file a motion here, but, boy, my dog died and
20 it ate my kid's homework before it died, and there's lots
21 of problems," and so you say on your own motion that,
22 "Okay, I'm going to give you another seven days." The way
23 this change is that's going to happen, right?

24 HONORABLE TOM LAWRENCE: Well, no, not --
25 well, I guess it could happen that way, but I would

1 propose taking out that second seven-day period. In other
2 words, the second sentence of 745, taking that out, and
3 then in the last sentence would write that in such a way
4 to give the court the ability to reset for a period.
5 Maybe we take out "longer period." Maybe that's the
6 stumbling block, to reset the case upon its own motion,
7 whatever it may be, and it may be it needs to be a one-day
8 or three-day or could be an eight-day. What if we took
9 out "longer period"? Would that --

10 CHAIRMAN BABCOCK: Well, for the agreement
11 you don't care.

12 HONORABLE TOM LAWRENCE: For the agreement
13 you don't care, but --

14 MR. GILSTRAP: But the "longer period" is
15 not in the second seven days, is it?

16 HONORABLE TOM LAWRENCE: Well, originally
17 the "longer period" referred to the seven days, meaning
18 longer than seven days, but if we take out the second
19 sentence then I am not sure we need to still have the
20 language "longer period." We could just say, "The trial
21 may be postponed," strike "for a longer period." Then
22 just say "may be postponed on the court's own motion or
23 upon the agreement of all parties," etc., and then finish
24 that out.

25 MR. NIEMANN: I must say, Judge, in some

1 part of the states the landlords are being abused by the
2 judges, and truly in The Valley we get settings like three
3 weeks from when they should be, and to -- you're going to
4 compound the problem if you give the judges absolute
5 discretion.

6 HONORABLE TOM LAWRENCE: Well, I want to
7 talk about that problem in 747.

8 MR. FUCHS: We can all recite litanies of
9 cases where it cuts both ways where the judges haven't
10 paid attention to the rules, and so on this second
11 continuance I think the court needs it. I thought you
12 were including not only the court's own motion but the
13 motion of a party the court would also have the discretion
14 to grant that second continuance.

15 HONORABLE TOM LAWRENCE: Well, here's how --

16 CHAIRMAN BABCOCK: That's how it's written
17 now, but I thought he was going to change it.

18 MR. FUCHS: Right. I understand.

19 HONORABLE TOM LAWRENCE: Here's how I am
20 envisioning that it would work, is that either party can
21 ask for the initial continuance not exceeding seven days.
22 Either party can ask for that.

23 MR. NIEMANN: With an affidavit for good
24 cause.

25 HONORABLE TOM LAWRENCE: Yeah. The only

1 change we're making there is that we're -- the current
2 rule is six. We're changing it to seven.

3 MR. NIEMANN: No problem.

4 HONORABLE TOM LAWRENCE: So that's the only
5 change.

6 MR. NEIMAN: We all agree.

7 HONORABLE TOM LAWRENCE: Then after that the
8 parties can agree on a longer -- on a different period, on
9 another continuance.

10 MR. NIEMANN: All agreed.

11 HONORABLE TOM LAWRENCE: Or -- and the
12 agreement must be in writing or made in open court or the
13 court on its own motion can reset the case for an
14 additional period, whatever that period may be. It may be
15 2 days, it may be 10 days.

16 MR. NIEMANN: That's where we disagree
17 because we have been so badly abused by judges who won't
18 set them soon.

19 HONORABLE TOM LAWRENCE: Well, I mean, it's
20 unfortunate that some judges are doing that, but I don't
21 -- I don't think we can correct all those ills.

22 MR. NIEMANN: But for sure you can put a day
23 limit and not give an open-ended, you know, set it a month
24 later in your discretion if you want to.

25 CHAIRMAN BABCOCK: Yeah. Larry's point is

1 that right now it's an abuse and not authorized by the
2 rules. If we put this in a rule, now he may feel abused,
3 but the judge will have authority under the rules to do
4 it.

5 MR. NIEMANN: And I will be legally abused.

6 CHAIRMAN BABCOCK: Right. He will be
7 legally abused.

8 MR. NIEMANN: With notice.

9 PROFESSOR CARLSON: So, Larry, what would be
10 the outside time limit you would advocate?

11 MR. NIEMANN: Well, I thought seven days in
12 Judge Lawrence's proposal was too long.

13 MR. GILSTRAP: Are you talking about for the
14 second or for the first?

15 MR. NIEMANN: Yes.

16 MR. GILSTRAP: For the second.

17 MR. DOGGETT: Mr. Chairman?

18 CHAIRMAN BABCOCK: Yeah, Robert.

19 MR. DOGGETT: As a practical matter, people
20 don't make a motion or talk about a continuance for seven
21 days. Let's say I'm going to need 10 up-front. In other
22 words, a judge is not going to want you to come back in
23 seven and hear it again. What happens on these cases is
24 the judge hears it, and if it's a day, they give you a
25 day. If it's seven, they give you seven.

1 In other words, what's happening now is the
2 judge resets it. I have never had a case where over the
3 landlord's objection you set it for a month. It's always
4 there's an agreement of the parties, because if the judge
5 wants it off his docket, DWOP it or, you know, one way or
6 the other; but the practical matter is I don't think it's
7 a good system necessarily as well to have this two-step
8 continuance when you want to have an eight-day.

9 I mean, if we're going to follow the rules,
10 I would have to first make one for seven and then come
11 back and plead with the judge for the extra day, and it
12 doesn't make sense. I would prefer it just in all cases
13 because it's so simple a motion of the court, a motion of
14 the parties, you make a motion for continuance, and the
15 court sets it. I mean, it's true in every other case.
16 Why can't we do it here?

17 I mean, judges, like we said, on both sides
18 can do things we don't like, but having this sort of three
19 sort of separate rules depending on when you ask for it
20 doesn't make sense. I think you just have a simple
21 continuance rule because that's what the judges all do.

22 CHAIRMAN BABCOCK: Yeah. Judge Lawrence,
23 could you or anybody, could you tell me what happens now
24 where you've got your initial continuance for six days or
25 whatever it is and then let's say somebody comes in and

1 says, "Judge, I really need another week"? I mean, under
2 the current rule is that happening now? Is the extra week
3 being granted?

4 HONORABLE TOM LAWRENCE: Well, according to
5 Larry Niemann I guess it is. I mean, I have not -- you
6 know, I don't see that, but anecdotally I'm hearing that
7 this is happening a lot around the state.

8 CHAIRMAN BABCOCK: I mean, I can see most
9 judges who feel like they have control of their docket
10 would think they had inherent power to reset it for
11 whenever they pleased.

12 HONORABLE TOM LAWRENCE: Well, not --

13 CHAIRMAN BABCOCK: This doesn't say you
14 can't set it. I mean, this rule as written doesn't say
15 you can't set it later.

16 HONORABLE TOM LAWRENCE: Well, the current
17 rule would seem to indicate there's only one six-day
18 continuance. I mean, that's the clear inference of the
19 current rule.

20 CHAIRMAN BABCOCK: Yeah. That's certainly
21 the implication.

22 MR. NIEMANN: Most judges do not abuse the
23 rules now, and I do not anticipate that most judges would
24 abuse whatever rule you write, but we are deathly afraid
25 that if you give in the rules a judge an open-ended

1 discretion to postpone it without time limits we will be
2 taken to the cleaners in some part of the states by judges
3 who don't like evictions in the first place and they're
4 giving us two- or three-week settings now when they should
5 be giving us seven-day settings, and we're going to end up
6 with months.

7 CHAIRMAN BABCOCK: And, Fred, you and Robert
8 think that that's a legitimate concern that Larry --

9 MR. FUCHS: That Larry -- to be honest with
10 you, I think it's overstated. I think that that's just --
11 I just think that's overstated. I'm not saying that there
12 aren't isolated examples, but it cuts both ways on real
13 short continuances for tenants, too, and I think this
14 proposal by subcommittee is a reasonable compromise.

15 MR. GILSTRAP: Here's a thought, Chip.

16 CHAIRMAN BABCOCK: Yeah, Frank.

17 MR. GILSTRAP: One way would be to be say,
18 look, we're not going to tilt the playing field either
19 way. We have an administrative reason to go from six to
20 seven days and leave it there, and that way we haven't
21 messed with the balance between landlord and tenant.

22 The second way would be to do that and say
23 that there could be an additional seven-day period for
24 exceptional circumstances and put some language in the
25 rule saying that it cannot be extended past that date,

1 period, and that would at least address the landlords'
2 concern about people going out more than, you know, two
3 and three weeks, at least put an iron 14-day cutoff there.

4 HONORABLE TOM LAWRENCE: Well, that's kind
5 of what the rule is now as proposed.

6 MR. NIEMANN: But there is no cutoff, and
7 that would be helpful.

8 HONORABLE TOM LAWRENCE: Well, there is a
9 cutoff for -- the second sentence is it's 14 days. It's
10 an initial -- excuse me, an initial seven days, and then
11 exceptional circumstances another seven days and then
12 that's it unless the parties agree.

13 MR. GILSTRAP: But, see, the point is --

14 MR. NIEMANN: But as the chairman says, all
15 it says is "may, "may," "may." It never says "may not."

16 CHAIRMAN BABCOCK: Right. That's the point.

17 MR. GILSTRAP: See, Tom, what he's saying
18 that it's not -- he's saying that it's not -- it doesn't
19 really come out expressly saying that's the last one, and
20 maybe we could kind of reach a compromise by putting --

21 HONORABLE TOM LAWRENCE: All right. Well,
22 what if we say at the second sentence "upon a showing of
23 exceptional circumstances in the form of affidavit of
24 either party or the court's own motion, the trial may not
25 be postponed for longer than an additional seven days."

1 MR. YELENOSKY: Well, you could do it in the
2 third sentence. You could say, "The trial may not be
3 postponed beyond that period except by agreement of the
4 parties."

5 CHAIRMAN BABCOCK: How does everybody feel
6 as that as a compromise? Is that --

7 MR. GILSTRAP: Let me say, the way you've
8 got this thing drawn now, the exceptional circumstances
9 can be in the affidavit or the court's own motion. The
10 court's own motion could be that, you know, "I've got to
11 play golf." You see what I'm saying?

12 HONORABLE TOM LAWRENCE: That's not
13 legitimate?

14 MR. GILSTRAP: Well, I don't know.

15 JUSTICE HECHT: So your point is?

16 MR. GILSTRAP: What you're intending is that
17 the exceptional circumstances only applies to the
18 affidavit. It doesn't apply to the court's own motion.

19 HONORABLE TOM LAWRENCE: Yes. Right.

20 PROFESSOR CARLSON: That was the intention.

21 HONORABLE TOM LAWRENCE: Yeah. Yeah.

22 MR. NIEMANN: So does that leave the door
23 open for the court to postpone it indefinitely?

24 MR. EDWARDS: No. Seven days.

25 HONORABLE TOM LAWRENCE: Well, not if we put

1 language in there that says that it may not be
2 postponed --

3 MR. EDWARDS: For more than seven days
4 without written agreement of both parties.

5 HONORABLE TOM LAWRENCE: Yeah.

6 PROFESSOR CARLSON: Frank suggested a third
7 sentence read "the trial or" -- maybe it was Steve.

8 MR. YELENOSKY: I just did. "The trial may
9 not be postponed for a longer period except upon agreement
10 of all parties," etc.

11 PROFESSOR CARLSON: And that makes it clear.

12 CHAIRMAN BABCOCK: Yeah. Can you guys work
13 on the language, but that's the concept?

14 HONORABLE TOM LAWRENCE: Yeah.

15 CHAIRMAN BABCOCK: Are we okay on the
16 concept? Yeah, Carl.

17 MR. HAMILTON: I have got a couple of
18 housekeeping things. Courts don't make motions, for one
19 thing, and this "if the agreement is made in open court,"
20 since that's not a court of record that doesn't seem to be
21 very meaningful unless it's put on the docket or
22 something, noted on the docket.

23 PROFESSOR CARLSON: We could add that.

24 HONORABLE TOM LAWRENCE: Well, I wanted to
25 -- what I'm trying to do there is say either you submit it

1 in writing or you do it in open court where everybody is
2 there, that you can't call in by phone and get this done,
3 that it's got to be -- the parties agree orally or the
4 parties agree in writing, I guess is what I'm trying to
5 say.

6 PROFESSOR CARLSON: Carl wants to say "made
7 in open court and noted on the docket" so that there is
8 some recordation of it.

9 MR. HAMILTON: Some record of it.

10 MR. GILSTRAP: Right.

11 HONORABLE TOM LAWRENCE: Okay.

12 PROFESSOR CARLSON: Seems reasonable.

13 HONORABLE TOM LAWRENCE: Okay. We can do
14 that.

15 MR. YELENOSKY: What about the "court's own
16 motion" objection that Carl had?

17 CHAIRMAN BABCOCK: You see that a lot, don't
18 you?

19 PROFESSOR CARLSON: We use that in --

20 HONORABLE TOM LAWRENCE: It happens all the
21 time.

22 MR. HAMILTON: I thought we were supposed to
23 say "on the court's own initiative."

24 CHAIRMAN BABCOCK: Yeah.

25 MR. GILSTRAP: Let's say "sua sponte." That

1 clears it up.

2 CHAIRMAN BABCOCK: In that sense we did
3 change that --

4 MR. YELENOSKY: When in doubt use Latin.

5 PROFESSOR CARLSON: "The court's own
6 initiative." All right.

7 JUSTICE HECHT: Yeah. We changed that in
8 the TRAP rules, as I recall.

9 CHAIRMAN BABCOCK: Changed it in the TRAP
10 rules.

11 HONORABLE TOM LAWRENCE: Okay. Done.

12 PROFESSOR CARLSON: I feel modernized.

13 HONORABLE TOM LAWRENCE: I do, too. Okay.

14 CHAIRMAN BABCOCK: You feel fresh?

15 PROFESSOR CARLSON: I feel fresh.

16 CHAIRMAN BABCOCK: Showered? Okay. What's
17 next?

18 HONORABLE TOM LAWRENCE: 746. 746 is
19 probably not something that affects the apartments too
20 much, but this is "except as provided in Rule 738 the only
21 issue in a forcible entry and detainer action under
22 Chapter 24, Texas Property Code, is the right to actual
23 possession and the merits of title shall not be
24 adjudicated."

25 Here's what happens. You're sitting there

1 trying a case and typically it's somebody is being evicted
2 from a house, a rent house, or it's going to be a
3 termination of an executory contract and the seller is
4 trying to get the purchaser out because the seller now
5 considers himself to be the landlord and the purchaser is
6 a tenant at sufferance, and the tenant comes in and says,
7 "No, you can't do that. You have no jurisdiction, JP.
8 There's a title issue here. There's a title dispute, and,
9 therefore, you need to decline jurisdiction."

10 Now, the case law -- and Elaine and I looked
11 at a lot of cases on this -- and the case law generally
12 says that if there is a real title issue then the JP court
13 doesn't have jurisdiction and needs to dismiss, they need
14 to go file a trespass to try title. But just because
15 someone says there is a title issue doesn't mean the court
16 automatically loses jurisdiction. There is allowed a
17 reasonable inquiry to determine if there really is a title
18 question, so we're not changing the rule itself that
19 appreciably from what the existing rule is. If you read
20 the existing rule, it says about the same thing, but we're
21 adding a comment to try to clarify this.

22 And this comes up a lot. Carl brought this
23 to our -- mentioned this I think at the January meeting,
24 and we went back and redrafted and put this comment in to
25 try to -- to try to clear that up, and I was talking to

1 Carl this morning, and I think Carl feels maybe we didn't
2 go far enough with it.

3 MR. HAMILTON: Yeah. I gave Judge Lawrence
4 some -- three case histories of a contractor that came to
5 me that -- real horror stories. One of them was he bought
6 property at a foreclosure sale and he tried to get the
7 tenant out, filed an F&D. Tenant came in, first of all,
8 to delay, asked for a jury, got a long delay for that.
9 Then he got his judgment, but the tenant appealed, went to
10 the court of appeals, went to county court then went to
11 the court of appeals, tried to go to the Supreme Court.

12 Finally came back having been affirmed. He
13 tried to get the writ of possession, and at that time the
14 tenant advised the court that he had filed a trespass to
15 try title suit in the district court, and he wouldn't
16 issue any writ. So then that went to the district court.
17 It took him five and a half years to get his property
18 without any rent, and he's got two or three stories like
19 that one involving a tax foreclosure, something else, but
20 what Judge Lawrence tells me is that the way they do it in
21 Houston, and this sounds like they ought to do it, is that
22 the JP ought to say, "Well, if there's a title dispute you
23 go to the district court and you have them issue an
24 injunction to stop me from ruling on the possession"
25 because the JPs just don't want to touch a case at all if

1 they are told there is a title dispute. They just say,
2 "Go handle it in the district court" and then that's the
3 end of it for months and months and months.

4 So I think this rule perhaps ought to be
5 specific and tell the JP that if they're advised that
6 there is a title issue pending in another court that the
7 tenant ought to go to that court and seek an injunction to
8 stop the JP court from adjudicating the possession issue.

9 HONORABLE TOM LAWRENCE: There are some JP
10 -- I'm sorry.

11 MR. HAMILTON: Go ahead.

12 HONORABLE TOM LAWRENCE: There are some JPs
13 that read Rule 746 and think that if the tenant even says
14 there is a title issue that the JP at that point has to
15 dismiss it for want of jurisdiction with no inquiry and
16 that be the end of it, and we're trying to clarify that's
17 not the law at all. The law is that the JP inquires. If
18 he thinks there is a legitimate title dispute, he
19 dismisses for want of jurisdiction. If he thinks there is
20 not, he says, "I have jurisdiction. I'm proceeding." If
21 you disagree, you need to go to district court, file your
22 suit, and tell the district court to enjoin the parties,
23 and that happens. I mean, there are times when the
24 district court does, in fact, enjoin the parties from
25 proceeding in the forcible and disagrees with the JP

1 court, and that's how it's supposed to work. So that's
2 what we're trying to say in the comment.

3 MR. GILSTRAP: But what is a genuine issue
4 of title? I mean, it looks to me like in Carl's
5 hypothetical, the guy -- yeah, there's an issue of title.
6 "I say it was an invalid foreclosure. He can't kick me
7 out." You know, I mean, that's an issue of title.

8 PROFESSOR CARLSON: And that goes to the
9 district court.

10 MR. GILSTRAP: I mean, just -- you know, I
11 mean, it's any issue. If they say that there is an issue
12 involving who owns the dirt then that's the end of it,
13 right?

14 MR. HAMILTON: The question here is whether
15 or not you want to have the JP decide whether the title
16 suit is just a frivolous suit to stay in the property or
17 whether it has a legitimate basis or whether you want the
18 district court to decide that and if the district court
19 thinks there is then let the district court enjoin the JP
20 court.

21 PROFESSOR CARLSON: I thought the inquiry
22 was if the allegations of title that are being asserted
23 would be determinative of who has right to possession then
24 the JP court is deprived of jurisdiction, but if the
25 questions pertaining to title would not be determinative

1 of who has the right to possession then it's not. There's
2 an Orange Laundry case vs. Rodriguez where the landlord
3 was trying to get the tenant out and the tenant said,
4 "Well, landlord, you own the laundry by purchasing it
5 through a bank, and the bank did not comply with the
6 Federal statute that said you can't hold real property for
7 more than five years," and so we're out of here, JP court,
8 in county court on a de novo appeal, and the appellate
9 court said, no, that determination of whether or not the
10 landlord had voidable title because it violated some
11 banking holding statute makes no difference on who has the
12 right to possession.

13 MR. GILSTRAP: Because the lease determines
14 that.

15 PROFESSOR CARLSON: Because between someone
16 with no title and someone with voidable title, obviously,
17 should be the superior right to possession, but there's
18 also cases where -- I think it's Sandoval vs. Rodriguez
19 where it was a purchase by a contract deed, and the seller
20 sold the property under contract of sale, contract of
21 deed, and the -- they were at odds. The purchaser said,
22 "We paid it all." The seller said, "No, you didn't. We
23 have title," and it was an FE&D, and the higher court
24 said, "This is a bona fide question of title. The
25 determination of those facts will necessarily adjudicate

1 as between the buyer and the seller under this contract
2 who will have the right to possession."

3 So I don't read it so much as, you know,
4 figuring out whether this is a bona fide allegation
5 process or the allegations that are being made, if
6 established, would be determinative of who has superior
7 right to possession.

8 MR. GILSTRAP: So in Carl's situation, the
9 JP court wouldn't have jurisdiction.

10 PROFESSOR CARLSON: Would not.

11 HONORABLE TOM LAWRENCE: Which situation?

12 MR. GILSTRAP: Where the guy bought it at
13 foreclosure sale and the prior owner is saying, "That
14 foreclosure sale is not valid. I'm still the owner."

15 HONORABLE TOM LAWRENCE: No. I disagree,
16 actually. I think that in that situation if someone -- if
17 the plaintiff in court has come in and said, "I have title
18 to this property. I have foreclosed. Here are my
19 documents. I filed it with the county clerk. I've got
20 title," and the defendant is saying, "No, they foreclosed
21 improperly," then I think the JP court has jurisdiction
22 there, and they need to go and file a trespass to try
23 title to set aside that foreclosure.

24 But I think the -- this is an extremely
25 complex area of the law, and what it comes down to is do

1 you want the JP court to any time a defendant says there
2 is a title question for the JP court to say, "King's X, I
3 dismiss for want of jurisdiction," and they not have a
4 remedy, even if it's not even remotely legitimate; or do
5 you want the JP court to have the discretion to make an
6 inquiry to determine if they do have jurisdiction? If
7 they're wrong then you can always go to district court and
8 get an injunction, and that's kind of what I think the law
9 ought to be. I mean, I think that's what the law is now,
10 but individual cases it gets very complicated sometimes
11 trying to figure out if there is a title dispute or
12 there's not a title dispute, but somebody has to make that
13 determination initially, and the JP court does it. If
14 somebody thinks they're wrong then they've got a quick
15 remedy to go to district court.

16 CHAIRMAN BABCOCK: What you're creating is a
17 de novo appeal to district court this way because what
18 you're saying is the JP court is going to say, "Look,
19 you've come to me. You've got a live case. I'm not going
20 to get involved in this title thing, so I'm exercising my
21 jurisdiction in favor of jurisdiction, but maybe I'm
22 wrong. So you're not going to appeal me de novo to county
23 court because that wouldn't work, but you can file an
24 action in district court, and if a district judge says I'm
25 wrong then he'll tell me that and he'll enjoin me."

1 That's the system you're setting up.

2 HONORABLE TOM LAWRENCE: I think that's what
3 the system is now.

4 MR. YELENOSKY: That's the current system,
5 but what Carl brought up is where there's already a suit
6 filed in district court; and I think, Carl, you were
7 suggesting the JP ought to go ahead even when there is a
8 suit filed in district court; and after listening to this
9 explication, even before Judge Lawrence said it was a very
10 complicated area of the law, do we really expect the JP to
11 be adjudicating possession while there's a pending case in
12 district court?

13 HONORABLE TOM LAWRENCE: Well, just because
14 a case has been filed --

15 MR. HAMILTON: Yeah.

16 HONORABLE TOM LAWRENCE: -- doesn't mean
17 that there is any merit to it, and somebody has to make
18 this determination on the possession issue, and it's got
19 to be done quickly.

20 MR. GILSTRAP: The way I've always thought
21 it should be, I'm not sure what the law is, is that the JP
22 decides who gets to stay on the property. You know, if he
23 has to decide ultimately, you know, whether or not it was
24 a valid foreclosure, he decides it; but that doesn't
25 ultimately determine who owns the land. That's decided in

1 district court. If you want to go to the district court,
2 get an injunction, and stop the JP from doing it or get
3 the district court to say who stays on the land, that's
4 fine; but the idea behind the forcible is we're going to
5 decide in a very short process who is on the land; and
6 that doesn't determine anything other than who's on the
7 land. Maybe it doesn't work that way, but it seems to me
8 that's kind of the sensible approach.

9 CHAIRMAN BABCOCK: Justice Hecht.

10 JUSTICE HECHT: If you -- if the justice
11 court decides improperly that this is an issue within its
12 jurisdiction then the tenant, whoever, somebody has to
13 appeal to the county court where not only that issue can
14 be raised but if the justice court did not have
15 jurisdiction, you can raise that issue. You can raise the
16 merits de novo in the appellate court.

17 HONORABLE TOM LAWRENCE: Yes, sir. You have
18 both a direct attack to appeal it and a collateral attack
19 to go to district court, or I guess county court, and get
20 an injunction. So you have two different ways to attack
21 the JP improperly assuming jurisdiction.

22 JUSTICE HECHT: Why should you have a
23 collateral attack?

24 HONORABLE TOM LAWRENCE: Well, because
25 that's the law.

1 PROFESSOR CARLSON: If the justice court
2 has, in fact, adjudicated title beyond its jurisdiction
3 it's a void judgment.

4 JUSTICE HECHT: Right. So you've got a
5 collateral attack.

6 PROFESSOR CARLSON: You can get that
7 enjoined in district court.

8 MR. GILSTRAP: And you can go back and file
9 another forcible. If you got kicked out on the forcible,
10 you go to district court, the district court says, "You
11 own the dirt." Then you go back to the JP and say "Look,
12 kick them out. I'm the owner."

13 MR. EDWARDS: If possession is really
14 important, the decision of a justice court which doesn't
15 have jurisdiction is nevertheless going to determine who
16 has to file a bond in the district court to secure
17 possession. Because if the person out of possession goes
18 to the district court, that person is going to have to
19 file a bond to kick somebody out; but if that possession
20 has been switched in justice court, as I understand it,
21 then the person who is dispossessed is going to have to
22 seek a writ in the district court for possession and post
23 the bond; and it's going to be a bond different from what
24 is going to be posted in the JP court. It's an entirely
25 different kind of bond when you start -- the equivalent of

1 replevying property, which is what you'd be doing.

2 HONORABLE TOM LAWRENCE: Well, that assumes,
3 as Justice Hecht is saying, that there has been no appeal
4 of the JP court judgment. I mean, there could be an
5 appeal of the JP court judgment in county court.

6 MR. EDWARDS: Well, if there's no
7 jurisdiction in the JP court, the only thing -- the only
8 jurisdiction in the county court is to dismiss for want of
9 prosecution. I mean, want of jurisdiction. Because the
10 only way you get an appeal there is if it came out of the
11 justice court, a court with jurisdiction.

12 JUSTICE HECHT: No. Because, I mean, if the
13 trial court does not have jurisdiction, the court of
14 appeals does not dismiss the appeal. The court of appeals
15 reverses the judgment of the trial court, and -- if it
16 were just an ordinary case.

17 MR. EDWARDS: That's what I'm saying.

18 JUSTICE HECHT: You file a case in district
19 court, and on the Sherman Act, and the judge renders a
20 judgment one way or the other, and somebody appeals, the
21 court of appeals doesn't say, "Well, there's no
22 jurisdiction under the Sherman Act claim and so,
23 therefore, we dismiss the appeal." They reverse it.

24 MR. EDWARDS: They reverse the case, but
25 we're saying the same thing with different words, but they

1 can't take the case and decide some other part of it.
2 They can't decide it if they would have jurisdiction
3 themselves and not the court below.

4 JUSTICE HECHT: Well, I'm not sure -- that's
5 what I'm trying to get at, is whether that's different in
6 here because the appellate proceeding, quote-unquote, is
7 de novo.

8 MR. GILSTRAP: But the appellate proceeding
9 is still only an adjudication of possession. It can never
10 be more than that.

11 JUSTICE HECHT: Well, that's what I was
12 asking.

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

14 JUSTICE HECHT: Can you add in more stuff at
15 the county court?

16 HONORABLE TOM LAWRENCE: Well, no, in a
17 forcible you're restricted to what 738 let's you sue for,
18 in the appeal of this one.

19 MR. GILSTRAP: He's saying could you go to
20 county court, appeal your forcible, and then say, "Okay,
21 and now I'm going to adjudicate title in the county
22 court"?

23 HONORABLE TOM LAWRENCE: No.

24 MR. GILSTRAP: My impression is you can't.

25 HONORABLE JAN PATTERSON: We have a rule

1 that speaks to that.

2 MR. EDWARDS: That's what I'm saying.
3 That's what I'm trying to say, is that you can't do
4 anything in the county court that you couldn't do in the
5 JP court. Your remedies are no greater in the county
6 court than in the JP court, so all that the county court
7 can do on appeal because of the JP court jurisdiction
8 prerequisite is send it back and reverse and remand.

9 MR. GILSTRAP: And that's one of the
10 reasons, for example, that the county court appeal is
11 fast-tracked, that type thing. It is really its own
12 special thing. It's not a regular county court case.

13 JUSTICE HECHT: So you can't add in the
14 title issues in the appeal of the justice court's
15 decision. You just have to bring a separate case.

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

17 MR. HAMILTON: I don't think the county
18 court would have jurisdiction of a title dispute.

19 PROFESSOR CARLSON: County court at law
20 would.

21 JUSTICE HECHT: County court at law.

22 MR. GILSTRAP: County court at law in some
23 counties might, you know, especially where they have
24 jurisdiction of a district court.

25 MR. HAMILTON: Well, all I'm saying is that

1 this is a complex problem for the JPs and --

2 CHAIRMAN BABCOCK: And it's too hard for us.

3 MR. HAMILTON: Yeah, and 9 times out of 10
4 they just say, "Well, I'm not going to mess with it.
5 You're over in the district court. Go over there. I'm
6 not going to issue any writ of possession." So we have
7 months of delay now simply by the filing of something that
8 challenges title, whether it's good, bad, or indifferent.

9 CHAIRMAN BABCOCK: So what you would say,
10 Carl, is that the nub of it is we ought to have a
11 statement in here that says you proceed until the district
12 court tells you not to?

13 MR. HAMILTON: Or some kind of guidelines
14 for the JPs to follow so they don't just back off and say,
15 "We're not going to do it."

16 PROFESSOR CARLSON: Isn't the reason why the
17 JP court and the constitutional county courts are not
18 given jurisdiction over title of the land is because most
19 of them are not attorneys?

20 MR. GILSTRAP: I mean, what if the question
21 involves a doctrine of worthier title or the rule in
22 Shelly's case or something like that.

23 MS. SWEENEY: Don't start with that. Don't
24 do it.

25 MR. GILSTRAP: I guess it's been abolished.

1 You know, something like that.

2 CHAIRMAN BABCOCK: Frank, what is the rule
3 in Shelly's case?

4 MS. SWEENEY: I'm out of here.

5 MR. GILSTRAP: I think it's been abolished
6 in Texas, so I erased it.

7 CHAIRMAN BABCOCK: Robert, did you have
8 something?

9 MR. DOGGETT: Yes, is that -- well, Shelly's
10 rule is -- getting back to his comment, though, the one
11 that brings up Shelly's case all the time is that deciding
12 just who owns the dirt, that's something else, and
13 possession, that's all the JP is doing. Obviously, you
14 decide possession, you're deciding who had title in the
15 case. I mean, it's tantamount to deciding who has title
16 when you decide to throw them out. So when you're moving
17 out a family, you are basically saying that, and that's
18 why the rule is the way it is. I think the comment as
19 written here does provide some guidance where there was
20 none before, or at least not without reading a lot of case
21 law.

22 So what this comment does is track what the
23 current law is and has been and complies with the
24 Constitution on JPs not deciding title, and I appreciate
25 the fact that if some lawyer files a frivolous case or

1 some pro se party files a frivolous case, but if we're
2 going to change all the rules now because of somebody
3 filing a frivolous case, I think, again, we can't take the
4 -- we can't write these rules for the frivolous case. If
5 there's frivolous cases being filed on questions of title,
6 there's other ways to deal with that, but to change all
7 the rules because of five bad frivolous cases filed in
8 Houston or whatever they are, I mean, a lawyer filing a
9 bad title case should be sanctioned. A pro se party, the
10 district judge ought to throw those out quickly, and
11 there's rules and law for that.

12 CHAIRMAN BABCOCK: Justice Hecht.

13 JUSTICE HECHT: Let me see -- I'm still
14 trying to make sure I understand this. If a question of
15 title is raised, someone asserts in the justice court that
16 this is really about title, the justice has to go ahead
17 and rule, right?

18 HONORABLE TOM LAWRENCE: Has to determine,
19 the JP has to determine if they have jurisdiction or not.

20 JUSTICE HECHT: But you can't just abate it,
21 or can you? And there seems to be -- that would be
22 something you wouldn't want to have happen.

23 HONORABLE TOM LAWRENCE: Well, not under the
24 current rule because you can't postpone it more than six
25 days, so you can't abate the suit to wait for the district

1 court to do something a year and a half down the road.

2 JUSTICE HECHT: So you're going to make a
3 ruling, and you're either going to rule on possession or
4 you're going to dismiss it for want of jurisdiction within
5 this specified time.

6 HONORABLE TOM LAWRENCE: Right.

7 JUSTICE HECHT: Then somebody can appeal
8 that to the county court, and they have the same --

9 MR. GILSTRAP: They have got to do the same
10 thing.

11 JUSTICE HECHT: They have got to do the same
12 thing.

13 HONORABLE TOM LAWRENCE: Right.

14 JUSTICE HECHT: And so the only problem is
15 what if somebody files a frivolous action in the court --

16 MR. GILSTRAP: Well, no, I think the problem
17 is worse. I think the problem that I see, and I think
18 this is a real problem, is, you know, you go down to the
19 JP and say, "Hey, JP, this is a title issue," and a lot of
20 times they're spooked. You know, "I'm not going to decide
21 a title issue. It says I shouldn't decide title issues."

22 JUSTICE HECHT: So he says, "Okay," but
23 you're still on a speedy track.

24 MR. GILSTRAP: No. He dismisses the case or
25 he --

1 JUSTICE HECHT: But you can appeal that.

2 MR. GILSTRAP: Okay. I see what you're
3 saying.

4 MR. YELENOSKY: And that isn't necessarily a
5 problem. I mean, we have been talking about where there
6 is a frivolous suit filed. The converse of that is that
7 there really is a title issue and no suit is yet filed in
8 the district court. I mean, you can have, in rural areas
9 in particular, lease purchase agreements; and there may,
10 in fact, be a title issue and the individual doesn't have
11 a lawyer yet, has not gone into district court. And, in
12 fact, the very first case I ever tried in a JP's office in
13 Buda was about that, and we got -- in fact, it was in her
14 living room. That's where they held it. She was not a
15 lawyer.

16 We successfully established that the
17 eviction was -- implicated a lease purchase issue, so she
18 did not grant the eviction. There was no lawsuit yet
19 filed. Now, I don't remember the particulars of that. I
20 don't know whether looking back at it now that was a
21 correct decision or not, but that clearly can happen.

22 So if you're going to say, as Carl is
23 suggesting, when the suit is filed the JP goes ahead until
24 the district court tells him otherwise, or her otherwise,
25 what are you going to say with respect to cases where it

1 is raised, yet no district court case is filed? I think
2 what the comment says is there's an inquiry into whether
3 it's a genuine issue or not.

4 CHAIRMAN BABCOCK: Let Justice Hecht --

5 JUSTICE HECHT: I've still got trouble
6 understanding this. When you get to county court and the
7 case was dismissed by the justice court, so you're
8 appealing and you say, "This case should not have been
9 dismissed because it really -- it does not involve title
10 issues. It only involves possession."

11 Now the county court rules on it and sends
12 it back to the justice court.

13 MR. GILSTRAP: I think he tries the case.

14 JUSTICE HECHT: He just adjudicates it.

15 MR. GILSTRAP: He just decides the case.

16 JUSTICE HECHT: But you have not been able
17 to raise the substantive claim in the county court in this
18 appeal.

19 HONORABLE TOM LAWRENCE: You mean the
20 underlying title dispute?

21 JUSTICE HECHT: Yeah.

22 PROFESSOR CARLSON: You can't add that in.

23 JUSTICE HECHT: You can't add that in. So
24 you go up on appeal to the court of appeals. This is now
25 your last -- this is your last step, and the court of

1 appeals rules one way or the other. It looks to me like
2 that's all res judicata of the claim that you never got to
3 bring, which was whatever the underlying title claim was.

4 HONORABLE TOM LAWRENCE: Well, no.

5 JUSTICE HECHT: You can't add it in.

6 HONORABLE TOM LAWRENCE: No. It's not res
7 judicata on anything. You know, one, there's Property
8 Code provisions that say that nothing that happens in a
9 forcible is a bar or estoppel to any other action, and the
10 JPs only have jurisdiction over the question of
11 possession. They don't even have jurisdiction over the
12 title issue --

13 JUSTICE HECHT: Right.

14 HONORABLE TOM LAWRENCE: -- itself. So I
15 think there's -- you know, and then in our rules we're
16 saying nothing here would give preclusive effect to
17 anything else. So I think we've got a -- we would have a
18 Supreme Court rule, if it's adopted; we have got a
19 property code provision; and then black letter law says
20 that we don't have jurisdiction over title anyway, so I
21 don't think it could be estopped.

22 JUSTICE HECHT: Why if you have an appeal on
23 this basis from the justice court to a court that now has
24 jurisdiction over the title issue shouldn't you have to
25 raise the title issue in that court?

1 HONORABLE TOM LAWRENCE: But what if that
2 court doesn't have jurisdiction?

3 JUSTICE HECHT: But it does.

4 HONORABLE TOM LAWRENCE: Well, no.

5 PROFESSOR CARLSON: What if you're in a
6 county court?

7 MR. HAMILTON: What if you're in a county
8 court?

9 JUSTICE HECHT: Constitutional county court.

10 HONORABLE TOM LAWRENCE: Yeah. A lot of
11 appeals are to a constitutional county court judge.

12 MR. GILSTRAP: But some will go to a court
13 that does have jurisdiction. I mean, you know, some go to
14 county court at law. The county court at law has the
15 jurisdiction of a district court because that's what the
16 statute says in that particular statute. The problem is,
17 is that -- I think the answer to that is that the forcible
18 procedure is its own animal. It's a fast-track issue
19 to -- proceeding to determine only possession, and it just
20 historically is never mixed in with the other county
21 cases.

22 CHAIRMAN BABCOCK: Well, let me ask you
23 this. Suppose, following Justice Hecht's hypothetical,
24 you're in JP court. The JP court says, "No, there's a
25 title issue here. You're dismissed." The landlord then

1 appeals de novo to county court. Let's say it's a county
2 court. It doesn't matter. It's a county court at law or
3 a constitutional county court. They appeal there, and
4 they say, "Look, we're entitled" -- Carl's client says,
5 "I'm entitled to possession. This guy hasn't paid rent in
6 a year." The defendant says -- the judge says, "Is that
7 right? You haven't paid rent in a year?"

8 "That's right. I haven't paid rent in a
9 year."

10 "Why not?"

11 "Well, because I own the place. I don't pay
12 rent to myself. I don't have to pay rent." All right.
13 The county court judge says, "Well, wait a minute. I
14 don't decide title. The only thing I'm deciding is
15 whether or not you've paid rent or not and you've admitted
16 that you haven't paid rent, so see ya. Vamoose, you're
17 out." Is that what happens?

18 HONORABLE TOM LAWRENCE: Well, it should.

19 MR. GILSTRAP: But it could. It could. No,
20 it could. I mean, he could decide. He could decide who
21 gets possession. He just may make the wrong decision.

22 HONORABLE TOM LAWRENCE: Well, I mean, if
23 there is a jurisdictional issue raised, the court ought to
24 rule on the jurisdictional issue first, so that's what the
25 county court should do. Even if the guy doesn't say "I

1 challenge your jurisdiction," the county court at law
2 judge ought to realize immediately that it's a
3 jurisdiction question and ought to decide that first.

4 JUSTICE HECHT: But if the county judge
5 decides that this is not a jurisdiction question and the
6 landlord is entitled to possession, that has to be the
7 judgment pretty quick and then the tenant has to appeal
8 that to the court of appeals; but, meanwhile, what you
9 would do, you're telling me, is now the tenant is
10 appealing, so the tenant would go to the district court
11 and enjoin the parties from changing the status quo.

12 HONORABLE TOM LAWRENCE: Well, you enjoin
13 the parties. You don't enjoin the court, as I understand
14 it, but the fact that a suit has been filed in district
15 court should not mean anything to the JP at all. That's
16 not a factor in whether or not he has jurisdiction, the
17 fact that a suit has been filed. He has to make an
18 independent determination. Now, what would affect the JP
19 is that --

20 PROFESSOR CARLSON: If there's a bona fide
21 question of title.

22 JUSTICE HECHT: Here's my problem. The
23 district court is now sitting here with a case that says
24 there's plainly jurisdiction, right or wrong. I mean,
25 either there's a title question or not, but the district

1 court has got jurisdiction of the case. So the district
2 court says, "Okay, I'm going to enjoin the parties."
3 Meanwhile, the tenant is pursuing an appeal of the county
4 court judgment to the court of appeals.

5 MR. GILSTRAP: In the forcible.

6 JUSTICE HECHT: And the court of appeals
7 says, "There's no title issue here. The justice court had
8 jurisdiction." Then doesn't that moot -- isn't that res
9 judicata of the -- the district court can't go behind
10 that.

11 MR. GILSTRAP: No, it can. Because in
12 forcibles you can't decide -- you know, that's not res
13 judicata. That's the point.

14 CHAIRMAN BABCOCK: No, but the whole issue
15 is whether or not there's a title -- there is a bona fide
16 title dispute, and the court of appeals has now ruled on
17 that.

18 MR. GILSTRAP: No. It's only ruled in the
19 forcible proceeding, and that can't control the district
20 court proceeding.

21 HONORABLE JAN PATTERSON: Essentially it's a
22 face off.

23 CHAIRMAN BABCOCK: Yeah.

24 HONORABLE JAN PATTERSON: I think the way
25 it's interpreted is on the face of the complaint type of

1 appeal on the basis of the facts alleged.

2 PROFESSOR CARLSON: What did you say, again,
3 Jan? I didn't hear the beginning.

4 HONORABLE JAN PATTERSON: I think the way
5 it's viewed is essentially on the face of the complaint
6 this is a possession matter, not a jurisdictional matter;
7 and so it more or less takes the facts as given; but I can
8 see where you would -- you could speak to title, but
9 you're not supposed to.

10 JUSTICE HECHT: But what I'm trying to
11 understand is -- I'm just trying to follow this along. If
12 the court of appeals says, "No, this is not a title case.
13 The justice court had jurisdiction, the county court had
14 jurisdiction on the forcible entry and detainer. That's
15 the end of that. Possession was awarded, and this is not
16 a title case." Now, the parties are still over in the
17 district court saying, "Oh, yes, this is a title case."

18 MR. GILSTRAP: The party is in the district
19 court litigating title. They are not litigating what was
20 necessarily the nature of the JP court case. You see what
21 I'm saying? They're just over there deciding title, and
22 once that title is decided then you may go back and file
23 another forcible and say, "Judge, look, it's been decided.
24 I'm entitled to possession."

25 JUSTICE HECHT: It just looks to me as if

1 the court of appeals in the appeal of the forcible case
2 can be inconsistent with the proceedings in the district
3 court which are involving the same issue and then it's
4 going to go to the court of appeals again, and I don't
5 know if it's the law of the case or what the problem be,
6 but you can't go to the Supreme Court from a forcible
7 case, so you could only go the other way. It seems to me
8 pretty difficult.

9 HONORABLE TOM LAWRENCE: Let me give you an
10 example. What if -- what if the defendant at the JP court
11 level and county court level says, "But they did the
12 foreclosure wrong," but they have not litigated that
13 issue, so on the face of all the documents and the face of
14 the record it appears there's been a valid foreclosure,
15 everything has been filed with the county clerk,
16 everything looks to be okay on the face of the documents.
17 So the JP says, "It looks fine to me." The county court
18 said, "It looks fine to me." There's no title question to
19 me," and so they make that decision.

20 The district court may get into the facts
21 behind things that are not apparent on the face. They may
22 find that there was a -- there is a title question because
23 they need to set aside the foreclosure, but that's not
24 ever going to be litigated anywhere because on the face of
25 it it's going to look like everything is fine, and it's

1 going to go up to the court of appeals looking like that.

2 JUSTICE HECHT: Well, let me give you
3 another example. You file in the justice court and then
4 the justice court says, "This is a title question." And
5 you appeal that to the county judge, the county court, and
6 the county court agrees, and you appeal to the court of
7 appeals, and the court of appeals affirms the dismissal of
8 the case for want of jurisdiction because the issue
9 involves title.

10 Meanwhile, or afterward, you've gone to the
11 district court now and brought the title issue, and the
12 district court says, "No, this is not a title question."
13 Then you go back to the justice court now armed with this
14 new judgment or --

15 MR. FUCHS: But in that case, Justice Hecht,
16 the district court would decide title. It may decide --
17 it's going to decide one way or the other title.

18 HONORABLE JAN PATTERSON: And that would be
19 law of the case.

20 MR. GILSTRAP: I think that's it.

21 JUSTICE HECHT: But then do you go back, now
22 that you know what the -- and say that's all affirmed.
23 Then you go back to the justice court and say the justice
24 court and the court of appeals case was wrong to start
25 with and this really was a title case and, therefore --

1 MR. YELENOSKY: Well, you don't even have to
2 discuss that. You go in and title is established, right?

3 HONORABLE TOM LAWRENCE: Yeah. Don't you
4 get a writ of possession?

5 MR. GILSTRAP: See, I think what the mistake
6 we're making is to equate the issue that's going to be
7 decided by the -- in the FED appeal, that is, whether or
8 not there's a title question with what's being decided
9 over in the district. The district court is probably not
10 going to decide whether or not there's a title question.
11 It's going to decide who owns the property.

12 So maybe that's how we get out of it, but I
13 mean, I think this does point up that this is a horribly
14 vague area; and if I was a JP I would probably say, "I
15 don't want to decide it either." I mean, it's -- I don't
16 think anybody understands this, and maybe -- you know,
17 maybe there is some understanding that's historic that's
18 just alluded us because we don't know what it is or maybe
19 it's something that needs further examination, but I'm not
20 satisfied by this at all. I mean, Carl's -- the same
21 thing that happened to Carl's client can happen, and it
22 may be the right thing to happen under the rules.

23 CHAIRMAN BABCOCK: Well, Judge Lawrence's
24 fix, though, is to put in language here that says -- that
25 directs the JP to go forward unless enjoined, right?

1 MR. DOGGETT: No. It doesn't say that.

2 CHAIRMAN BABCOCK: That's not what this
3 says, but I thought that's what you were saying.

4 MR. YELENOSKY: Carl is saying that.

5 HONORABLE TOM LAWRENCE: Well, what I'm
6 saying is that the comment tells them that they need to
7 make the determination as to jurisdiction and they can
8 look into the issues to determine if there is a legitimate
9 title question or not. The fact that a suit has been
10 filed in district court really doesn't have any bearing on
11 what the JP does. You don't know what's going to happen,
12 you don't know if it's meritorious or frivolous.

13 What would have a bearing is if the district
14 court judge enjoins the parties from proceeding. You
15 know, that would obviously stop the -- stop the JP court
16 from doing anything, and that does happen from time to
17 time. There's case law on that, but what we're saying is
18 that the existing law puts the burden on the JPs to make
19 this initial determination of jurisdiction. We're trying
20 to beef up the comment so it gives them more of an
21 understanding of what the current status of the case law
22 is. A lot of this language is a direct quote from the
23 existing -- direct quote from the existing case law.

24 MR. YELENOSKY: Judge Lawrence, you would
25 agree then there can't be a default, as Carl suggested,

1 about the JP going forward unless enjoined because it's
2 possible that the JP should go forward while a case is
3 filed in district court and it's possible that a JP could
4 determine on his or her own that she or he should not go
5 forward even though a lawsuit has not been filed.

6 HONORABLE TOM LAWRENCE: Absolutely.

7 MR. YELENOSKY: So you would agree that we
8 can't have a default that says the JP must continue unless
9 enjoined by the district court, which is what Chip was
10 referring to.

11 HONORABLE TOM LAWRENCE: Yeah.

12 MR. GILSTRAP: Here's what I think -- here's
13 what I think we're doing. We are addressing the situation
14 where the JP just gets spooked when someone says "title,"
15 and we're saying, "No, JP, go back and look and make sure
16 that this issue is, quote, genuine or legitimate." Now,
17 ultimately that's not very satisfactory to me, but I think
18 it does advance the ball some. It does tell them that you
19 can't -- you can't throw up your hands if someone comes in
20 and says "title issue." You've got to make a further
21 inquiry. Now, maybe that's all we can do here.

22 PROFESSOR CARLSON: I think that's all we
23 can do.

24 HONORABLE TOM LAWRENCE: We move the
25 adoption.

1 CHAIRMAN BABCOCK: After extended discussion
2 is there a second?

3 HONORABLE TOM LAWRENCE: Carl, did you want
4 to do something more with the rule itself? I don't know
5 if you ever made a motion on that.

6 MR. HAMILTON: I haven't had a chance to
7 really study it or think about it. There's two things
8 that happen in the JP court. One is that the tenant may
9 come in and actually raise a title issue in the JP court
10 and try to get that before the court and then the court
11 says, "No, this is title. I can't decide that." And the
12 other thing the tenant does is just come in and say,
13 "Judge, you can't proceed here because I have a lawsuit
14 pending in district court that involves title"; and
15 there's no issue actually brought before the JP court,
16 just the knowledge that there's a pending suit in JP
17 court; and then most of those, both cases like that, the
18 JP usually says, "Well, it's title. I can't do anything,
19 so I can't issue a writ. I can't go forward. I have no
20 jurisdiction."

21 HONORABLE TOM LAWRENCE: What about a
22 sentence -- would this satisfy, if we put a sentence in
23 that said the mere filing of an action in district court
24 is not enough in and of itself to defeat the jurisdiction,
25 something to that effect?

1 MR. YELENOSKY: Fred.

2 MR. FUCHS: There's also a recent case out
3 of Dallas. There was no petition for the Supreme Court,
4 Rice vs. Penny, and in your very scenario where there was
5 a wrongful foreclosure suit filed in district court, and
6 the tenant tried -- or the occupant tried to defeat the
7 jurisdiction of the justice and the county court saying
8 there was a genuine title issue, and the court said --
9 Dallas Court of Appeals said, and I think correctly, that,
10 no, there's no really genuine issue of title here, and you
11 can still adjudicate here the issue of possession, and I
12 think the comment by the subcommittee by -- really, really
13 is correct on the law, and I'm just not sure there's more
14 that you can do here.

15 MR. YELENOSKY: Well, he wants to add a
16 sentence that would say explicitly the mere filing or fact
17 that a contest to title is pending in district court
18 doesn't preclude the JP from going forward or making his
19 own decision about whether there is a genuine issue of
20 title. That's not in the comment right now, and that's
21 what they're proposing.

22 MR. FUCHS: Maybe you could reference some
23 of the appellate court cases are over the -- all around on
24 this issue. Maybe you should reference a couple of the
25 correct case law decisions in here.

1 MR. HAMILTON: I think that would help.

2 HONORABLE TOM LAWRENCE: What do you think
3 about that?

4 PROFESSOR CARLSON: I am not wild about
5 putting that in.

6 MR. EDWARDS: Does the court that has
7 jurisdiction over the title issue have the power to stay
8 the proceedings on the possession issue?

9 HONORABLE TOM LAWRENCE: Sure.

10 MR. GILSTRAP: Stay the parties. They could
11 stay the parties.

12 HONORABLE TOM LAWRENCE: Stay the parties,
13 not the court.

14 MR. GILSTRAP: They can't enjoin the JP.
15 They can enjoin the litigants.

16 MR. EDWARDS: The question is do they have
17 the power to stay the proceedings?

18 HONORABLE TOM LAWRENCE: Well, yes, by
19 prohibiting the litigants from going forward.

20 MR. EDWARDS: Well, that doesn't stop the
21 court from going forward.

22 JUSTICE HECHT: No, they don't have that.

23 MR. EDWARDS: Where would that power come?

24 HONORABLE TOM LAWRENCE: I don't think a JP
25 is going to go forward once the district court has

1 enjoined the parties from proceeding. I think that's
2 going to be it, so --

3 MR. EDWARDS: Well, the parties may not do a
4 thing.

5 MR. HAMILTON: You know, really the way this
6 thing ought to be solved is that there ought to be a
7 provision that if there is, in fact, title dispute, then
8 there has to be a suit filed in the district court and
9 then if that's the case then this whole problem ought to
10 somehow be quickly referred to the district court for a
11 speedy solution over possession and not just let it go
12 through the regular --

13 MR. YELENOSKY: But that doesn't solve the
14 problem you had. There was a case filed in district
15 court, and it creates a problem for everybody else because
16 we have these expedited proceedings for eviction. So
17 you're in your house, you think you own it, you get a
18 notice of eviction, and you've got to have a district
19 court suit filed within the four days.

20 HONORABLE TOM LAWRENCE: Yeah, and the
21 landlord is going to say, "Why should I have to go to a
22 district court and file a trespass to try title when I own
23 this property? There is no legitimate dispute. I
24 shouldn't have to go to district court and litigate that."

25 PROFESSOR CARLSON: He's already there if

1 the tenant files a suit.

2 HONORABLE TOM LAWRENCE: No, the tenant --
3 it's not a meritorious defense on the part of a tenant.
4 They're just saying there's a title issue and there's
5 really not, and the tenant is not about to go to district
6 court and waste their money filing a trespass to try title
7 suit.

8 MR. HAMILTON: That's what I'm saying.

9 HONORABLE TOM LAWRENCE: You can't just say
10 automatically make somebody go file in district court if
11 the issue is raised.

12 MR. HAMILTON: That's what I'm saying. If
13 the tenant comes into JP court and tries to raise a title
14 issue there, it can't do it. The JP court has no
15 jurisdiction; but if the tenant comes into JP court and
16 says, "I have filed a suit in district court because there
17 is a legitimate title dispute," then the JP court can't
18 proceed, so the matter ought to be quickly referred
19 somehow or dealt with in the JP court on the question of
20 possession, pending the title dispute, and we ought to get
21 some kind of a speedy resolution in the district court.
22 Tenant has already filed a suit there.

23 MR. YELENOSKY: Yeah, but you can't require
24 -- I mean, somebody could file an eviction against me in
25 my home right now, and you're saying that if I went to JP

1 court I couldn't say, "This is a title matter," unless I
2 file a suit?

3 MR. HAMILTON: Well, if you say that it's a
4 title matter the JP can't --

5 MR. YELENOSKY: Well, it's only a title
6 matter because this guy is trying to evict me from my own
7 home. I mean, I have no interest in going to district
8 court. I'm just interested in deflecting the eviction
9 from my own home. I think, I mean, what you started with
10 and I think would help you is where there is a district
11 court case pending to have a comment. Fred suggested
12 citing the case law, but I think it's pretty clear what
13 the law is. We might as well add that comment in there
14 saying the existence of a case disputing title or the
15 filing of a case disputing title does not in and of itself
16 preclude the JP court from going forward or something to
17 that effect. That applies to the problem you were having
18 where there was a district court case pending and the JP
19 threw up his hands and said, "I am not going forward
20 because it's pending." Let's not create a problem the
21 other way, which is the only way you can convince the JP
22 there's a genuine issue of title is to have a case filed.

23 CHAIRMAN BABCOCK: Elaine, would a sentence
24 like that be offensive?

25 PROFESSOR CARLSON: Yes.

1 MR. EDWARDS: Well, the problem is --

2 MR. YELENOSKY: I'm sorry. I didn't mean to
3 offend.

4 MR. EDWARDS: -- if the possessor really has
5 title and the JP rules against him, you're putting the
6 possessor who really has title in the position of having
7 to post a bond to keep his own property.

8 MR. YELENOSKY: Right.

9 MR. EDWARDS: Well, in the suit in the court
10 with jurisdiction of the title issue they have the power
11 of sequestration where they put up a bond not only for the
12 costs and for the rent that's involved but also for any
13 damage that might occur to the property while it's in the
14 hands of the person in possession.

15 PROFESSOR CARLSON: Well, I think the mere
16 filing of a district court proceeding asserting title,
17 allegations of fact going to title that would be
18 determinative of possession does deprive the JP court of
19 jurisdiction.

20 MR. YELENOSKY: The mere filing, does?

21 PROFESSOR CARLSON: Uh-huh, of pleadings
22 that make those assertions.

23 MR. YELENOSKY: Well, Fred and I are arguing
24 against interests again, but --

25 MR. FUCHS: I think under the Dallas case,

1 Rice vs. Penny, that that's -- the JP court looks at
2 whether there's a genuine issue of title or whether it's
3 just --

4 PROFESSOR CARLSON: Well, I think the JP can
5 make that inquiry, but it doesn't have jurisdiction if the
6 allegations --

7 MR. FUCHS: Oh, no, no, determines, right, I
8 agree. It determines there is a genuine issue.

9 PROFESSOR CARLSON: Right.

10 MR. FUCHS: But it could say there is no
11 genuine issue.

12 PROFESSOR CARLSON: But I guess where I'm
13 kind of differing with what I'm hearing, "genuine issue"
14 meaning the JP believes the people or is "genuine issue"
15 these are allegations that if supportable would --

16 MR. GILSTRAP: You're begging the question
17 of what the genuine issue is.

18 PROFESSOR CARLSON: Right.

19 MR. GILSTRAP: And what that really is, I
20 think we said earlier, as I said, is that's telling the JP
21 to look a little bit below the surface. I mean, that's
22 all it can mean.

23 PROFESSOR CARLSON: But the genuine issue of
24 title doesn't mean that the JP court finds that your
25 allegations are true.

1 MR. YELENOSKY: No.

2 MR. GILSTRAP: No.

3 PROFESSOR CARLSON: It can't be that.

4 MR. YELENOSKY: No, no. It's not that. No
5 one is suggesting that.

6 PROFESSOR CARLSON: So what is it?

7 MR. GILSTRAP: It means a bona fide dispute.

8 PROFESSOR CARLSON: That's right, and aren't
9 pleadings a bona fide setting for factual allegations --

10 MR. YELENOSKY: According to the Rice case.

11 CHAIRMAN BABCOCK: You're almost setting up
12 a 12(b)(6) standard. The JP looks at the district court
13 pleadings, takes them all, accepts them as true, and if
14 all these pleadings accepted as true create a title issue
15 then he's done.

16 MR. GILSTRAP: What if they're lying? What
17 if it's just a totally specious suit and it's a suit to
18 keep the JP court from acting?

19 MS. SWEENEY: That happens -- that potential
20 exists in every pleading in every case.

21 MR. YELENOSKY: Well, what does the Rice
22 case say?

23 MR. FUCHS: Well, it gets back to genuine
24 issue of title. Just the mere filing of a wrongful
25 foreclosure suit doesn't deprive the justice court or the

1 county court of jurisdiction in a forcible. You have to
2 decide whether there is a genuine issue of title. I think
3 the subcommittee's comment to the rule solves the problem.
4 Or gives some guidance, because it's not going to solve
5 the problem because it's a thorny issue.

6 PROFESSOR CARLSON: It's not going to solve
7 the problem. I agree.

8 MR. GILSTRAP: What happens in this scenario
9 is -- is I get my house foreclosed and I go down and then
10 the landlord files -- excuse me, the purchaser, punitive
11 purchaser, goes and files a forcible against me and then I
12 go to district court and file a suit saying wrongful
13 foreclosure and that shuts everything down for three
14 years.

15 HONORABLE TOM LAWRENCE: One thing we
16 haven't talked about, which I think is important, is that
17 the JPs have original exclusive jurisdiction over this
18 question of possession, and there's a mandate in most of
19 these cases that we've -- and the rules, I think, mandate
20 that when the case is filed we've got to hear it, and
21 we've got to make the decision. I mean, there is a duty
22 on the part of a JP to go forward with this if we have
23 jurisdiction.

24 We can't just sit back and wait for a
25 district court to do something. We've got a mandate to go

1 forward and speedily try these cases, so there's got to be
2 a quick solution; and I think, you know, it puts a burden
3 on the JPs, many of whom are not attorneys, to make a
4 difficult decision; but that's where -- that's where the
5 law and the Legislature and the Constitution have put the
6 burden on the JPs to do that; and this is the best the
7 subcommittee can come up with.

8 CHAIRMAN BABCOCK: There's been a motion
9 made to --

10 PROFESSOR CARLSON: Second.

11 MR. EDWARDS: One other thing, if a trespass
12 to try title suit is filed, the rules specifically
13 provide, don't they, that the person in possession will
14 remain in possession, the defendant or whoever is in
15 possession will remain in possession? Isn't that what it
16 says?

17 HONORABLE TOM LAWRENCE: I don't know.

18 PROFESSOR CARLSON: I don't know.

19 MR. YELENOSKY: I don't know, but I second
20 the motion.

21 MR. EDWARDS: If that's the case then the
22 notion that the JPs have exclusive jurisdiction of
23 possession isn't right.

24 HONORABLE TOM LAWRENCE: No, it is right. I
25 mean, that's absolute.

1 MR. EDWARDS: Well --

2 HONORABLE TOM LAWRENCE: It doesn't matter
3 if --

4 MR. EDWARDS: Well, then there's something
5 wrong with the rules.

6 HONORABLE TOM LAWRENCE: Well, all I can
7 tell you is unless somebody enjoins the cause of action
8 that's going on, the JP has the ability to issue a writ of
9 possession, regardless of what's happening in the other
10 case. Now, I can see that in theory you could have a JP
11 court render a writ of possession for a plaintiff,
12 defendant prevail in a trespass to try title, and have
13 district court render a writ of possession for that, you
14 know, for that prevailing tenant in essence undoing it.
15 That could certainly happen under the rules. But the JP
16 court does not stop their proceedings just because of
17 something filed in district court, and there's a lot of
18 law on that.

19 MR. EDWARDS: Rule 784, "The defendant in
20 the action shall be the person in possession if the
21 premises are occupied."

22 MR. GILSTRAP: Yeah. That gets into the
23 nature, though, of the trespass to try title suit.

24 MR. EDWARDS: I know it does, but --

25 MR. GILSTRAP: It's not technically a suit

1 to determine title. It's a trespass to determine title.

2 MR. EDWARDS: I understand that.

3 MR. GILSTRAP: It's a lot different.

4 MR. EDWARDS: But if you've got a trespass
5 to try title suit pending, do I hear that the JP can come
6 in and change this rule?

7 MR. YELENOSKY: Yes. Well, not change the
8 rule because the rule doesn't say they shall remain in
9 possession. It just says they are in possession. So a
10 suit is filed, they're in possession at that time.

11 MR. EDWARDS: Okay.

12 MR. YELENOSKY: That rule doesn't say they
13 have to remain in possession. A JP could change it.

14 MR. EDWARDS: Okay.

15 MR. GILSTRAP: And what's in possession
16 under a TTT title is -- you know, that goes like that
17 notion ouster, and it's a very technical thing that
18 technically gives the court the jurisdiction that --

19 MR. EDWARDS: I am no expert on TTT, I
20 guarantee you.

21 CHAIRMAN BABCOCK: Okay. We've got a motion
22 that's been seconded and actually, Stephen, yours is a
23 third, so everybody in favor of proposed Rule 746 with the
24 comment raise your hand.

25 All opposed? It passes unanimously, the

1 Chair not voting.

2 MR. EDWARDS: I didn't vote either because I
3 still don't understand it.

4 CHAIRMAN BABCOCK: Note that Mr. Edwards did
5 not vote, either.

6 MR. GILSTRAP: And Justice Patterson.

7 HONORABLE TOM LAWRENCE: Rule 747 is one
8 that I would like to not vote on today and refer this to
9 ad hoc, and the reason --

10 MS. SWEENEY: Second. Sorry.

11 HONORABLE TOM LAWRENCE: 747 is one that I
12 would suggest that we hold on and let the ad hoc and the
13 reason is -- Larry, you want to explain the problem with
14 not necessarily having speedy trials always in your
15 comment? I think that was your comment.

16 MR. NIEMANN: On the jury trial?

17 HONORABLE TOM LAWRENCE: Yeah, about how
18 trials don't always occur as fast as they could, and I
19 think Carl had some comments on that, too.

20 MR. NIEMANN: This is another situation
21 where I don't know the solution, but I'll give you an
22 example. In Houston, Texas, when a jury is requested, it
23 could be a month before a jury is impaneled and sent to
24 the JP court sometimes. Now, that's the extreme example,
25 but two weeks is typical, three weeks is common, and

1 there's nothing in the rules to put the pressure on the
2 central docket administrators to move with speed to get a
3 jury panel to the court. Am I stating that correctly,
4 Judge?

5 HONORABLE TOM LAWRENCE: Well, a month would
6 be rare, but two weeks is not uncommon at all. Three
7 weeks is not atypical.

8 MS. SWEENEY: You-all are talking about just
9 mechanically for the central clerk to send over a panel or
10 what?

11 MR. NIEMANN: Yeah.

12 HONORABLE TOM LAWRENCE: No, it's a whole
13 process, I think. It's the process of, one, you've got
14 this request for a jury. Where do you fit this jury trial
15 in an already very busy trial schedule, and, two, the
16 mechanics, most of the JPs get their jurors through -- the
17 only ones that use the central jury docket are the JPs
18 that have courts downtown. Most of the -- or the other
19 JPs out in the suburbs will notify the constable, who
20 sends out letters telling people to report for jury duty,
21 so you figure, you know, at least going to be a delay of a
22 week or so.

23 If I tell the constable 4:30 in the
24 afternoon to send out notices for a jury trial, then the
25 earliest it's going to get out is the next business day,

1 whenever that is. And you've got to give, you know, a
2 couple days for mail service, and you've got to give some
3 time to -- you know, some notice for them to be able to
4 come in, and then you've got to fit it into a trial
5 docket, so it's not unusual to take at least two weeks to
6 get a jury docket, unless you just happen to have a docket
7 coming up that you can tack this onto.

8 So it -- there's a -- there are built in
9 delays inherent in the system, but I think what Larry is
10 also talking about is that there needs to be some
11 mechanism to put a time limit on how soon you've got to
12 get these things tried because the landlords have a right
13 to get these things heard in a timely manner. So that's
14 the struggle.

15 MS. SWEENEY: But you mean that you-all only
16 request juries on an ad hoc basis? There's no sort of,
17 gee, we've got an FED docket every Wednesday, we need to
18 have juries on standby for trial?

19 HONORABLE TOM LAWRENCE: No. Nobody does
20 that. I don't know any JP court in the state that just
21 says, "Bring me jurors in because I may have a jury
22 docket. I may need it for a jury trial next Wednesday."
23 Typically you set jury dockets on a certain day and you
24 try civil and criminal, maybe civil one week and criminal
25 the next.

1 MS. SWEENEY: Okay. But if you're trying to
2 juries most weeks then, I mean, you don't have to --
3 they're fungible. You don't have to have a specific jury
4 requested, you know, this is the jury for, you know,
5 Lincoln Properties vs. Gonzales and we're sending out
6 letters to come in for Lincoln Properties vs. Gonzales. I
7 mean, I don't understand. The district courts and the
8 county courts and every court I've ever seen know they are
9 going to be trying jury cases and they have juries come
10 in.

11 HONORABLE TOM LAWRENCE: Well, I don't know
12 I'm going to be trying jury cases.

13 MS. SWEENEY: But you try one most weeks?

14 HONORABLE TOM LAWRENCE: Well, I do. I have
15 a busy trial schedule, but I don't necessarily have a jury
16 docket set every week. I may not need any jury. I may be
17 current and nothing is ready to be set, so for the next
18 week I don't have a jury docket because I don't need one.
19 So somebody asks for a jury trial then I'm going to be
20 full the next week. I can't fit it in. It may be two
21 weeks later is the earliest available opportunity I can
22 set that for a jury trial.

23 Some judges may have jury trials one day a
24 month because that's all they need, that's all they have.
25 So when you get a forcible, which is supposed to take

1 precedence, you either have to get a special jury in to
2 hear that more quickly or you add it to your next
3 available docket. Now, the JPs that are downtown are in a
4 little bit different situation. They just say, "Oh, I've
5 got a jury trial. Okay. Let me tell the central jury
6 pool to send me over a panel," and they can do it, but
7 everybody else can't do that. We have to depend on the
8 constables getting mail service out.

9 CHAIRMAN BABCOCK: Larry.

10 MR. NIEMANN: One of the big problems I have
11 with the language in the draft before you is the phrase
12 "as soon as reasonably possible," and I'm afraid that that
13 is another Mack truck size loophole that some judges would
14 use to delay three weeks or a month. Judge Lawrence has
15 told me of situations where without that language the
16 simple jury docket is very slow.

17 HONORABLE TOM LAWRENCE: I'm not sure where
18 you -- we're talking about 747.

19 MR. NIEMANN: Oh, I'm looking at the wrong
20 one, huh? Okay.

21 CHAIRMAN BABCOCK: You're not proposing any
22 changes in 747, are you?

23 HONORABLE TOM LAWRENCE: No. The
24 subcommittee is not proposing a change. However, what I'm
25 saying is that Larry Niemann and, I think, Howard

1 Bookstaff both had comments about the problem that they
2 have in getting the court -- some of the JP courts to
3 either timely schedule a bench trial or a jury trial.
4 It's not just a jury trial problem. So I think what
5 they're looking for, if I understand they're comments, is
6 they would like to have some time limits --

7 MR. NIEMANN: Outside limit.

8 HONORABLE TOM LAWRENCE: -- in which the
9 court has to set the trial. And from the judges'
10 standpoint, I don't know that we're necessarily opposed to
11 that; however, don't put something unreasonable as far as
12 jury trials go because there's some inherent difficulties
13 in always getting those quickly.

14 MR. NIEMANN: Well, you decided to give the
15 judge discretion under exceptional circumstances to
16 postpone. It seems to me reasonable to set an outer time
17 limit that you would initially have to have a jury panel,
18 and if the jury panel is not there for some administrative
19 or impossible reason then the court on its own motion
20 could postpone it further to wait for the jury, and I'm
21 trying to get some pressure on the courts to set these
22 jury trials and not just wait a month.

23 HONORABLE TOM LAWRENCE: Well, my point is
24 that for today the subcommittee has no proposed changes to
25 this rule, and I'm recommending that we refer this to the

1 ad hoc.

2 MR. NIEMANN: Yes.

3 HONORABLE JAN PATTERSON: And I think the
4 better language may be with regard to other rules
5 regarding the timing as opposed to this rule.

6 HONORABLE TOM LAWRENCE: Well, this is a
7 rule about trial. I mean, I don't know. 744 talks about
8 demanding a jury, but this is the rule that talks about
9 the -- we've really got a couple. We've got 743, which is
10 docketing. We've got 744, which is jury, and 747. So
11 there really are three different rules that could talk
12 about it. It's just a matter of where we want to put it
13 if we want to make any changes at all, but that's
14 something I think the ad hoc committee can look at.

15 HONORABLE JAN PATTERSON: Another important
16 concept to keep in mind is that we're dealing with courts
17 throughout the state and that we can't -- that everyone
18 has such an individual situation that we cannot make a
19 rule for Houston, although it's always tempting.

20 CHAIRMAN BABCOCK: The family law and
21 Houston. Okay. What else?

22 HONORABLE TOM LAWRENCE: 747a, all we're
23 doing here, there is a rule in the Property Code, 24.011
24 of the Property Code, which has differed a little bit than
25 Rule 747a. They're both the same rule. We're just simply

1 wanting to conform 747a to 24.011 of the Property Code.

2 CHAIRMAN BABCOCK: Any controversy about
3 this?

4 MR. HAMILTON: Let me ask a question.

5 CHAIRMAN BABCOCK: Carl.

6 MR. HAMILTON: My recollection is that
7 there's some rule or something somewhere that got changed
8 that said that corporations cannot practice pro se in a JP
9 court.

10 HONORABLE TOM LAWRENCE: There's some
11 attorney general's opinions on that excepting small claims
12 court, but I don't think that that applies in a forcible.
13 I mean, I think this is a -- I think Larry would probably
14 -- you probably know the history of that.

15 MR. NIEMANN: In the Property Code there's a
16 statute that point-blank says you don't have to be an
17 attorney to file an eviction lawsuit, to obtain a default
18 judgment, or to even try a case that's based on rent or
19 holding over. So even Legal Aid paralegals could come
20 over and help a tenant in a rent case or holdover case.

21 MR. HAMILTON: I understand that, but what
22 if the landlord is a corporation?

23 HONORABLE TOM LAWRENCE: I think --

24 MR. NIEMANN: Well, it would still be an
25 authorized agent of the landlord.

1 HONORABLE TOM LAWRENCE: This is an
2 exception to Globe Leasing, to the Globe Leasing case,
3 that requires a corporation be represented by an attorney.

4 MR. NIEMANN: I think the statute is very
5 clear that regardless of the legal entity type of the
6 landlord, a layperson can represent the landlord in filing
7 an eviction case and getting a default judgment and trying
8 certain kinds of eviction cases. It's statutory.

9 PROFESSOR CARLSON: Carl, we looked at that
10 issue in the last session of the advisory committee. I
11 remember a judge sending a letter complaining about the
12 unauthorized practice of law, and to tell you the truth, I
13 don't remember how that debate came out, but we did look
14 at that issue.

15 HONORABLE TOM LAWRENCE: So we move the
16 adoption.

17 MR. EDWARDS: What happens in the county --
18 this would make it where the nonattorney is able to appear
19 and a representative could pass into county court, right?

20 HONORABLE TOM LAWRENCE: Yeah. This would
21 apply to trial or appeal.

22 MR. EDWARDS: What do the county court
23 judges think about that?

24 HONORABLE TOM LAWRENCE: It's not a problem.

25 MR. NIEMANN: I think it's limited to

1 justice court.

2 MR. EDWARDS: Not if this --

3 HONORABLE TOM LAWRENCE: Why do you think
4 it's limited to justice court?

5 MR. EDWARDS: Not according to this.

6 HONORABLE TOM LAWRENCE: Property Code is
7 going to -- at the very minimum, but --

8 MR. GILSTRAP: Because we took the words "in
9 justice court" out.

10 MR. EDWARDS: That's right.

11 MR. GILSTRAP: We had "in justice court" in.

12 MR. EDWARDS: That's correct.

13 HONORABLE TOM LAWRENCE: But that goes to
14 the Property Code, 24.011. Before I say that, let me
15 double check.

16 MR. EDWARDS: I know if I'm sitting at a
17 county court at law somewhere I don't want my dockets
18 screwed up by a bunch of nonlawyers coming in representing
19 clients.

20 MR. YELENOSKY: Yeah. The lawyers are
21 screwing it up enough.

22 HONORABLE TOM LAWRENCE: I'm sorry. In the
23 Property Code it does say "justice court."

24 MR. EDWARDS: Well, I don't think we can
25 take that out of here.

1 MR. NIEMANN: Where is the law on that?

2 HONORABLE TOM LAWRENCE: It does say
3 "justice court." That's correct.

4 MR. DOGGETT: Where does it say?

5 Oh, there it is. "In justice court." There
6 it is. It's hidden.

7 MR. NIEMANN: The Property Code that I'm
8 referring to, it says, "in eviction suits in justice
9 court."

10 MR. EDWARDS: That's what I'm saying.

11 MR. NIEMANN: Okay. The nonlawyers cannot
12 represent the litigants in county court.

13 MR. EDWARDS: This crossed out "in justice
14 court."

15 PROFESSOR CARLSON: We're putting it back
16 in.

17 HONORABLE TOM LAWRENCE: It's now back in
18 there.

19 MR. NIEMANN: It should be in there.

20 PROFESSOR CARLSON: Good save. Good save,
21 Larry.

22 HONORABLE TOM LAWRENCE: Good save.

23 MR. NEIMANN: We're not trying to get a
24 layman into county courts except pro se.

25 MR. EDWARDS: Personally I don't care, but

1 the judges might.

2 MR. YELENOSKY: Well, is the first sentence
3 still correct then, because that first sentence is not
4 limited to in justice court?

5 MR. DOGGETT: That's where he's adding it
6 back in.

7 CHAIRMAN BABCOCK: That's where we're adding
8 "in justice court" back in.

9 MR. EDWARDS: See "in justice court" was --

10 MR. YELENOSKY: Oh, okay. I thought you
11 were -- I thought it was crossed out of the second
12 sentence.

13 CHAIRMAN BABCOCK: Is it okay with that put
14 back in? With that amendment, is there a motion?

15 HONORABLE TOM LAWRENCE: So moved.

16 PROFESSOR CARLSON: Second.

17 CHAIRMAN BABCOCK: Any further discussion,
18 Frank or Bill? Anybody opposed?

19 Passes unanimously, the Chair not voting.

20 HONORABLE TOM LAWRENCE: Okay. 752. We're
21 getting close. 752 is not really changed very much from
22 the existing rule. We did add the words "de novo" where
23 the existing rule says "on the trial of the cause in
24 county court." We're saying "on the trial de novo of the
25 cause in county court," and this is -- and then in the

1 second paragraph we are -- we try wherever possible to
2 take out specific references to individual sections in the
3 Property Code and just say chapter just in case the
4 Legislature wants to renumber things.

5 And then the last sentence which is struck,
6 that language is now in 754. So it's not being deleted
7 from the rules. We just moved it. One thing that I
8 noticed this morning when I was reading over this, on the
9 first sentence that we might want to look at changing, we
10 say, "On the trial de novo of the cause in county court,
11 the appellant or appellee shall be permitted to plea." Do
12 we want to change that to "plaintiff or defendant" instead
13 of "appellant or appellee"?

14 CHAIRMAN BABCOCK: Didn't we have that
15 discussion yesterday?

16 HONORABLE TOM LAWRENCE: Sort of. Yeah.

17 CHAIRMAN BABCOCK: Because we had debtor
18 yesterday.

19 PROFESSOR CARLSON: That's got to be one of
20 our to do's at the end.

21 CHAIRMAN BABCOCK: Yeah. Let's do it at the
22 end and be consistent whatever we call it.

23 PROFESSOR CARLSON: Right.

24 HONORABLE TOM LAWRENCE: All right. So --

25 MR. EDWARDS: Is there a special reason for

1 taking out the section number in there?

2 HONORABLE TOM LAWRENCE: We have done that
3 consistently throughout the rules just because if the
4 Legislature chooses to renumber a section, as they do from
5 time to time, we won't have to come back and change the
6 rules.

7 MR. EDWARDS: Well, suppose they put
8 something in the chapter that screws up the whole system.
9 Suppose it's something you don't want to happen.

10 HONORABLE TOM LAWRENCE: Well, then we'll
11 have to look at changing the rules if they do that.

12 CHAIRMAN BABCOCK: Larry.

13 MR. NIEMANN: I think we have recommended
14 that the section numbers remain in there for the very
15 concern that Mr. Edwards has raised. There is 21.005
16 requirement in the code about, what is it, 21.005?

17 MR. FUCHS: 24.005.

18 MR. NIEMANN: 24.005.

19 MR. FUCHS: Notice to vacate.

20 MR. NIEMANN: Notice to vacate, that I think
21 some of the lawyers were concerned that if the pleading
22 failed to allege notice to vacate was served then the
23 courts would be real technical and say, "Well, the
24 Property Code requires notice to vacate. You didn't plead
25 according to the Property Code," and I think there was a

1 concern that just an all-encompassing reference to the
2 Property Code perhaps may start allowing people to get too
3 picky about you didn't cross this I and dot this T or what
4 have you in your pleadings.

5 MR. EDWARDS: I just get worried when you
6 adopt a whole chapter as opposed to --

7 MR. NIEMANN: That's our worry.

8 MR. FUCHS: You could say "Chapter 24" --

9 CHAIRMAN BABCOCK: Pam, what do you think?

10 MR. DOGGETT: "Chapter 24 as amended."

11 MR. FUCHS: -- "as may be amended."

12 CHAIRMAN BABCOCK: Pam has no opinion.

13 MR. GILSTRAP: Well, I think the general
14 rule is that if a rule refers to a statute and then that
15 statute is renumbered then you trace it to the new -- to
16 the old statute under the new number. I guess the
17 question is maybe there might be confusion for JPs.

18 MR. EDWARDS: Well, but I'm worried about
19 other parts of it, other parts of the chapter.

20 MR. GILSTRAP: I understand. I understand.

21 CHAIRMAN BABCOCK: If we do -- if we put
22 this specific number back in then we're going to have to
23 do that everywhere else where we've --

24 HONORABLE TOM LAWRENCE: Yeah. We need to
25 go back in several other places. I mean, it's not a big

1 deal to the subcommittee one way or the other.

2 MR. EDWARDS: You never know what's going to
3 get tucked in a chapter.

4 CHAIRMAN BABCOCK: So does everybody share
5 Bill's view that we ought to be specific as opposed to
6 general?

7 MS. SWEENEY: Yes.

8 CHAIRMAN BABCOCK: Bobby, what do you think?

9 MR. MEADOWS: I agree.

10 CHAIRMAN BABCOCK: You agree with that. And
11 Pam?

12 MS. BARON: That's fine.

13 CHAIRMAN BABCOCK: Okay. It sounds like
14 that's the approach we want to take.

15 HONORABLE TOM LAWRENCE: Okay. Well, we'll
16 go back and change that for all of the rules then where
17 we've done that. Subject to that --

18 CHAIRMAN BABCOCK: Subject to that, any
19 opposition to 750 -- the changes in 752?

20 And that will pass unanimously, the Chair
21 not voting. Yes.

22 MR. YELENOSKY: If we are going to put in
23 the specifics, I would just suggest that where it's not
24 necessary to make reference to the Property Code because,
25 you know, it's already clear that that requirement exists

1 and has to be complied with, we simply not reference that.
2 I don't know if that's true here or not, but, I mean,
3 there are times I think when there are references to
4 statutory provisions that in and of themselves have to be
5 complied with, and so then the question is why are they
6 referenced in the rules, just overall. Just a comment.

7 CHAIRMAN BABCOCK: Elaine, while you were
8 out --

9 PROFESSOR CARLSON: Yes.

10 CHAIRMAN BABCOCK: -- more work was created
11 for you.

12 PROFESSOR CARLSON: Oh, good.

13 CHAIRMAN BABCOCK: The sense of the full
14 committee is that it's better to be specific, for example,
15 here where it says "Section 24.006," rather than general,
16 but that's going to be another omnibus type thing that
17 you're going to have to go back through all these changes
18 and go back to the specific as opposed to the general.

19 Okay. What's next?

20 HONORABLE TOM LAWRENCE: 753, duty of clerk
21 to notify parties. Actually, we have -- this is not new
22 language. In shifting things around and renumbering
23 things we've just -- we took this from a different rule
24 and now made it 753 so it kind of flowed together a little
25 bit better. So this is not -- as I recall, isn't it,

1 Elaine? This is not new. We just transferred this from
2 another rule, which I think was 749 or something. I don't
3 remember.

4 MS. SWEENEY: So moved.

5 HONORABLE TOM LAWRENCE: But there's no new
6 law here.

7 MR. EDWARDS: Oh, I see you've renumbered
8 753 to 753a?

9 HONORABLE TOM LAWRENCE: Well, yeah, but --
10 no. Well, yeah. But what is in 753 now was formerly I
11 think in 749 or something else. I can't remember where.

12 PROFESSOR CARLSON: 751.

13 HONORABLE TOM LAWRENCE: 751.

14 MR. EDWARDS: All I'm saying is we did have
15 a Rule 753 that's now renumbered 753a.

16 PROFESSOR CARLSON: Yes.

17 HONORABLE TOM LAWRENCE: Yes. Yeah. But
18 Elaine says 753 used to be 751.

19 PROFESSOR CARLSON: Second paragraph of 751.

20 MR. EDWARDS: I'm wondering if you're going
21 to put an "a" in there and you want to keep it
22 geographically where you have it, maybe you would want to
23 call that "duty to notify the clerk," or "the parties,"
24 rather, 752a and then you don't have to renumber 753.

25 HONORABLE TOM LAWRENCE: Well, 752 is

1 damages, and --

2 MR. EDWARDS: Well, it's the end of all of
3 what happens in the justice court.

4 HONORABLE TOM LAWRENCE: Well, no. 752 is
5 county court. 753 is county court. 753a is county court,
6 but we thought 753 and 753a, that those topics went
7 together better --

8 MR. EDWARDS: Okay. Whatever.

9 HONORABLE TOM LAWRENCE: -- than to put it
10 somewhere else.

11 MR. EDWARDS: Okay.

12 CHAIRMAN BABCOCK: Yeah, Larry.

13 MR. NIEMANN: Small but potentially big
14 problem for the litigants. So many county clerks
15 unfamiliar with the process think that when there is an
16 appeal by the defendant then you docket the case by
17 stating the defendant's name first and the plaintiff's
18 name second, appellant versus appellee, and I think it
19 would help the county clerks and the parties if you would
20 simply say, "The style of the case in the county court
21 must be the same as in justice court."

22 PROFESSOR CARLSON: Larry, we deal with that
23 in Rule 754, paragraph (d).

24 MR. NIEMANN: Do you?

25 PROFESSOR CARLSON: Uh-huh.

1 HONORABLE TOM LAWRENCE: Yeah, on page 30.

2 MR. NIEMANN: You do. Yes, you do. Okay.
3 You satisfied me.

4 CHAIRMAN BABCOCK: Yeah.

5 MR. FUCHS: Mr. Chairman, I would suggest
6 the second sentence of 753 read that "such notice shall
7 advise the defendant that a default judgment may be
8 entered unless the defendant timely files a written
9 answer," so that they're actually put on notice.

10 HONORABLE TOM LAWRENCE: That's 753a.
11 that's the next rule, 753a, where we get into that.

12 MR. FUCHS: It doesn't -- there's no warning
13 in 753a.

14 MR. DOGGETT: The necessity -- instead of
15 saying "the necessity," you say you're going to -- you
16 know, going to lose the case.

17 MR. FUCHS: "Such notice shall advise the
18 defendant that a default judgment may be entered unless
19 the defendant timely files an answer."

20 PROFESSOR CARLSON: I think that's a good
21 idea.

22 HONORABLE TOM LAWRENCE: Yeah. That's fine.

23 JUSTICE HECHT: Written.

24 CHAIRMAN BABCOCK: Written answer, yeah.

25 JUSTICE HECHT: Can't you just track

1 whatever the district court rule is?

2 MR. HAMILTON: Is there a requirement in
3 here -- I couldn't find it -- that the forcible detainer
4 complaint be in writing?

5 HONORABLE TOM LAWRENCE: Well, there will
6 be. That's Rule 741, and that's one of the rules that's
7 being recommended to the ad hoc committee.

8 MR. HAMILTON: Okay. Because this 753 only
9 deals with notice to the defendant.

10 HONORABLE TOM LAWRENCE: Well, about the
11 answer, yes.

12 MR. HAMILTON: Yeah, about the answer.

13 HONORABLE TOM LAWRENCE: So what's the
14 district court rule?

15 CHAIRMAN BABCOCK: 99(c).

16 HONORABLE TOM LAWRENCE: All right.

17 CHAIRMAN BABCOCK: You can use that language
18 there.

19 HONORABLE TOM LAWRENCE: Okay. We'll do
20 that and have that rule revised for June.

21 753a, judgment by default. There was a
22 comment by Larry and Howard Bookstaff that we keep the
23 period at eight days. All we really changed was changed 8
24 days to 10 days, and their comment is that we ought to
25 keep it at 8.

1 MR. NIEMANN: Just two more days of
2 defendant's rent that we're -- that result when you have
3 10 days instead of 8.

4 PROFESSOR CARLSON: And here we're talking
5 about how much time that the defendant has to answer
6 before you can take a default in county court.

7 HONORABLE TOM LAWRENCE: Yeah.

8 MR. NIEMANN: That's two days of rent.

9 PROFESSOR CARLSON: No, I understand, but
10 that's correct.

11 MR. GILSTRAP: What was the reason for going
12 to 10?

13 HONORABLE TOM LAWRENCE: Well, I can't say
14 that -- the reason was that, in looking at it, 8 days
15 seemed to be an unusual time period, and I think it was
16 more desired to have 10 days, which seemed to be a more
17 standard time period in the rules in general, and that was
18 about the only reason I recall. I mean, there wasn't any
19 particular good reason to do it.

20 MR. NIEMANN: I have a good reason. Two
21 days rent.

22 CHAIRMAN BABCOCK: Okay. Yeah, Robert.

23 MR. DOGGETT: Sorry.

24 MR. EDWARDS: Go ahead.

25 MR. DOGGETT: I just wanted -- it would be

1 helpful if the rule also tracked the law on entering
2 default judgments. I think I mentioned it yesterday that
3 a defendant if they fail to file an answer still is
4 entitled to notice of a hearing. For instance, in the
5 Hughes case the Supreme Court held that when the defendant
6 filed an affidavit of inability, it was approved, that's
7 considered enough to be a pro se answer in the procuring
8 opinion. I mentioned yesterday and I think it's pretty
9 clear that the rules should also reflect that.

10 In other words, not allowing a default
11 unless there's been some sort of notice and opportunity
12 for hearing. Remember default judgments are when -- in
13 typical cases when a party doesn't respond at all or do
14 anything. In this case, either the tenant has won and
15 shown up to JP court and been victorious or, two, the
16 tenant has lost and perfected an appeal by filing various
17 documents. So what we're saying is we should give notice
18 to the defendant and a hearing before an order is entered,
19 tracking Hughes and whatnot, and I see on an ad hoc basis,
20 but I think that -- I don't think that's --

21 PROFESSOR CARLSON: Are you suggesting in
22 every case or in cases where the tenant files something
23 tantamount to an answer a default should not be entered?

24 MR. DOGGETT: Well, obviously if a defendant
25 files something with the courts, obviously, you know,

1 Smith vs. Litman and obviously the Hughes case
2 specifically in a forcible case, the Court has found that
3 that is enough to satisfy notice and hearing. Now,
4 remember, if it's not -- doesn't say a general denial on
5 it or doesn't adequately answer then obviously a party can
6 move to strike.

7 MR. GILSTRAP: What if they file nothing?
8 That's what we're talking about.

9 MR. DOGGETT: Exactly. What if they file
10 absolutely nothing, the only chance that would be is --

11 MR. FUCHS: They won in justice court.

12 MR. DOGGETT: -- if they won. The tenant
13 shows up and wins, and what we're saying is that you give
14 a notice and an opportunity to explain why you didn't
15 answer in court. I mean --

16 MR. GILSTRAP: On the appeal.

17 MR. DOGGETT: That's correct.

18 MR. FUCHS: Right.

19 MR. DOGGETT: In other words, the only
20 reason a tenant would not have filed anything with the
21 court at all is if they showed up and they won, and so
22 what we're saying is in either case it seems to me
23 fairness on the first instance and, secondly, the law as
24 it is now if a tenant files something to appeal the case,
25 then that should be considered enough to be a pro se

1 answer, and that's Smith vs. Litman and Hughes vs. Habitat
2 Apartments, both Supreme Court cases of this decade --
3 well --

4 HONORABLE TOM LAWRENCE: If we change 753 to
5 put that warning on there that you're going to have a
6 default rendered and they still don't answer then, I mean,
7 they've had their notice, haven't they?

8 MR. DOGGETT: Well, but, of course, I guess
9 we're going to then ignore the ruling of Habitat
10 Apartments. That's exactly what they claim in that case,
11 that the tenant in that case gave an affidavit of
12 inability, suggesting they wanted to appeal. They did
13 everything they should -- they thought they needed to do,
14 and so they didn't realize that that required something
15 more. Remember, this is for often nonlawyers that are in
16 these cases.

17 CHAIRMAN BABCOCK: Robert, will you get
18 those citations, those two cites, to Elaine and Judge
19 Lawrence?

20 MR. DOGGETT: Yeah. I will give them to you
21 right now if that would be preferable.

22 CHAIRMAN BABCOCK: Well, actually we want to
23 move on. Just hand it to them.

24 PROFESSOR CARLSON: I am familiar with those
25 cases.

1 MR. EDWARDS: One other question I had on
2 this. What's the difference between 8 or 10 days on one
3 hand and 8 or 10 full days on the other hand? What is a
4 full day when you're counting time?

5 CHAIRMAN BABCOCK: Well, late filing in
6 Harris County that could be up to 11:59. That could be a
7 full -- 11:59.

8 MR. EDWARDS: Well, I think that's a day,
9 too.

10 CHAIRMAN BABCOCK: That's a full day.

11 MR. EDWARDS: What?

12 CHAIRMAN BABCOCK: That's a full day.

13 MR. EDWARDS: I just wondered what "full"
14 means.

15 PROFESSOR CARLSON: I have no idea.

16 HONORABLE TOM LAWRENCE: I don't know. I
17 don't remember ever seeing "full" anywhere else in the
18 rules.

19 CHAIRMAN BABCOCK: So we're going to leave
20 it at eight and take out "full."

21 MR. YELENOSKY: Or are we going to leave it
22 at 10?

23 CHAIRMAN BABCOCK: We've going to leave it
24 at eight. Leave it at eight, and Elaine will look at
25 those cases. So let's go on to the next one because we

1 just have a little bit of time left.

2 HONORABLE TOM LAWRENCE: All right. 754,
3 (a) is not, I don't think, a change. I think we took that
4 from another rule that it takes precedence.

5 (b), no jury trial shall be -- what we're
6 adding is "no jury trial shall be had in any appeal of a
7 forcible entry and detainer unless a written request for
8 jury trial is filed." The rest of that is existing in the
9 rule as it exists now.

10 (c), we would not take -- we want to take
11 that part out of the vote today because that's something
12 the ad hoc committee is going to look at.

13 (d), Larry Niemann and Howard Bookstaff also
14 had a request on (d) that that remain at 8 from the change
15 to 10, and that is the -- that the case shall be subject
16 to trial de novo at any time after the expiration of 10,
17 and they want to keep it back at 8 full days after the
18 date the transcript is filed in county court.

19 MR. NIEMANN: Take out the "full."

20 HONORABLE TOM LAWRENCE: Yeah, and take out
21 "full."

22 MR. GILSTRAP: Well, you know, let me say
23 this. You know, if our idea is to leave it like it was,
24 maybe we ought to leave the "full," because, you know,
25 we're kind of sending a message it's something else. I

1 don't know.

2 CHAIRMAN BABCOCK: No. This is new
3 language.

4 MR. GILSTRAP: Yeah, but we had "full" in
5 the earlier one. You see what I'm saying?

6 MR. EDWARDS: The way you count it, the way
7 you count days, you don't count the first day and you do
8 count the last day, and so you're told in the rules what
9 "days" means, and you're not told that there's any
10 difference between "days" and "full days," and there
11 really aren't.

12 MR. YELENOSKY: Well, and since this is a
13 trial and not the filing of a paper, it's unlikely that
14 it's going to happen after 5:00 p.m.

15 MR. EDWARDS: Well, you can file a paper at
16 4:00 and then you set the trial -- you've got to have 10
17 full days, and that could be 4:00 in the afternoon instead
18 of 10:00 in the morning, could be the argument, but I
19 don't see any reason for not being consistent in that
20 regard.

21 MR. NIEMANN: I think it raises a question
22 that shouldn't exist.

23 MR. EDWARDS: Yeah, that "full days" means
24 something different than "days."

25 MR. YELENOSKY: Yeah. I agree we should

1 take "full" out.

2 CHAIRMAN BABCOCK: Yeah. Take "full" out.
3 Okay. What else?

4 HONORABLE TOM LAWRENCE: The next sentence
5 is requested by the county court judges. "The county
6 court may set appeals of forcible entry and detainer cases
7 for trial on written motion of any party, on the court's
8 own motion" --

9 CHAIRMAN BABCOCK: "The court's own
10 initiative."

11 HONORABLE TOM LAWRENCE: "On the court's own
12 initiative with reasonable notice to the parties of the
13 first setting for trial or by agreement of the parties,"
14 and then the next sentence is what we were referring to
15 about the case being docketed, that it's docketed in the
16 county court in the name of the plaintiff in the justice
17 court is plaintiff and the name of the defendant in the
18 justice court is defendant.

19 "Regardless of which party appealed from the
20 judgment in the justice court, only the plaintiff in the
21 county court may take a nonsuit. If the county court's
22 jurisdiction is invoked then it must dispose of all
23 parties and issues before the court, including the issue
24 of possession."

25 The last two sentence are to correct some

1 problems that we found in the case law and occasionally in
2 practice where you have a -- the county court takes
3 jurisdiction and then dismisses the case and treats it
4 like it's a remand back to county court for the county
5 court judgment to be enforced, which is not the law. So
6 we're making it clear that once the county court takes
7 jurisdiction that they have got to dispose of all the
8 parties including possession so we don't have the case in
9 limbo and that only the plaintiff can take a nonsuit, not
10 the -- because the tenant who had the judgment against
11 them is the appellant, and we don't want the appellant to
12 be able to take a nonsuit on the case, and that's why
13 we're making it clear only the plaintiff can do that.

14 MR. EDWARDS: I can see that way they docket
15 the losing party as the plaintiff in county court, that's
16 a pretty slick deal.

17 MR. GILSTRAP: I think that happens. Bill,
18 that really happens.

19 MR. EDWARDS: I can see where it would
20 happen. I am not saying it wouldn't happen. I am not
21 laughing because I can't conceive it happening. I'm
22 laughing because I can see it happening.

23 HONORABLE TOM LAWRENCE: In (e), "On written
24 motion by the appellee contesting the sufficiency of the
25 appeal bond or the supersedeas the county court may hold a

1 hearing on the appellee's motion. If upon review of the
2 appeal bond or the supersedeas bond the county court
3 should find the bond to be deficient, the court may
4 disapprove the bond and allow the appellant five days from
5 the date the bond is disapproved to correct the
6 deficiencies with the bond. If the deficiencies are
7 corrected then the bond may be approved. If the
8 deficiencies on the appeal bond are not corrected, then
9 the appeal may be dismissed. If the deficiencies on a
10 supersedeas are not corrected then the appellee may
11 proceed with the enforcement of judgment including a writ
12 of possession."

13 MR. EDWARDS: Why do you say "may hold a
14 hearing"? As opposed to "shall."

15 You know, if I'm the landlord and the
16 defendant is appealing and they post a bond deficient in
17 sureties or amount or something else and I file a motion,
18 it seems to me I really need to get that heard, and if
19 it's a big building that we're talking about, commercial
20 building, I darn sure want it heard.

21 HONORABLE TOM LAWRENCE: I think we just
22 want to give the county court the option to hold the
23 hearing if they think it's necessary. They may look at it
24 and decide there's just no substance or merit to it and
25 not think that a hearing is necessary, just gives some

1 discretion.

2 MR. EDWARDS: How can you decide that
3 without having some evidence on it?

4 HONORABLE TOM LAWRENCE: Well, maybe the
5 allegation in the motion is just deficient on its face and
6 they just don't want to hold a hearing.

7 CHAIRMAN BABCOCK: What if you say "the
8 county court shall hold a hearing on the appellee's motion
9 if requested by any party"?

10 MR. EDWARDS: That's what I would do. I
11 would at least give somebody the opportunity to have an
12 absolute right to a hearing on that because it could be
13 the most important part of the case for somebody.

14 HONORABLE TOM LAWRENCE: Say that again.
15 "The county court shall"?

16 CHAIRMAN BABCOCK: "Shall hold a hearing on
17 the appellee's motion if requested by a party."

18 MR. EDWARDS: And I think I would say "shall
19 promptly hold a hearing" or something like that.

20 HONORABLE TOM LAWRENCE: Okay. We can
21 change that.

22 And then (f), "When the appellant fails to
23 prosecute the appeal in effect or the county court renders
24 judgment against the appellant then the county court must
25 render judgment against the sureties on the appellant's

1 appeal bond or supersedeas bond up to the amount of the
2 bond," and that was an issue that Howard Bookstaff raised
3 yesterday that I think we've taken care of here.

4 Then the comment is just that the rule
5 provides guidance to the county court of procedures to use
6 in the trial of the case. "When a county court invokes
7 jurisdiction of a case it must dispose of all issues and
8 parties before the court." You would think that that's a
9 no brainer, but you would be amazed at how many cases
10 where that didn't happen, and it leaves the judgment kind
11 of in limbo. "If the case is dismissed once the county
12 court has invoked jurisdiction then the dismissal should
13 address the issue of possession."

14 MR. EDWARDS: "Should" or "must"?

15 MR. YELENOSKY: "Must."

16 CHAIRMAN BABCOCK: "Must."

17 HONORABLE TOM LAWRENCE: It is now "must."

18 Okay. That's it.

19 CHAIRMAN BABCOCK: Any other discussion
20 about this rule? Recognizing that we're going to defer on
21 754(c), is there a motion to approve it?

22 HONORABLE TOM LAWRENCE: So moved.

23 MR. YELENOSKY: Second.

24 CHAIRMAN BABCOCK: Any further discussion?

25 Anybody opposed to this rule?

1 Passes unanimously, the Chair not voting.

2 HONORABLE TOM LAWRENCE: And the last one.
3 today.

4 HONORABLE JAN PATTERSON: In the second
5 sentence you need a comma after "jurisdiction of the
6 case."

7 HONORABLE TOM LAWRENCE: Second sentence of
8 where?

9 HONORABLE JAN PATTERSON: "Notes and
10 comments."

11 HONORABLE TOM LAWRENCE: After "case"?

12 HONORABLE JAN PATTERSON: Second sentence,
13 "jurisdiction of a case," comma.

14 HONORABLE TOM LAWRENCE: Okay. Done.

15 755, we -- there is a conflict here between
16 the language in Property Code, Section 24.007, and this;
17 and so we're conforming this language to the Property
18 Code; and it deals with whether or not the appeal from a
19 final judgment at county court can be had unless the
20 premises in question are going to be used as the principal
21 residence of the party, which is what the current rule
22 says, or what the Property Code says is if the premises in
23 question are being used for residential purposes only. So
24 we're just simply conforming this to the Property Code.

25 Now, Elaine, refresh my memory. Where did

1 we get the last --

2 PROFESSOR CARLSON: That mirrors the
3 Property Code, 24.007.

4 HONORABLE TOM LAWRENCE: Okay. Okay. Yeah.
5 The last sentence, too, is the same thing. That's right.
6 It's 24.007 also picks up the -- yeah, picks up the
7 language of the Property Code. So we're just conforming
8 the rule to the Property Code.

9 MR. YELENOSKY: The Property Code says "for
10 residential purposes only"?

11 HONORABLE TOM LAWRENCE: Yes.

12 MR. YELENOSKY: So it's broader.

13 HONORABLE TOM LAWRENCE: Yes.

14 MR. YELENOSKY: In a way, although I was
15 suggesting somewhat if you have a home office are you
16 prevented from --

17 HONORABLE TOM LAWRENCE: I don't know if
18 it's broader or not. I mean, one rule -- the rule says
19 "principal residence." The other says "residential
20 purposes only," so that means that could be a second home
21 or a third home or whatever.

22 MR. YELENOSKY: Yeah. That's what I meant.

23 MR. EDWARDS: Even your lakehouse is safe.

24 MR. YELENOSKY: Yeah, my lakehouse.

25 HONORABLE TOM LAWRENCE: Move to adopt.

1 MR. FUCHS: Just two issues on that,
2 Mr. Chairman. On the first sentence I think we need to
3 make it clear that it may not be issued until 10 days
4 after the judgment. I know it says in the last sentence
5 it may not be stayed, but I think it's got to be clear
6 because county court judges now are issuing those writs
7 five days after the judgment, so we should be clear that
8 it may not be issued until 10 days after the judgment.

9 The second point here is while -- since the
10 Legislature changed the rule with respect to manufactured
11 homes and a tenant may stay in possession if they pay rent
12 for another 30 days after the judgment, we ought to
13 address -- that ought to be addressed in Rule 755, too.

14 HONORABLE TOM LAWRENCE: Well, I was going
15 to -- on the manufactured homes, that comes up in a couple
16 of places, and I was going to talk about that in a second.
17 That's one of the things I think we could put as a
18 comment, would be my suggestion.

19 CHAIRMAN BABCOCK: Well, if the rule says 10
20 days and the statute says 30 --

21 HONORABLE TOM LAWRENCE: No. He's talking
22 about manufactured housing. You're talking about two
23 different things.

24 MR. NIEMANN: The statute clearly says that
25 you've got to have a 30-day gap between judgment and rent

1 in manufactured housing. I don't think that you want your
2 rules to be in conflict with the statute, and I think you
3 need to address the statute in the rules.

4 CHAIRMAN BABCOCK: Yeah. You're saying what
5 I just said.

6 MR. NIEMANN: Carve out an exception,
7 specifically refer to the statute and the 30-day exception
8 in the statute. I don't think it should be by comment
9 because a lot of judges simply don't have the comments or
10 don't read the comments.

11 CHAIRMAN BABCOCK: Well, and we say at the
12 beginning of the rules that the comments don't count
13 except on a couple of discrete issues.

14 MR. NIEMANN: You just have to assume that
15 the comments don't exist, so you don't want to be in
16 conflict.

17 CHAIRMAN BABCOCK: Yeah. I agree with that.
18 Can you guys go back and rework this?

19 MR. NIEMANN: I'm wanting this for the
20 landlords' benefit, too, because if the judge makes a
21 mistake, we're in trouble.

22 CHAIRMAN BABCOCK: Right. Right.

23 MR. GILSTRAP: Let me go back to this
24 "residential purposes." The Property Code says
25 "residential purposes only"?

1 HONORABLE TOM LAWRENCE: Yes.

2 MR. GILSTRAP: It says that?

3 HONORABLE TOM LAWRENCE: Yes.

4 MR. GILSTRAP: I think Stephen's question
5 about the home office is an interesting question.

6 MR. YELENOSKY: But it's a statutory
7 provision.

8 MR. GILSTRAP: If the statute says it...

9 MR. YELENOSKY: So it remains just a
10 question.

11 CHAIRMAN BABCOCK: Yeah. Okay.

12 HONORABLE TOM LAWRENCE: I don't think we
13 want to be different from the Property Code.

14 MR. GILSTRAP: Great.

15 MR. YELENOSKY: No, I don't either. That
16 was just a rhetorical question.

17 HONORABLE TOM LAWRENCE: That actually
18 happened in Mel -- Mel something or other. It was a
19 Harris County deal. He had an office building, about a
20 10-story office building in Sharpstown, and he had a
21 little apartment on it, and he was saying, "You can't
22 evict me because" -- "you can't evict me from this office
23 building because it's residential," so I think that was
24 part of what started all this. But, anyway, that's it.

25 MR. GILSTRAP: That really has a ring of

1 truth to it, doesn't it?

2 CHAIRMAN BABCOCK: Well, let me tell you,
3 you guys have done terrific work, and Larry Niemann and
4 Fred Fuchs and Robert Doggett, today and yesterday you
5 really added to the process and made our rules better.

6 HONORABLE TOM LAWRENCE: Can I bring up one
7 more thing that's real short? I swear it's short.

8 CHAIRMAN BABCOCK: 30 seconds?

9 HONORABLE TOM LAWRENCE: Yeah. There was
10 some suggestions about putting post-judgment interest in
11 these judgments, but I don't know why we need to do that.
12 I didn't even know it was a problem because I've always
13 put post-judgment interest because the Finance Code says
14 any state -- any judgment in the state you include
15 post-judgment interest. So is there really any reason to
16 even address that?

17 CHAIRMAN BABCOCK: Do you have any reason to
18 do that, Bill? Edwards? Do you know any reason to do
19 that?

20 MR. EDWARDS: What?

21 CHAIRMAN BABCOCK: What he just said.

22 MR. EDWARDS: I don't know.

23 MR. DOGGETT: Lunch is on you.

24 PROFESSOR CARLSON: I think Larry was --

25 CHAIRMAN BABCOCK: Larry.

1 MR. NIEMANN: If there is silence, we have
2 had a little bit of a problem because 738 doesn't say that
3 you can sue for -- you can join a suit for rent and
4 interest and attorneys fees. We've had some judges who
5 say, "No, you can only join a suit for rent; therefore, I
6 can only give you judgment for rent," and they are not
7 recognizing the fact that we could have statutory interest
8 as a matter of law and that we could have contractual
9 interest at a greater rate if in a contract. So this is
10 an attempt to forestall the problem of some JPs thinking
11 that they don't have authority to grant contractual
12 interest.

13 MS. SWEENEY: Wouldn't it be easier to have
14 a --

15 MR. NIEMANN: And it wouldn't do any harm to
16 put it in, but it sure would do a lot of help.

17 CHAIRMAN BABCOCK: Okay. Paula.

18 MS. SWEENEY: Wouldn't it be easier to have
19 a seminar? I don't mean to be --

20 HONORABLE TOM LAWRENCE: When are you
21 available to speak?

22 MS. SWEENEY: On FED, yeah, that will be a
23 good one.

24 MR. FUCHS: Pay him.

25 MS. SWEENEY: We're putting all this stuff

1 in the rules because the JPs don't know what the law is.
2 Wouldn't it be easier to have a seminar and tell the JPs
3 what the law is, or send them a flier?

4 CHAIRMAN BABCOCK: Justice Hecht.

5 JUSTICE HECHT: Well, we have a pending case
6 where the court of appeals refused to award -- refused to
7 order payment of post-judgment interest because the trial
8 judge didn't put it in the judgment, so --

9 MS. SWEENEY: Have a seminar for him, too.

10 JUSTICE HECHT: It's just not -- you know,
11 you may have 3,00 people at your course is what I'm
12 saying.

13 MR. NIEMANN: In rebuttal, we would suggest
14 this committee to give the JPs all the help you can, so I
15 would respectfully request that you allow post-judgment
16 interest.

17 CHAIRMAN BABCOCK: Okay. Our next meeting
18 is June 14th and June 15th in Dallas, everybody, remember.

19 HONORABLE TOM LAWRENCE: Can I ask, what
20 does the committee want us to do? Do you want us to put
21 post-judgment in or --

22 CHAIRMAN BABCOCK: Put it in.

23 HONORABLE TOM LAWRENCE: Put it in. All
24 right.

25 CHAIRMAN BABCOCK: It's going to be in

1 Dallas, and we will have the agenda, the tentative agenda,
2 up on the website soon. We will most likely take a final
3 vote on our version of offer of judgment and our FED rules
4 at that meeting, to the extent anybody is interested, and
5 we may vote finally on other things, too, but at least
6 those two things it's my objective.

7 PROFESSOR CARLSON: And we will do our best
8 to get the FED rules on the web page a week in advance and
9 would really appreciate everyone reading with a
10 fine-toothed comb. We really need editing help and to
11 make sure we've got it right.

12 HONORABLE TOM LAWRENCE: Can I reiterate
13 that the Chair yesterday asked for the JPs and the
14 apartment associations and the Legal Aid guys to try to
15 get together and work this out and --

16 MR. NIEMANN: Can we get together with your
17 committee for that purpose? Not just among ourselves,
18 but --

19 HONORABLE TOM LAWRENCE: But there is a
20 deadline, because the subcommittee has to have a draft of
21 all of these outstanding rules, so that means we've got a
22 real deadline to get this done quick.

23 MR. NIEMANN: Well, the apartment
24 association, I can assure you, we will move with light
25 speed, and I'm confident that the tenants will as well.

1 Did the Chairman make a suggestion that it
2 was okay to mention post-judgment interest?

3 HONORABLE TOM LAWRENCE: Yeah. He told us
4 to put it in.

5 CHAIRMAN BABCOCK: Yeah. That's correct,
6 and, by the way, there is another perhaps small
7 constituency that you ought to consult, and that's Chuck
8 Herring of the pro bono committee of the State Bar that
9 has asked to comment on these things. So why don't we get
10 them involved early, and if you need me to prod them to --

11 HONORABLE TOM LAWRENCE: Well, if you can
12 tell them to send us their comments or call me or
13 whatever, call Elaine.

14 MR. DOGGETT: I'm on the committee.

15 CHAIRMAN BABCOCK: Okay. Robert, yeah,
16 you're on that committee.

17 PROFESSOR CARLSON: You make sure they get
18 in the loop.

19 MR. DOGGETT: I'll -- yeah.

20 CHAIRMAN BABCOCK: Get them ginned up.

21 Thanks, everybody, for coming today. We're in
22 adjournment. Recess.

23 (Meeting adjourned at 11:37 a.m.)

24

25

1 * * * * *

2 CERTIFICATION OF THE MEETING OF
3 THE SUPREME COURT ADVISORY COMMITTEE

4 * * * * *

5
6
7 I, D'LOIS L. JONES, Certified Shorthand
8 Reporter, State of Texas, hereby certify that I reported
9 the above meeting of the Supreme Court Advisory Committee
10 on the 18th day of May, 2002, Morning Session, and the
11 same was thereafter reduced to computer transcription by
12 me.

13 I further certify that the costs for my
14 services in the matter are \$ 964.00.

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

16 Given under my hand and seal of office on
17 this the 30th day of May, 2002.

18
19 ANNA RENKEN & ASSOCIATES
20 1702 West 30th Street
21 Austin, Texas 78703
(512)323-0626

22 D'Lois L. Jones
23 D'LOIS L. JONES, CSR
24 Certification No. 4546
Certificate Expires 12/31/2002

25 #005,079DJ/AR