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HEARING OF THE SUPREME COURT
ADVISORY COMMITTEE

COPY

Taken before Anna L. Renken, a
Certified Shorthand Reporter for the State of
Texas, on the 14th day of June, 2002, between
the hours of 1:30 p.m. and 5:50 o'clock p.m.
at Southern Methodist University, Storey Hall,
Building #2, Dallas, Texas.

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1 HONORABLE NATHAN L. HECHT: Let's go on
2 the record and get underway.

3 MR. GILSTRAP: Do you want me to
4 whistle?

5 HONORABLE NATHAN L. HECHT: All right.
6 We're back on the record, and we're ready to
7 do FE&D or eviction or whatever it is called
8 these days.

9 HONORABLE TOM LAWRENCE: The popular
10 phrase today is "eviction."

11 HONORABLE NATHAN L. HECHT: All right.
12 And we have guests. Let me get them to
13 introduce themselves. Judge, if you'd
14 introduce yourself.

15 HONORABLE SANDY PRINDLE: Thank you,
16 Judge. I'm Sandy Prindle. I'm a justice of
17 the peace from Tarrant County, our
18 neighboring county to the west. Some of you
19 in Dallas County recognize our county over
20 there. I've been a justice of the peace 20
21 years. I'm immediate past president of our
22 state association of JPs and Constables. I am
23 chair of a committee formed as rule liaison to
24 rulemaking authorities like yourself. And
25 Carl, of course I've worked with Carl Hamilton

1 in years past with the Bar Association. And I
2 appreciate the opportunity to be here today.

3 HONORABLE NATHAN L. HECHT: Okay.

4 MR. NIEMANN: I'm Larry Niemann on a
5 revisit. I'm the attorney for the Texas
6 Apartment Association. I also wear the hat of
7 general counsel for the Texas Building Owners
8 and Managers. That's the office building
9 group, and the Texas Ministorage Association;
10 and I've been around in this business since
11 1965 in the landlord/tenant arena. Thank
12 you.

13 MR. TEES: My name is Andy Tees.
14 I'm with the Houston Apartment Association.

15 MR. DOGGETT: My name is Robert
16 Doggett. I'm with Legal Aid of Central
17 Texas. I'm formerly from Dallas. I did
18 eviction work for about nine years and now I
19 hail from Austin with Fred here.

20 MR. FUCHS: Judge, Fred Fuchs with Legal
21 Aid of Central Texas in Austin.

22 MS. SPECTOR: I'm Mary Spector with the
23 SMU Civil Clinic here in Dallas in this
24 building.

25 HONORABLE NATHAN L. HECHT: Yes. All

1 right. Elaine, where are we? Tom? Who has
2 got it?

3 PROFESSOR CARLSON: Judge, you go ahead.

4 HONORABLE TOM LAWRENCE: At our last
5 meeting which was the fifth time we had taken
6 up the eviction rules, this is now the sixth
7 time, we voted on a number of rules. We
8 actually have and there was a handout and it
9 was on the website the list of the actions and
10 the votes that we've taken. So we voted on
11 quite a few things. We still have some things
12 left to vote on.

13 At the last meeting there was some
14 discussion with among the representatives from
15 the tenant's groups and the landlord groups
16 about holding off on voting on several of the
17 issues to try to give those groups the
18 opportunity to meet with the subcommittee and
19 try to work out some compromises and some
20 language that everybody could live with and
21 then come back and suggest that. I sent out a
22 kind of a charge to all the participants; and
23 the people invited were the Houston Apartment
24 Association, Texas Apartment Association,
25 San Antonio group, a group in Austin that

1 represents those people that have subsidized
2 housing, the landlords, and then somebody from
3 the Dallas group.

4 We had four landlord representatives show
5 up including the Texas Apartment Association,
6 Houston Apartment Association, San Antonio
7 Apartment Association and the guy from Austin,
8 Greg Hitt who represents some of the landlords
9 with assisted housing.

10 All three, in fact all three of the
11 people sitting over here now, Mary Spector and
12 Fred Fuchs and Robert Doggett were invited.
13 They had conflicts. They weren't able to
14 come; but they did send some comments, and
15 then I talked to them after the meeting.
16 Well, I talked to Fred and Robert after the
17 meeting also to kind of relay what was
18 discussed. Judge Prindle was there and
19 another JP from Waco, David Freya was there.
20 A couple of others that were invited weren't
21 there. I was there. Chris Griesel of course
22 was there, and then Elaine was there by
23 phone. She was in the shores of Annapolis at
24 the time.

25 We spent six hours straight from 10:00

1 a.m. to 4:00, no breaks, and talked about
2 everything that we're supposed to talk about.
3 Fred Fuchs and Larry Niemann and Judge Prindle
4 had actually had a meeting. I had talked with
5 Judge Prindle the week before and found out he
6 was going to Austin and asked him to try to
7 get together with Fred Fuchs and Larry Niemann
8 to have kind of a preliminary meeting so they
9 could start to work some things out. And they
10 did, and they came out with a sort of a
11 tentative agreement on a number of things. We
12 used that at a basis when we started the
13 meeting; and as I said, we spent six hours.

14 And there were agreements between the JPs
15 and the landlords. None of the tenants'
16 groups were there. There were tentative
17 agreements with the tenants on some things;
18 but as it turns out by the end of the day we
19 didn't really have a consensus among all three
20 of the primary interested groups, the
21 landlords, the tenants and the JPs on anything
22 that we could take back to the subcommittee.
23 We were sort of close. Some of the things
24 that there were some tentative compromises on
25 we had really already voted on or there were

1 some other difficulties with. So as a result
2 of that the subcommittee met last week by
3 phone, and then we came out with Version 8.5
4 which is the version before you. And you have
5 two versions, actually the marked-up version
6 and then a clean version just to see what it
7 looks like.

8 And the subcommittee is ready to go
9 forward. There are 18 more rules left to vote
10 on either in totality or in portions. In some
11 cases we voted on 95 percent of a rule, and
12 there's just one sentence left to be
13 discussed. In other cases there are some
14 things there are really not very controversial
15 that I think we can take and get a number of
16 those out of the way and be done with. Some
17 of those were changes we were instructed to
18 make at the last meeting, which we made those
19 changes. We are ready to go on those.

20 The problem areas, there are eight rules,
21 a total of eight rules and really about four
22 different areas that constitute areas that are
23 controversial where there is no substantive
24 agreement in the rules; and the committee,
25 subcommittee is prepared to talk about those

1 and go forward and seek a vote on those.

2 I summarize the position of the parties;
3 but I think the parties are all here today,
4 and they probably depending on the will of the
5 Chair can summarize their own or we can
6 summarize their position. And but we're ready
7 to go forward as the committee desires.

8 HONORABLE NATHAN L. HECHT: Well, of
9 course, we're happy to hear from everybody
10 within reason, as we have been in the past.
11 So we have the principals present. We're just
12 sorry we ever let you out of the jury room
13 before you reached the settlement. But how do
14 you propose to, where do you want to start?

15 HONORABLE TOM LAWRENCE: Let us start
16 with, if you would, with some of the things
17 that are relatively uncontroversial that we've
18 already talked about in some detail, and let's
19 get those out of the way, and then we can move
20 on to the areas that are going to take some
21 more discussion.

22 HONORABLE NATHAN L. HECHT: Okay.

23 HONORABLE TOM LAWRENCE: The first deals
24 with Rule 4 and then also Rule 739. We
25 discussed this last time; and the problem here

1 we discussed in quite a bit of detail was that
2 we need to include all of the rules that are
3 underlined in the new version of Rule 4 in
4 Rule 4 because the Rule 4 of course deals with
5 the five-day period. And there was agreement
6 to do that last time. However, there was a
7 desire to add some language in Rule 739 which
8 is the citation rule to make sure that it's
9 clear to a defendant who has been served
10 exactly what the five days mean. So we have
11 added the language which is now the
12 next-to-last sentence in Rule 739 to comply
13 with the committee's dictates last time, and
14 so we would ask that Rule 4 and Rule 739.

15 Now in Rule 739, the last sentence of 739
16 I'd like to hold off on. That deals with
17 discovery; but I think we're ready on
18 everything except the last sentence, and we
19 will get back to the last sentence on 739. So
20 we would move for approval of Rule 4 and then
21 Rule 739 with the exception of the last
22 sentence.

23 MR. HAMILTON: I've got a question on
24 739. You used the term "calendar day." Is
25 that different than a day, just a regular

1 day?

2 HONORABLE TOM LAWRENCE: Well, --

3 MR. YELENOSKY: Not on this planet.

4 HONORABLE TOM LAWRENCE: We thought that
5 was the more accurate way to say it.

6 MR. YELENOSKY: Just to make it clear
7 you're not talking about birthdays.

8 MR. FUCHS: Business days.

9 MR. YELENOSKY: Business days.

10 HONORABLE NATHAN L. HECHT: Well, I guess
11 the time frames are so short where 24 hours,
12 whatever the next.

13 MS. BARON: Yes. You don't want to say
14 it starts at 3:00 and then goes to 3:00 and
15 then goes to 3:00 and then.

16 MR. YELENOSKY: So there is a difference
17 between a calendar day and a day, because a
18 calendar day is all of Monday until whenever I
19 guess the court closes as opposed to 24
20 hours.

21 HONORABLE NATHAN L. HECHT: From 5:00
22 o'clock p.m. until 9:00 o'clock a.m. the next
23 morning is the calendar day, or transversely
24 from 9:00 o'clock in the morning to 5:00
25 o'clock the next day would be a calendar day.

1 MR. YELENOSKY: Okay.

2 HONORABLE NATHAN L. HECHT: Who else has
3 a question, Rule 4?

4 MR. DOGGETT: I just have --

5 HONORABLE NATHAN L. HECHT: Yes.

6 MR. DOGGETT: -- an insignificant
7 concern. But the Rule 739 references a sworn
8 complaint; but the rules jockey between a
9 sworn complaint and a sworn petition, and I'd
10 just ask that we pick one and do a word
11 change.

12 MR. YELENOSKY: Consistency.

13 HONORABLE NATHAN L. HECHT: Any other
14 problems with Rule 4 or Rule 739 except for
15 the last sentence?

16 MR. FUCKS: Justice Hecht, there had been
17 a concern and the tenants had expressed it to
18 the subcommittee. I assume by their silence
19 the subcommittee decided not to adopt it.
20 And that was to include a warning in Spanish
21 on a citation given the short time frames
22 telling someone who has been sued in Spanish
23 that their appearance date is going to be the
24 trial date. And I'm not sure what actually
25 happened out of the subcommittee with the

1 request that there be a warning in Spanish on
2 the citation.

3 HONORABLE NATHAN L. HECHT: Elaine.

4 PROFESSOR CARLSON: We voted "no."

5 HONORABLE NATHAN L. HECHT: Okay.

6 Anybody else? So there is a motion to adopt
7 Rule 4 as you have it before you and Rule 739
8 except for the last sentence. Are you ready
9 to vote?

10 MS. EADS: Question?

11 HONORABLE NATHAN L. HECHT: Yes.

12 MS. EADS: Why did you vote against the
13 Spanish?

14 PROFESSOR CARLSON: I suspect the
15 consensus was if we started there, you could
16 do all the rules, 106 and --

17 HONORABLE TOM LAWRENCE: 536.

18 PROFESSOR CARLSON: We really just didn't
19 feel it was within our subcommittee's decision
20 to say we're going to do this one in Spanish
21 or any other rule, and it wasn't within our
22 charge.

23 MR. YELENOSKY: We could move an
24 amendment to this that would include Spanish
25 and get a vote on the committee on it. Is

1 that appropriate?

2 HONORABLE NATHAN L. HECHT: Yes.

3 Amendments are in order.

4 MR. YELENOSKY: I would move that
5 amendment to be included, because I do think
6 the short time frame; and there are a lot of
7 things that are different about eviction
8 rules. And so I guess one other difference
9 doesn't trouble me that much from just a
10 consistency standpoint.

11 MS. EADS: I second that.

12 HONORABLE NATHAN L. HECHT: All right.
13 Motion to amend by requiring in Spanish, so we
14 take the amendment first. How about the
15 Chair?

16 CHAIRMAN BABCOCK: We'll take whatever
17 you think.

18 HONORABLE NATHAN L. HECHT: We'll take
19 the amendment first. All in favor of -- does
20 everybody understand the amendment? All in
21 favor of the amendment raise your right hand,
22 raise your hands. It carries eight to five.

23 PROFESSOR CARLSON: Could you supply us
24 with an English translation?

25 MR. YELENOSKY: Sure. I assume you-all

1 proposed something.

2 MR. FUCHS: We have that.

3 MR. YELENOSKY: Me Espanola is esta bien.

4 HONORABLE NATHAN L. HECHT: All right.

5 Now on the Rule 749 except for the last
6 sentence and Rule 4, all in favor raise your
7 hand.

8 MR. HAMILTON: 739.

9 HONORABLE NATHAN L. HECHT: 739. I'm
10 sorry. Yes. 12. It carries 12 zip. The
11 Chair is back.

12 CHAIRMAN BABCOCK: All right. And I
13 apologize. This is all Tommy Jacks' fault.
14 He told me he had a cab waiting for us; but
15 apparently not. Where are we, Elaine?

16 PROFESSOR CARLSON: Do you want to take
17 up 740?

18 HONORABLE TOM LAWRENCE: No. Let's
19 do -- let's go to 747. This is a -- 747 is
20 the rule that says that if a jury is demanded,
21 the justice shall try the case. There was a
22 comment that when some JPs have a request for
23 a jury trial in some parts of the state that
24 it seems to take them too long to set that
25 case for trial. And there was some of the

1 people on the, and I think Larry Niemann was
2 one, was asking that there be a restriction
3 put on that that it be done within X number of
4 days; and I think two weeks was one of the
5 things that was discussed. And that was
6 really there really wasn't much discussion
7 about this at the meeting we had on May 30th.
8 I think we brought it up and nobody really
9 wanted to talk about it much. So in essence
10 the subcommittee has voted to leave the
11 proposed language as it was except that we've
12 added four words to the second sentence "If a
13 jury is demanded by either party, the jury
14 shall be impaneled as soon as practicable and
15 sworn in." And that doesn't set an arbitrary
16 deadline which is sometimes difficult to meet
17 by judges to get juries into some areas; but
18 it does convey the meaning that it's supposed
19 to be soon. And that's the recommendation of
20 the subcommittee.

21 CHAIRMAN BABCOCK: Any discussion?
22 Elaine, do you want to say anything?

23 PROFESSOR CARLSON: You might recall that
24 there was some discussion last meeting that
25 the method and timing by which a JP can obtain

1 a jury really varies from location to
2 location; and that's why we were hesitant to
3 go to a hard number so as to leave local
4 practice somewhat in tact, but send the
5 message this is to be done expeditiously.

6 CHAIRMAN BABCOCK: Any other discussion?
7 Anybody want to make a motion?

8 HONORABLE TOM LAWRENCE: I move adoption.

9 CHAIRMAN BABCOCK: Anybody second?

10 MS. EADS: Second.

11 CHAIRMAN BABCOCK: All in favor raise
12 your hand. All opposed. It passes by a vote
13 of 13 to nothing, the Chair not voting. I
14 wish Sarah would come back.

15 MR. GILSTRAP: So she could hear you say
16 that.

17 CHAIRMAN BABCOCK: Yes.

18 MR. ORSINGER: It wouldn't be "nothing"
19 anymore if Sarah came back.

20 (Laughter.)

21 CHAIRMAN BABCOCK: Good point. Okay.
22 Where are we next, Judge?

23 HONORABLE TOM LAWRENCE: 748. 748 is a
24 rule that deals with what has to be in the
25 judgment. This was not one of the rules that

1 was on the table to be discussed by the ad hoc
2 committee; but what we -- we have already
3 voted on parts of this. On September 28 we
4 voted to give JP judgment presumptive validity
5 after the perfection of the appeal. We also
6 voted to require the party appealing to pay
7 the county court filing fee into the registry
8 of the JP court. We didn't vote on this.
9 There were about four or five rules we didn't
10 vote on last time because we wanted to have
11 one last pass through because there was some
12 discussion at the last meeting that we wanted
13 to try to look at the terms plaintiff,
14 defendant, appellant, appellee, judgment
15 creditor, judgment debtor.

16 So we've gone through these rules and
17 changed everything that we could change to
18 make that more consistent, and so we just held
19 out 748; but we had discussed this in the
20 past, have taken two votes on a portion of
21 it. And we're ready to move forward on it.

22 CHAIRMAN BABCOCK: Elaine.

23 PROFESSOR CARLSON: You might recall in
24 this rule there's quite a bit more that's
25 going to be required to be included in the JP

1 eviction judgment. What our thought process
2 on this was, as you see in the last paragraph,
3 the county court can actually on an appeal by
4 trial de novo look back to a finding by the
5 justice court and rely upon them in making or
6 assessing certain determinations such as rent
7 to be paid when due although that is not
8 binding if you look at the de novo
9 proceedings.

10 We are hoping in the long run that we can
11 put together a form judgment. There are so
12 many of these cases that it won't be onerous
13 for the JP court to enter a judgment with this
14 much information.

15 CHAIRMAN BABCOCK: Hi, Judge, how are
16 you?

17 HONORABLE SANDY PRINDLE: Good afternoon,
18 Mr. Chairman. I'm sorry. I came in before
19 you got back to lunch, and I've introduced
20 myself.

21 CHAIRMAN BABCOCK: Okay. I'm sorry. I
22 wasn't here.

23 HONORABLE SANDY PRINDLE: Okay. I have a
24 letter that is before you as well as the other
25 members of the committee. Our state

1 association is not opposed to this rule; but
2 there are two or three little things that I'd
3 like to ask you-all to consider in addition to
4 the things being proposed. The first thing
5 that is under subsection (c) at 740 -- I'm
6 sorry. No. Not 740. Let me go back to the
7 rule. Pardon me. Rule 748 on the third line
8 of this rule proposal we're asking that a
9 formula be presented for the judges to
10 calculate the rent. And that is left silent;
11 and for the sake of uniformity across the
12 state we are suggesting that the back rent be
13 calculated through the court date. This is
14 also mentioned under (b)(5) of this rule as
15 well. And we, the JPs in the state would like
16 clarity and certain direction on this date.
17 We don't think it's right for the judgment
18 formulas to vary from one court to the other
19 or one county to the other.

20 CHAIRMAN BABCOCK: Okay.

21 HONORABLE SANDY PRINDLE: Number two is
22 there is language in the same paragraph where
23 it talked about attorney's fees being granted
24 if sought. And we would like to request for
25 clarity sake that the word "sought" be changed

1 to "pled for," and this would eliminate
2 surprise at the time of the trial where a
3 party would request attorney's fee when they
4 did not plead for them. And as most of you
5 know, attorneys are statutorily set forth in
6 Chapter 24.006 of the Texas Property Code; but
7 I really think "if sought" is a little bit
8 ambiguous. We would really like the words
9 "pled for" there.

10 Next, well, actually let me see. I think
11 that's just about all that I have got on this
12 particular rule.

13 MR. NIEMANN: (a)4), Judge.

14 HONORABLE SANDY PRINDLE: I'm sorry.
15 Under (a) (4) this judgment would require the
16 court to calculate court costs. This is
17 unworkable, Mr. Chairman, we submit because
18 it's impossible for the justice court at the
19 time to know the amount of court costs that
20 are going to arise later if writs of
21 possession are filed for or abstracts; and
22 customarily in our civil suits and small
23 claims suits court costs are not calculated
24 until the time the judgment is paid. And we
25 ask that that be rescinded. And we think

1 these are just primarily housekeeping changes,
2 and I respectfully request that these issues
3 be considered.

4 CHAIRMAN BABCOCK: If the court costs
5 under (a)(4) were just amended to says "court
6 costs" without requiring specification?

7 HONORABLE SANDY PRINDLE: That's fine.
8 We're happy with that.

9 CHAIRMAN BABCOCK: All right.

10 HONORABLE SANDY PRINDLE: And also you
11 could have a contractual post judgment
12 interest that can vary statutorily. As you
13 all know, it's 10 percent; but contractually
14 we are allowed, the litigants are allowed to
15 recover up to 18 percent under Article
16 5069.105 or somewhere in there. And we
17 wouldn't have a problem with stating a
18 specific amount of post judgment interest if
19 it varies from the 10 percent.

20 CHAIRMAN BABCOCK: All right. Thank
21 you.

22 HONORABLE SANDY PRINDLE: Thank you very
23 much.

24 CHAIRMAN BABCOCK: Judge Lawrence, what
25 about the first issue of having a specific

1 provision about back rent through the court
2 date?

3 HONORABLE TOM LAWRENCE: Well, we had
4 talked about this in the subcommittee a long
5 time ago; and I guess our thinking was to
6 leave it up to the discretion of the judge at
7 the time as to when they awarded the rent.
8 Some leases call for if there is a breach, the
9 rent is, you know, it can be awarded through
10 the end of the month. Some judges may award
11 it until they think the defendant is actually
12 going to be evicted on the writ of
13 possession. Some judges award it through the
14 court date. Our only thought was that we
15 would just leave that up to the discretion of
16 the Court as to when they felt that it was
17 appropriate to award rent. That was our
18 thinking.

19 CHAIRMAN BABCOCK: And the reason and
20 Judge Prindle says that if you had it at a
21 specific date like through the court date,
22 then that would bring uniformity; and your
23 answer -- across the state, and your answer to
24 that is that some leases vary.

25 HONORABLE TOM LAWRENCE: Well, this is

1 the first time I've heard of this, frankly. I
2 didn't know we had a controversy about it.

3 CHAIRMAN BABCOCK: Well, is there some
4 reason why --

5 HONORABLE TOM LAWRENCE: I don't know why
6 we necessarily need to have uniformity, why
7 that is important. I don't have any strong
8 feelings one way or the other.

9 CHAIRMAN BABCOCK: Is there a reason why
10 you might want to have more flexibility
11 because the various rental agreements might be
12 different?

13 HONORABLE TOM LAWRENCE: Well, some
14 leases call for rent to be paid if there's a
15 breach and you're in there after the first of
16 the month, that you owe to the end of the
17 month, so that rental agreement may provide
18 that rent is due to the end of the month if
19 you're there past the first day of the month
20 and you haven't paid right. Quite a few of
21 them say that. So I would think that you
22 would need to have that provision to allow the
23 judge to follow what the rental agreement
24 says. I mean, the judge I guess in their
25 discretion can always award less. We were

1 just trying to leave it up to the discretion
2 of the Court as much as possible.

3 CHAIRMAN BABCOCK: What about -- Elaine,
4 do you want to add anything to that?

5 PROFESSOR CARLSON: No.

6 CHAIRMAN BABCOCK: What about the issue
7 of attorney's fees? The language of this rule
8 says "if sought." Judge Prindle says it
9 should say "if pled for."

10 HONORABLE TOM LAWRENCE: Well, he
11 referenced 24.006 I think of the Property
12 Code. And actually what that provides for is
13 that a defendant is entitled to get attorney's
14 fees, and the defendant would not be pleading
15 for attorney's fees and they don't have to
16 plead for attorney's fees. The defendant gets
17 attorney's fees if the plaintiff is entitled
18 to attorney's fees and the plaintiff
19 prevails. So in that case you would be
20 cutting out the defendant from getting
21 attorney's fees then because there wouldn't be
22 any pleadings for the defendant. I think
23 that's why the subcommittee had the language
24 "sought" instead of "pled" in there was
25 because of the problem with the defendant's

1 attorney's fees.

2 CHAIRMAN BABCOCK: Elaine, do you want to
3 add anything to that?

4 PROFESSOR CARLSON: No.

5 CHAIRMAN BABCOCK: What about the third
6 point about subparagraph (a)(4), court costs,
7 because Judge Prindle's point is that you
8 don't know --

9 HONORABLE TOM LAWRENCE: That's fine.

10 CHAIRMAN BABCOCK: -- at the time of the
11 judgment?

12 HONORABLE TOM LAWRENCE: That's fine.

13 CHAIRMAN BABCOCK: That makes sense to
14 me.

15 HONORABLE TOM LAWRENCE: Uh-huh (yes).

16 CHAIRMAN BABCOCK: Yes, Carl.

17 MR. HAMILTON: On that first point what
18 Judge Prindle was merely asking for as I read
19 his letter is he wanted the calculation to be
20 through the judgment date; and I don't really
21 see anything wrong with having --

22 HONORABLE TOM LAWRENCE: Well, that's
23 going to be the court date, of course.

24 MR. YELENOSKY: Right.

25 CHAIRMAN BABCOCK: The same thing as the

1 court date.

2 MR. HAMILTON: The same thing.

3 CHAIRMAN BABCOCK: But Judge Lawrence's
4 point is sometimes your underlying contractual
5 documentation is going to provide for
6 additional monies beyond the court date, so
7 the judgment is going to have to reflect that,
8 and you don't want to hamstring the JP into
9 putting a date down that conflicts with the
10 written documentation. That is what Judge
11 Lawrence's point was as I take it.

12 MR. HAMILTON: Judge Prindle's point is
13 that would be granting anticipatory damages if
14 it's beyond the judgment date.

15 CHAIRMAN BABCOCK: Well, can you --

16 HONORABLE TOM LAWRENCE: If you've got a
17 lease agreement and the lease agreement says
18 that if you're in there on the 10th of the
19 month and you've not paid rent, you owe until
20 the end of the month, I don't know that that's
21 anticipatory damages.

22 MR. HAMILTON: That wouldn't be. That
23 would be just contract damages.

24 CHAIRMAN BABCOCK: Right. That's the
25 point.

1 HONORABLE TOM LAWRENCE: That's my
2 point.

3 MR. YELENOSKY: And you're saying that
4 the language proposed by Judge Prindle would
5 preclude you from awarding that because it
6 would say through the court date and
7 because -- I guess I'm not sure that that
8 language would preclude that.

9 HONORABLE TOM LAWRENCE: Well, it would
10 if the court date were the 15th of the month
11 and the lease called for the rent to be,
12 called for the tenant to have to pay the rent
13 through the end of the month. Then you
14 wouldn't be able to give the last two weeks of
15 the month rent as I understand what you're
16 saying. Correct me if I'm wrong, Sandy.

17 MR. YELENOSKY: Well, --

18 CHAIRMAN BABCOCK: Go ahead, Stephen.

19 MR. YELENOSKY: Well, I was just -- I
20 don't know. I mean, I'm not sure of the
21 implications of it. But just literally to say
22 to award the back rent due through the court
23 date if it's the 15th of the month, what to do
24 is through the end of the month even if, you
25 know, you haven't reached it yet. So I'm not

1 sure that language would preclude you from
2 awarding that; but I'm not sure what the pros
3 and cons are between the two justices of the
4 peace on that, so that's my only point.

5 CHAIRMAN BABCOCK: Let's see if we -- are
6 there any other parts of 748 that we want to
7 talk about? Yes, ma'am

8 MS. SPECTOR: I'm Mary Spector. I
9 introduced myself at the beginning of the
10 meeting, at the beginning of the session. I
11 would like to talk about a piece of 748 that
12 really goes back to Rule 730(a), and that is
13 the inclusion of the judgment of contractual
14 late charges. And I understand that this may
15 be a horse that was beaten; and --

16 MS. EADS: I'm sorry. We beat them again
17 around here.

18 MS. SPECTOR: -- I would like to revive
19 that for a small time so we can beat it
20 again. But the inclusion of contractual late
21 charges in the eviction proceeding I think is
22 an unwise expansion and may be ultimately an
23 unconstitutional expansion of the eviction
24 rules.

25 The eviction rules are fast and they're

1 limited in a number of issues. The limitation
2 on the number of issues and the speed are
3 permitted just for those reasons. If you've
4 got limited issues, you can have it fast. If
5 want it fast, you limit the issues. And so
6 there is balance there. And to allow the
7 landlord to or the plaintiff to seek
8 contractual late charges in addition to the
9 back rent and in addition to the possession
10 without giving the tenant or the defendant a
11 reciprocal right to seek damages of one kind
12 or another in the eviction case really is a
13 fairness issue.

14 There are also two legal reasons. One is
15 that the Property Code rules Chapter 24 and
16 Chapter 92 both expressly provide for the
17 limitation of issues in the eviction
18 proceeding. Chapter 92 under retaliation
19 provisions provides for, allows a tenant to
20 raise a defense in an eviction case on the
21 basis of retaliation. That same chapter gives
22 a tenant a remedy to get damages, but does not
23 allow the tenant to seek damages in the
24 eviction suit. The tenant is forced to file a
25 new lawsuit to seek the damages. So arguments

1 about judicial economy seem to me to fall by
2 the wayside. It's economical for one, but not
3 economical for the other.

4 CHAIRMAN BABCOCK: Your objection is to
5 the language "contractual late charges" in
6 748?

7 MS. SPECTOR: Yes. And that also is the
8 same objection to 738.

9 CHAIRMAN BABCOCK: We'll get to --

10 MS. SPECTOR: The first rule of 738.

11 CHAIRMAN BABCOCK: We'll get to 738 in a
12 minute. But contractual late charges, Judge
13 Lawrence?

14 HONORABLE TOM LAWRENCE: Well, we voted
15 on June 15th of last year to accept this.

16 CHAIRMAN BABCOCK: Right.

17 HONORABLE TOM LAWRENCE: And the reason
18 that we voted to do it was that calculating
19 the late charges we felt that was inextricably
20 linked to the question of rent, and it didn't
21 make any sense to separate those. If you're
22 going to render a judgment for rent which the
23 rules provide for, the calculation for late
24 charges was not much more than that already.

25 There are a number of different

1 provisions in the Property Code and in the
2 leases that allow tenants to sue landlords for
3 other reasons and landlords to sue tenants.
4 Certainly we don't intend to, have no intent
5 to expand the rules to include all of these;
6 but calculating late charges just didn't seem
7 to the committee at the time we voted on it I
8 don't think to be anything that was going to
9 take a lot of time or would hopelessly expand
10 it. In fact it's in the section. In most
11 leases late charges is in the same paragraph
12 as rent. Many JP Courts across the state
13 already grant late charges because they
14 consider that it is part of rent. Some do
15 not; but many do. And that was the thinking
16 of the subcommittee; and again, we voted on
17 it.

18 CHAIRMAN BABCOCK: Yes, okay. Elaine,
19 anything to add to that?

20 PROFESSOR CARLSON: Mary brought this
21 issue up before, and I'm trying to bring to
22 mind our discussion. It seems to me that we
23 discussed the fact that you could -- the
24 tenant could be evicted for not paying the
25 late charges, that that could be -- it is

1 construed as part of rent. If you don't pay
2 your rent, if you pay rent late, you owe back
3 charges, you owe back rent. You therefore
4 could be evicted. Our subcommittee really did
5 feel that they were so closely linked as to
6 essentially they were one and the same.

7 MS. SPECTOR: May I respond?

8 CHAIRMAN BABCOCK: Well, yes. Make it
9 brief, because we on things we've voted on
10 unless the Chair of the subcommittee wants to
11 reopen it, we usually don't; but for the
12 purpose of the record why don't you just
13 respond real quickly.

14 MS. SPECTOR: You're referring to a
15 common provision in a form lease that's widely
16 used. The problem is landlords vary in the
17 way they account, and it can be a very
18 difficult issue to determine how the back, the
19 late charges are accounted for on the ledger
20 sheet. The parties can usually agree what the
21 rent is; but the amount of late charges may be
22 a highly disputed issue. And so I would
23 disagree that it's not inextricably
24 intertwined, that the rent is one issue. The
25 landlords chooses, how the landlord chooses to

1 account for it may cause the tenant to be late
2 on rent; but it does complicate the matters in
3 which it's a complicated issue already, but it
4 complicates it even further to add the
5 additional issue in without a corresponding
6 right of the tenant to seek any kind of
7 damages.

8 PROFESSOR CARLSON: But the tenant could
9 contest the late charges and validity against
10 them.

11 MS. SPECTOR: Defend against them; but
12 have no opportunity to offset them against any
13 other remedies that you might be entitled to.

14 CHAIRMAN BABCOCK: Ms. Spector's comments
15 will be in the record for the Court to
16 consider. Anything else about Rule 748 that
17 anyone wants to raise? Carl.

18 MR. HAMILTON: Where it says "may enter a
19 judgment for attorneys fees if authorized" I
20 know we all know that means if authorized by
21 law; but I'm wondering if it ought not to say
22 "by law" instead of just "if authorized."
23 Authorized by who? By the judge or?

24 CHAIRMAN BABCOCK: Judge Lawrence, what
25 do you think about that?

1 HONORABLE TOM LAWRENCE: That's fine.

2 Sure.

3 MR. HAMILTON: And then in the last --

4 CHAIRMAN BABCOCK: What line is that?

5 CHAIRMAN BABCOCK: I got it. Nevermind.

6 MR. HAMILTON: And in the last four lines
7 that starts with "except," if that exception
8 is not an exception to the preceding sentence,
9 I think we should put a period after "signed"
10 and start a new sentence with "A writ of
11 possession." It's confusing to me as to what
12 it was excepting.

13 PROFESSOR CARLSON: I think Professor
14 Dorsaneo had the same observation. He
15 suggested that we put a period after "signed"
16 and put "if the defendant is leasing a
17 manufactured home lot subject to Section
18 94.203 of the Texas Property Code, a writ of
19 possession may be issued only in accordance
20 with that provision.

21 MR. HAMILTON: That's better.

22 CHAIRMAN BABCOCK: Okay.

23 MR. YELENOSKY: And I have one very minor
24 thing.

25 CHAIRMAN BABCOCK: Yes, Stephen.

1 MR. YELENOSKY: And Judge Lawrence and I
2 I think maybe exchanged e-mails on this, and I
3 don't know if a decision was made or if it was
4 just an oversight. But (b)(4) refers to the
5 government and then it refers to the federal
6 government; but it's not consistent between
7 the two references.

8 HONORABLE TOM LAWRENCE: I thought I
9 changed it. Oh, no, I didn't.

10 MR. YELENOSKY: It has got "federal."

11 HONORABLE TOM LAWRENCE: I think I
12 changed that.

13 MR. YELENOSKY: Maybe in the version I'm
14 looking at. I'm looking at the strike-out
15 version.

16 CHAIRMAN BABCOCK: You're right. You're
17 right. It should be "government" both
18 places. Right?

19 MR. YELENOSKY: Right. Because you could
20 have another entity. There are some TMHMR.

21 HONORABLE TOM LAWRENCE: You're right.

22 PROFESSOR CARLSON: So strike "federal."

23 HONORABLE TOM LAWRENCE: I got that.

24 MR. YELENOSKY: Not TMHMR. A local
25 MHMRA.

1 CHAIRMAN BABCOCK: Does anybody else have
2 anything? Yes, Carl.

3 MR. HAMILTON: Well, this is a problem
4 that I've seen throughout several of the
5 rules; and that is in the (d) part where it's
6 talking about the 10 days and it's talking
7 about enforcement of the judgment can only be
8 done after 10 days after the judgment is
9 signed. And if the enforcement doesn't occur
10 within the 10-day period, --

11 MR. YELENOSKY: Then it goes to county
12 court.

13 MR. HAMILTON: No. But then what if it
14 goes to the county court, and then the county
15 court somehow dismisses it because the
16 pauper's affidavit or something is no good?
17 Then we're left with a hiatus of no
18 enforcement. But that appears in several
19 places that I think we need to talk about at
20 some point.

21 CHAIRMAN BABCOCK: 748(d) is what you're
22 on now?

23 MR. HAMILTON: 748(d) and 749(b).

24 HONORABLE TOM LAWRENCE: And it's also in
25 750.

1 MR. HAMILTON: In other words, you might
2 have a contest, for example, over something
3 that is not heard for 15 days because it can
4 be five plus five and another five extension,
5 so you may have a decision beyond the 10-day
6 period; but enforcement of the judgment cannot
7 be had after 10 days.

8 HONORABLE TOM LAWRENCE: Well, this is
9 designed to correct a problem where you have
10 an appeal of the case and the appeal bond is
11 perfected. The appeal is perfected; but the
12 defendant does not post a supersedeas bond.
13 So you have to have the ability if the
14 supersedeas is not posted for the landlord to
15 get a writ of possession for that tenant to be
16 evicted. Now if you wait until it's docketed
17 in the county court, then that may be a delay
18 of, I don't know, 10 days possibly. I don't
19 know how long. How long do you think it would
20 take, Andy, to get it docketed in county court
21 once it's sent up?

22 MR. HARWELL: Not longer than 10 days.

23 HONORABLE TOM LAWRENCE: Because the
24 judge is going to certify the transcript and
25 send all the papers up with the appeal; but

1 there is going to be a period of time where
2 the landlord is not going to be able to get
3 that tenant out unless he can get the writ of
4 possession in justice court. Now after that
5 period of time then he's going to go to county
6 court because you don't want to have
7 jurisdictions overlapping and two people able
8 to do that. We thought within this time
9 period that there was almost no chance that
10 the county court would have gotten all that
11 information and be able to docket it by then,
12 so there would be a remedy for the landlord to
13 get the writ of possession in the JP court at
14 least within this initial period, and then
15 after that they go to county court where the
16 case is docketed.

17 MR. HAMILTON: Unless the 10 days is up
18 and the county court decides it doesn't have
19 any jurisdiction because it denies the
20 affidavit of the indigent or something like
21 that.

22 HONORABLE TOM LAWRENCE: Well, if that's
23 the case, then if the appeal is not perfected,
24 then the JP court judgment would prevail and
25 the JP court would have the ability to issue a

1 writ of possession.

2 MR. HAMILTON: But not after 10 days.

3 HONORABLE TOM LAWRENCE: No, they would
4 after the 10 days if the appeal is not
5 perfected.

6 MR. YELENOSKY: Yes, because it says "if
7 perfected."

8 HONORABLE TOM LAWRENCE: If the appeal is
9 not perfected, then the JP court judgment will
10 still prevail.

11 CHAIRMAN BABCOCK: Okay. Are you
12 satisfied with that Carl or not?

13 MR. HAMILTON: I don't know. I'll have
14 to think about that and see how it all shapes
15 out.

16 CHAIRMAN BABCOCK: Has anybody else got
17 anything else, any other issues in 748?
18 Mr. Niemann.

19 MR. NIEMANN: Really not a issue, but a
20 clarification, Mr. Chairman. Is it the
21 impression of Judge Lawrence, Judge Prindle
22 that they would need to keep the file at their
23 office during this entire 10-day period?

24 CHAIRMAN BABCOCK: I don't know that the
25 rule addresses that.

1 MR. NIEMANN: Because if that's the case,
2 it will slow down the eviction by five days.

3 HONORABLE SANDY PRINDLE: This is also
4 addressed in Rule 750(a); and I was going to
5 comment on this a little later. And my
6 suggestion was that if an appeal is perfected
7 and a supersedeas bond is submitted at the
8 same time inside of five days, I see no reason
9 why the justice court needs to hold it for 10
10 unless there is something that you-all may
11 think of that there may be a five-day period
12 that we would have to hold it to give the
13 plaintiff an opportunity to challenge the
14 bond; but you know, I'm not sure that we need
15 to hold it the full 10 days in every case, and
16 the rule does not give us flexibility on that
17 issue. But that's 750, Mr. Chair, not 748.

18 CHAIRMAN BABCOCK: Okay.

19 MR. NIEMANN: My point was that for every
20 day that the justice court keeps it beyond
21 five days after judgment is adding another day
22 to the ultimate resolution in county court.

23 CHAIRMAN BABCOCK: Right.

24 HONORABLE TOM LAWRENCE: Well, but 748(d)
25 only applies where there has been no

1 supersedeas bond filed in the JP court by the
2 tenant, and we're doing this to help the
3 landlords. Now if the landlords want us to
4 take that out, we can.

5 MR. NIEMANN: No.

6 HONORABLE TOM LAWRENCE: But that
7 means that you've got to go to county court to
8 get the writ of possession. Is that what
9 you?

10 MR. NIEMANN: No, no. I just want
11 everybody to remember that as a practical
12 matter the cases are going to be --

13 CHAIRMAN BABCOCK: Okay. Has anybody
14 else got anything on 748, any other issues?
15 Okay. Here is what I see as changes that
16 everybody agrees on: That the phrase "by law"
17 is inserted after the "attorney's fees if
18 authorized." That's number one.

19 Two, the language that Elaine suggested
20 with respect to the lines talking about writ
21 of possession issued in accordance with
22 Section 94.203, striking the phrase "and in
23 what amount" in subparagraph (a)(4) and
24 striking the word "federal" before the word
25 "government" in (b)(4). Judge Lawrence, and

1 Elaine Carlson, are those changes acceptable?

2 HONORABLE TOM LAWRENCE: Uh-huh (yes).

3 PROFESSOR CARLSON: Uh-huh (yes).

4 CHAIRMAN BABCOCK: All right. Anything
5 else that people want to raise as issues on
6 748? Then in that event everybody in favor of
7 748 as --

8 MR. EDWARDS: Are we voting on the clean
9 version or the line version?

10 CHAIRMAN BABCOCK: We're voting on the
11 line version as amended.

12 MR. EDWARDS: Because in the clean
13 version part of the sentence is left out.

14 CHAIRMAN BABCOCK: We're voting on the
15 line version. Everybody in favor of 748 with
16 those amendments that I've just enumerated
17 raise your hand. Opposed? The vote is 12
18 nothing in favor, the Chair not voting.
19 Okay. What is next, Judge Lawrence?

20 HONORABLE TOM LAWRENCE: Let's take
21 748(b). I'm sorry. 749(b). Excuse me. This
22 is the perfection of the appeal. We have
23 taken a couple of votes on this. On September
24 28 we voted. Excuse me. I'm sorry. On
25 November 2nd we voted to adopt the last two

1 sentences of the proposed rule; and there's
2 been a little change in the nomenclature here;
3 but basically what we voted on was that if the
4 appeal does contest a judgment for possession
5 and the tenant fails to post a supersedeas
6 bond when required, the appellee may seek a
7 writ of possession. The issue of possession
8 may not be further litigated in the eviction
9 action in county court. That's what we voted
10 on November 2nd; and we didn't take any other
11 votes on this in May.

12 CHAIRMAN BABCOCK: Okay. Does anybody
13 have any issues with respect to 749(b)? Carl.

14 MR. HAMILTON: I have a question. This
15 may relate to some of the others too; but this
16 seems to all be directed at appeals by the
17 defendant. But what if the plaintiff gets
18 dispossessed in the case and wants to appeal?

19 HONORABLE TOM LAWRENCE: How would the
20 plaintiff get dispossessed?

21 MR. HAMILTON: Well, if the Court rules
22 that the defendant is entitled to possession
23 and the plaintiff disagrees with that and
24 wants to appeal it.

25 HONORABLE TOM LAWRENCE: Well, the

1 tenant, the defendant would be the person in
2 possession, so the plaintiff wouldn't be
3 getting dispossessed.

4 MR. HAMILTON: No, they're not
5 dispossessed. Well, dispossessed in the sense
6 that he doesn't get possession of it. He
7 loses his case, and so he wants to appeal.

8 HONORABLE TOM LAWRENCE: Yes. Well,
9 under 749 there is a provision for the
10 plaintiff to appeal. The plaintiff even could
11 in theory have to post a supersedeas if there
12 is a judgment for attorney's fees for the
13 defendant in fact. So the plaintiff would
14 have to post an appeal bond. I'm sorry. Not
15 an appeal bond; but a notice of appeal. And
16 that's all provided for in 749 which we've
17 already voted on.

18 And then 749(b) makes reference to 749.
19 If you look at the second sentence, the fourth
20 line, when the plaintiff timely files a notice
21 of appeal in conformity with Rule 749 and pays
22 the filing fee required for the appeal of
23 cases to county court or an affidavit of
24 indigency is approved, which I don't see
25 happening very often; but you have got to make

1 it available for both. Then the appeal by the
2 plaintiff shall be perfected.

3 So there is a mechanism for the plaintiff
4 to appeal. It's not very costly for the
5 plaintiff because they've already paid the
6 court costs. There is no need to secure it.
7 In all likelihood they're not going to have to
8 post a supersedeas bond although they could in
9 theory. So the appeal by the plaintiff is
10 really pretty easy.

11 PROFESSOR CARLSON: That first paragraph
12 of 749(b) does set forth distinctive methods
13 for the defendant as opposed to the
14 plaintiff. It's not all defendant.

15 HONORABLE TOM LAWRENCE: Yes. Both in
16 749 and 749(b) where we talk about the appeal
17 and perfecting the appeal, I mean, there are
18 different standards for what the defendant has
19 to do and what the plaintiff has to do, and
20 it's all set out in the rules.

21 CHAIRMAN BABCOCK: Any other issues about
22 749(b)? Bill.

23 PROFESSOR DORSANEO: The next to the last
24 paragraph of the last sentence I'm having a
25 little trouble digesting that.

1 CHAIRMAN BABCOCK: Was lunch not so good
2 today?

3 PROFESSOR DORSANEO: I thought it was
4 fine. It was Italian food, which is what
5 you-all should eat more often.

6 (Laughter.)

7 CHAIRMAN BABCOCK: Is this the sentence
8 that starts "If the appeal" does not
9 contest -- "does contest a judgment for
10 possession"?

11 PROFESSOR DORSANEO: Is that always going
12 to be the tenant's appeal?

13 HONORABLE TOM LAWRENCE: Well, this
14 relates to the supersedeas and the eviction;
15 and the plaintiff would never be evicted, so
16 really only it would relate to the defendant.

17 PROFESSOR DORSANEO: The terminology is
18 what bothered me. I don't know whose appeal
19 this is, and then you use the term "tenant"
20 and then "appellee."

21 HONORABLE TOM LAWRENCE: Okay.

22 PROFESSOR DORSANEO: I'd rather use
23 "plaintiff and defendant" or "landlord and
24 tenant" or have somebody identified if it's
25 somebody rather than nobody, because you're

1 very familiar with what all of this is about.

2 HONORABLE TOM LAWRENCE: Okay.

3 PROFESSOR DORSANEO: And I'm going to be
4 more like the people who aren't when I'm
5 reading it.

6 CHAIRMAN BABCOCK: How do you fix it,
7 Bill?

8 PROFESSOR DORSANEO: I'm asking him to
9 fix it.

10 (Laughter.)

11 CHAIRMAN BABCOCK: Do you fix it, Tom?

12 PROFESSOR DORSANEO: I'm asking Judge
13 Lawrence to fix it.

14 PROFESSOR CARLSON: And the reason we
15 didn't use "landlord" --

16 HONORABLE TOM LAWRENCE: We were trying
17 not to lose --

18 PROFESSOR DORSANEO: It might not be a
19 landlord.

20 MR. YELENOSKY: Well, you could say "If
21 the defendant does contest a judgment for
22 possession," and that's going to be the
23 tenant, "and fails to post a supersedeas bond
24 when required, the plaintiff/appellee may seek
25 a writ of possession."

1 PROFESSOR DORSANEO: That would help me.

2 HONORABLE TOM LAWRENCE: Okay. I think
3 that's a good fix.

4 CHAIRMAN BABCOCK: Say that again,
5 Stephen.

6 MR. YELENOSKY: "If the defendant does
7 contest a judgment for possession and fails,"
8 just strike "the tenant," "and fails to post a
9 supersedeas bond when required," and then you
10 could leave it "the appellee," or to conform I
11 guess you would say "the plaintiff may seek a
12 writ of possession."

13 HONORABLE TOM LAWRENCE: Yes. That's a
14 good fix.

15 CHAIRMAN BABCOCK: Okay. What else on
16 749(b)?

17 PROFESSOR DORSANEO: It would be better
18 to say "If the defendant appeals a judgment
19 for possession" rather than "contests."

20 HONORABLE TOM LAWRENCE: Well, we got
21 into that last time.

22 MR. YELENOSKY: We got into that last
23 time, because they could be appealing more
24 than one thing. And so the question is among
25 the things that they're contesting in appeal

1 are they contesting the possession?

2 PROFESSOR DORSANEO: Okay. All right.

3 CHAIRMAN BABCOCK: Carl.

4 MR. HAMILTON: That provision prohibits
5 the relitigation of the possession right of
6 the tenant unless he puts up a supersedeas
7 bond on the appeal.

8 HONORABLE TOM LAWRENCE: Well, if he's
9 evicted. He could also be evicted for not
10 paying rent to the registry of the court, so
11 there are two ways the tenant can be evicted.
12 And what this is saying is that if the tenant
13 gets evicted, then he can't litigate the
14 question of possession in county court. The
15 judgment itself will go up on appeal; but the
16 question of possession would not be
17 litigated. It would be moot in essence.

18 PROFESSOR DORSANEO: That bothers me.

19 MR. YELENOSKY: This is your
20 motorcycle --

21 PROFESSOR DORSANEO: I don't understand
22 how you're appealing a judgment that's
23 primarily about possession, and then if you
24 win, you don't get possession back. That
25 bothers me somehow. That doesn't make any

1 sense to me.

2 PROFESSOR CARLSON: There's a whole line
3 of cases, Bill, that say that.

4 COURT REPORTER: I'm sorry?

5 PROFESSOR DORSANEO: I mean, I whole line
6 of dead horses might, you know, be pretty
7 impressive too; but it's not worth a damn.

8 CHAIRMAN BABCOCK: All right.
9 Mr. Niemann, Mr. Prindle and Ms. Spector, do
10 you have comments about this?

11 MR. NIEMANN: Last time you-all sent
12 Fred Fuchs and I out in the hall to try to
13 work out some language to allow continued
14 litigation and the issue of possession in
15 county court even if the writ had been issued
16 or the defendant had voluntarily vacated
17 during appeal. We did work out that language,
18 and we did submit it to Judge Lawrence. It
19 would have allowed the tenant to continue to
20 litigate possession in the county court for
21 purposes of removing the justice court
22 judgment from the tenant's credit record and
23 rental history record.

24 One might ask why would the Apartment
25 Association want the tenant to have that

1 continued right? We think it is very
2 important for the tenant to be able to
3 continue that litigation because we think that
4 we strongly feel that even the pauper should
5 be putting up one month's rent or less as a
6 condition to stop issuance of the writ of
7 possession. So if they don't put up the rent,
8 they ought to be able to appeal and get it off
9 their record even if they don't get possession
10 back. And I think Fred Fuchs agreed with me
11 on that.

12 MR. YELENOSKY: But it doesn't, if I
13 can guess from what you have said many, many
14 months ago, that doesn't solve the problem
15 where you're representing a motorcycle company
16 that gets evicted and wants back in. I
17 remember you talking about that before.

18 PROFESSOR DORSANEO: Uh-huh (yes).

19 MR. YELENOSKY: If you don't post a
20 supersedeas, you don't get to litigate getting
21 back in. You can sue for wrongful eviction
22 it's my understanding of the subcommittee's.
23 That's what you're stuck with is a damage
24 claim.

25 CHAIRMAN BABCOCK: Well, --

1 PROFESSOR DORSANEO: Maybe you can sue
2 for possession in the other action. Can you?
3 Or this? This is?

4 CHAIRMAN BABCOCK: Larry, are you saying
5 that this language is not faithful to the
6 compromise that was struck?

7 MR. NIEMANN: No. I think Mr. Fuchs
8 would agree with me that it does not reflect
9 what we had asked the subcommittee to
10 incorporate.

11 HONORABLE TOM LAWRENCE: Well, let me
12 point out the other two representatives from
13 the landlords there didn't agree. Howard
14 Bookstaff and David Fritche from San Antonio,
15 they wanted the judgment to be final and not
16 able to be appealed any longer if the tenant
17 is evicted, and that was their position quite
18 strongly. So there was no compromise that was
19 reached at the May 30th meeting.

20 Now it's true that Larry Niemann and Fred
21 Fuchs agree on that and maybe Judge Prindle
22 too. I'm not sure. But there was an
23 agreement of some of the parties.

24 MR. PRINDLE: Judge Prindle nods his head
25 yes.

1 MR. YELENOSKY: So all the reasonable
2 parties agree is what you're saying?

3 (Laughter.)

4 MR. NIEMANN: Let me tell you why the
5 difference. I strongly believe that under
6 Dillingham and Open Courts the tenant needs to
7 be able to in order to make sure that the
8 tender of rent requirement to stop the writ of
9 possession being issued I think it is
10 essential that the tenant needs to be able to
11 continue litigation of possession.

12 CHAIRMAN BABCOCK: We talked about this
13 at some length; and then after the meeting in
14 the hallway the subcommittee went back and
15 looked at it, and this is what you came up
16 with and recommended subject to the language
17 that Stephen has talked about changing.

18 HONORABLE TOM LAWRENCE: Uh-huh (yes).

19 CHAIRMAN BABCOCK: So it reads "If the
20 appeal does contest the judgment" --

21 MR. YELENOSKY: "If the defendant."

22 CHAIRMAN BABCOCK: I'm sorry. "If the
23 defendant does contest the judgment for
24 possession and fails to post a supersedeas
25 bond, when required, the plaintiff may seek a

1 writ of possession, and the issue of
2 possession may not be further litigated in the
3 eviction action in the county court."

4 MR. YELENOSKY: And I was just offering
5 that as wordsmithing.

6 CHAIRMAN BABCOCK: Right.

7 MR. YELENOSKY: My position actually
8 would be to offer an amendment, which I'll do
9 when we're done with that.

10 CHAIRMAN BABCOCK: Okay. So Stephen, you
11 would say that the subcommittee was not right,
12 and that the --

13 MR. YELENOSKY: Well, in light of what I
14 have been told and what I saw on the other
15 thing if Larry Niemann and the tenants'
16 representatives agreed on a way that would
17 allow a tenant to protect their records, that
18 seems a reasonable thing to do here. It
19 doesn't solve Bill Dorsaneo's problem about
20 really wanting to get back in; but it does
21 solve one problem where the tenant may be
22 forever blacklisted because they have an
23 eviction on their record for lack of a
24 supersedeas bond. So I guess I would propose
25 the committee take a vote on that proposed

1 agreement that Mr. Niemann and Mr. Fuchs were
2 able to reach.

3 CHAIRMAN BABCOCK: Okay. And Judge
4 Lawrence, your reason for, accepting that
5 there was no consensus because some of the
6 tenant groups opposed it, your reason for --

7 MR. YELENOSKY: Some of the landlord
8 groups apparently opposed it.

9 CHAIRMAN BABCOCK: Some of the landlord
10 groups. I'm sorry. Your reason for doing it
11 this way was what?

12 HONORABLE TOM LAWRENCE: Well, several.
13 One, we have already voted that early on that
14 all rent be paid into the registry of the
15 county court. And I think what Larry Niemann
16 and Fred Fuchs and Judge Prindle were trying
17 to do with their agreement was to craft a
18 proposal, and this gets into 750(a) also; but
19 what they would like to do is to craft a
20 proposal that would allow initially rent not
21 be paid into the county court, that one
22 month's rent be paid into the JP court within
23 five days after the judgment is signed or
24 thereabouts, and that the tenants went along
25 with that. And if you don't, you get

1 evicted. And the tenants went along with that
2 because if, and correct me if I'm putting
3 words in your mouth, but as I understand the
4 tenants went along with that --

5 MR. FUCHS: I think that's sort of a
6 little different issue from my perspective.

7 HONORABLE TOM LAWRENCE: Well, but it's
8 really kind of tied in. If you could appeal
9 the question of possession if the tenant had
10 been evicted, so long as you could do that,
11 because you're concerned about getting it off
12 their credit history.

13 MR. FUCHS: That's correct.

14 HONORABLE TOM LAWRENCE: The subcommittee
15 just frankly didn't feel that the credit
16 history problem was part of our charge or part
17 of what we were to consider.

18 The other problem that we struggled with
19 was if the tenant is out of the premises, if
20 he's been evicted, we just don't know what the
21 point other than credit of litigating the
22 question of possession. There is no mechanism
23 by which the tenant can be put back in
24 possession. We discussed this in a lot of
25 detail back in September.

1 CHAIRMAN BABCOCK: Right.

2 HONORABLE TOM LAWRENCE: You can't put
3 the tenant back in possession. He's out. He
4 can't be put back in. What is the county
5 court litigating? Now I know that Larry
6 Niemann agrees with this; but David Fritche
7 and Howard Bookstaff did not agree. They want
8 this to be final. They don't want the tenant
9 to be able to appeal. So we've got kind of a
10 agreement among the landlord groups.

11 So we've got the Texas Apartment
12 Association that wants, that feels like they
13 want that language; but the other two don't
14 want it, and the subcommittee just doesn't see
15 the point of appealing the question of
16 possession if the tenant has been evicted.

17 MR. YELENOSKY: Well, when we talked
18 about credit, and I'm sure someone here can
19 tell me, probably Mr. Niemann, aren't we
20 really talking about a person's ability to
21 rent again? Because when you say "credit"
22 what you're saying is that they are then
23 listed as having been evicted and will have
24 trouble with some landlords being able to rent
25 again.

1 MR. NIEMANN: That's true. Now let me
2 explain the difference between myself and
3 Bookstaff and Fritche. I think it is
4 necessary for the tenant to be able to perfect
5 the appeal and to continue litigation of the
6 issue of possession, not to get possession
7 back, but to get it off his record, okay, for
8 two reasons. Number one, I think it's
9 important to Dillingham and Open Courts, and
10 also incidentally it's fair. But this is so
11 very related to the most important issue that
12 you haven't reached yet, and that is 750. We
13 think that if 750 is left alone the way it is
14 without incorporating what the tenants and the
15 JPs and the landlords all have agreed to in
16 the past of requiring even the pauper who has
17 signed a pauper's affidavit to put up one
18 month's rent or less if that's the amount of
19 the judgment in order to stop the writ.
20 Otherwise you're just setting up the landlord
21 to judicially have to give the tenant, you
22 know, two or three weeks more free rent; and
23 that's what the bottom line is. And it is so
24 important for us, for me in my mind to require
25 the tenant, even the pauper tenant to put up

1 one month's rent in order to stop the writ
2 from issuing after he loses in JP court that
3 I'm willing to do everything I can to make
4 sure that Dillingham is satisfied, and I think
5 that is important in satisfying Dillingham and
6 I'm not afraid to give up on that.

7 CHAIRMAN BABCOCK: You would -- this
8 language would be satisfactory to you I take
9 it if there was a period after "a writ of
10 possession" striking the language "and the
11 issue of possession may not be further
12 litigated in the eviction action in the county
13 court"?

14 MR. NIEMANN: No. We had worked on some
15 language that would make it very clear that it
16 could be litigated; but even if the tenant won
17 or the defendant won, there would be no
18 repossession. He could not get possession
19 back; but he could get the blotch off his
20 record so to speak. That's from their
21 standpoint. From my standpoint it satisfied
22 Dillingham that which is necessary in order
23 for us to get one month rent even by the
24 pauper.

25 CHAIRMAN BABCOCK: Okay. Bill.

1 PROFESSOR DORSANEO: How much is this?
2 I'm still having trouble with this same
3 sentence. I gather what it really means is
4 unless the defendant or tenant posts a
5 supersedeas bond, the issue of possession
6 cannot be relitigated at a county court. I
7 guess that's what that means in English.

8 So my question would be, or that's what
9 it should say rather than this more confusing
10 version of that. How much is the supersedeas
11 bond, Larry? Is it the one month's rent or is
12 it more?

13 MR. NIEMANN: The supersedeas bond should
14 be for the entire judgment plus attorney's
15 fees plus interest during appeal.

16 PROFESSOR DORSANEO: That is a Dillingham
17 problem.

18 MR. NIEMANN: I'm not asking for the
19 pauper to have to put up a supersedeas bond in
20 order to appeal. He can appeal on the
21 basis --

22 PROFESSOR DORSANEO: That's still a
23 Dillingham problem. You can appeal. But if
24 you can't win, there's not much of an appeal.
25 It would make sense to me from the landlord's

1 perspective that the rent is paid, the one
2 month's rent or whatever is paid as a
3 condition to the appeal. I don't think that's
4 a Dillingham problem. Okay? I think posting
5 a supersedeas on a whole thing is a Dillingham
6 problem.

7 MR. NIEMANN: I hate to disagree and to
8 my own detriment; but having to put up money
9 as a condition of perfecting an appeal is a
10 Dillingham problem; and I think anybody who
11 read Dillingham would tend to agree. But
12 having to put up money, having to put up money
13 to stop enforcement of the judgment pending
14 appeal is not a Dillingham problem; and I
15 don't want the appeal to become moot. If it
16 becomes moot, we have no basis by which to
17 require one month's rent.

18 PROFESSOR DORSANEO: Well, I could call
19 it superseding, but make it one month's rent;
20 and I don't think that's a Dillingham problem,
21 because it makes good sense that somebody
22 doesn't get something for nothing during this
23 period.

24 MR. NIEMANN: Well, that's what the
25 current rules end up allowing.

1 PROFESSOR DORSANEO: That's bad, somebody
2 you know, not getting a chance to get what
3 they deserve; but that's the same thing.

4 MR. NIEMANN: I think maybe --

5 PROFESSOR DORSANEO: Maybe we could
6 adjust the supersedeas to say one month's rent
7 to stay in possession.

8 MR. NIEMANN: -- we could put that part
9 of 749 on the table until you resolve the
10 750. 750 will tell you what to do with 749.

11 PROFESSOR DORSANEO: That makes sense to
12 me.

13 CHAIRMAN BABCOCK: Any other issues on
14 749(b)? Yes, Carl.

15 MR. HAMILTON: I can see the appeal going
16 forward by the tenant without a supersedeas
17 bond if the tenant indeed wants to regain
18 possession. And if it's worded or however
19 you-all have it worded to where he cannot
20 regain possession, then it seems to me that
21 that's a moot question and there is nothing
22 for the court to decide on.

23 HONORABLE TOM LAWRENCE: Exactly. That's
24 exactly the position of the subcommittee.

25 MR. HAMILTON: So it ought to be limited

1 to a situation where the tenant wants to
2 regain possession it seems to me.

3 PROFESSOR DORSANEO: And if it is the
4 case that -- we need for the tenant to have
5 the continued obligation to pay rent if there
6 is possession.

7 MR. HAMILTON: Right.

8 PROFESSOR DORSANEO: Continued
9 possession. But that's a different problem
10 from --

11 MR. NIEMANN: I was just trying to circle
12 as many wagons as I could around one month's
13 rent in JP court; and I'm willing to give up
14 that to make it bulletproof.

15 CHAIRMAN BABCOCK: Yes. Judge Lawrence,
16 is it your inclination to vote on 749(b) now
17 or to defer this rule until we talk about 750,
18 or what is your pleasure?

19 HONORABLE TOM LAWRENCE: Well, we've --
20 let's see. On 750 we voted on parts of 750.
21 I mean, I think what the proposal by Larry is
22 is to redo part of what we've already done,
23 that the writ not be paid into the registry of
24 the county court, it been paid into the
25 registry of the JP court. So if we want to go

1 back and, you know, review and revote on some
2 of that, then I guess it's necessary to wait
3 on 748(b) -- 749(b).

4 CHAIRMAN BABCOCK: Yes. Well, we're
5 hopefully not going to vote on things we've
6 already voted on unless there is a real good
7 reason. So I take it then that you would like
8 to vote on 749(b) now subject to the language
9 changes?

10 HONORABLE TOM LAWRENCE: Well, I mean,
11 that's the subcommittee's proposal.

12 CHAIRMAN BABCOCK: Okay. And people have
13 heard the debate here. So we can do it or
14 not. Is there anything else about 749(b) that
15 we want to discuss before we vote on the rule?

16 MS. EADS: Vote on 749(b) right now?

17 CHAIRMAN BABCOCK: Before we vote on it,
18 yes.

19 MS. EADS: I mean, I'm in favor of
20 looking at 750 first to decide whether or not
21 I'm content with what is here in 749, because
22 right now until I know that issue I'm not sure
23 I'm able right now to make that decision.

24 CHAIRMAN BABCOCK: Stephen, you share
25 that view?

1 MR. YELENOSKY: Yes. I think I'd like to
2 look at 750 first.

3 PROFESSOR DORSANEO: Mr. Chairman.

4 CHAIRMAN BABCOCK: Yes.

5 PROFESSOR DORSANEO: I'm trying to
6 understand. But maybe something in 749(b) or
7 in the vicinity of that sentence that troubles
8 me that says that the defendant's appeal does
9 not suspend the county court on the possession
10 issue, does not suspend defendant's obligation
11 to pay rent or to deposit the amount of rent
12 into the registry of the court or something
13 like that, okay, if that's what the problem is
14 or if that's largely what the problem is. And
15 I don't see that as a Dillingham problem at
16 all. Maybe I don't see Dillingham clearly
17 enough; but to say you're supposed to pay rent
18 as a condition of proceeding doesn't seem like
19 an unfair thing.

20 MR. YELENOSKY: I think what that there
21 may be two ships crossing in the night,
22 because I think what Mr. Niemann is talking
23 about is paying one month's rent as a
24 condition regardless of whether or not the
25 rent happens to be due at that point.

1 HONORABLE TOM LAWRENCE: That's correct.

2 MR. NIEMANN: No. One month's rent only
3 in an unpaid rent case.

4 MR. YELENOSKY: In an unpaid rent case.

5 MR. NIEMANN: And even then no greater
6 than the amount of the judgment.

7 MR. YELENOSKY: Okay. But you are
8 talking about that as opposed to what we
9 talked about for a long time and everybody I
10 think ended up voting on that the tenant
11 should have to pay what they would have to pay
12 anyway if there were no eviction action going
13 on. That is water under the bridge, I think.
14 We all agree the way this is drafted is that
15 even a pauper has to pay what they paid as a
16 pauper as the appeal goes along and there are
17 mechanisms set up for this. What Mr. Niemann
18 is talking about is not just paying, in a
19 nonpayment of rent case not just paying what
20 comes due --

21 MR. NIEMANN: In the future.

22 MR. YELENOSKY: -- in the future; but
23 paying one month's essentially back rent or
24 one month's worth of rent at the time of
25 appeal even if the future rent has not yet

1 come due. They have to pay essentially some
2 of the back rent.

3 MR. DOGGETT: That's right.

4 MR. YELENOSKY: Isn't that's right?
5 Isn't that what you're saying?

6 MR. DOGGETT: That's right.

7 MR. NIEMANN: That's right. It serves
8 the same purpose as a supersedeas bond does
9 assuring that at least some of the rent has to
10 be paid.

11 CHAIRMAN BABCOCK: Linda, I'm going to
12 take your comment as a motion to suspend
13 approval of Rule 749(b) pending 750. I'll
14 take Stephen's acquiescence as a second. So
15 let's vote on that. Everybody who wants to
16 delay approval or disapproval of 749(b)
17 pending a discussion of 750 raise your hand.
18 All those opposed? So that will carry. Did
19 you raise your hand, Elaine?

20 PROFESSOR CARLSON: No.

21 CHAIRMAN BABCOCK: So that will carry by
22 a vote of seven, zero. Should we then go on
23 to 750 right now, Judge Lawrence?

24 HONORABLE TOM LAWRENCE: Well, how about
25 749(c)? That ought to be quick.

1 CHAIRMAN BABCOCK: Okay. Let's do 749(c)
2 quickly.

3 HONORABLE TOM LAWRENCE: That is the form
4 of the appeal bond.

5 CHAIRMAN BABCOCK: Chair not voting on
6 the last one.

7 HONORABLE TOM LAWRENCE: That is the
8 phone numbers of the sureties. That was what
9 was requested to be added at the last
10 meeting. That's the change.

11 PROFESSOR CARLSON: Did we add this
12 (indicating)?

13 HONORABLE TOM LAWRENCE: Oh, we have also
14 added some language about approval and
15 disapproval of the bond for the reason. There
16 is a request for that, so we put that in
17 there.

18 CHAIRMAN BABCOCK: Any comment about
19 749(c)?

20 MR. HAMILTON: My form doesn't have the
21 phone numbers on it.

22 HONORABLE TOM LAWRENCE: It doesn't?

23 MR. HAMILTON: Isn't it supposed to have
24 it under surety, signature of surety?

25 HONORABLE TOM LAWRENCE: Yes.

1 MR. HAMILTON: Signature of surety?

2 HONORABLE TOM LAWRENCE: No. Not under
3 the signature. Up in the body. We can put it
4 in the signature.

5 MR. HAMILTON: Okay. I see. Okay.

6 HONORABLE TOM LAWRENCE: The location
7 doesn't really matter. We can put it wherever
8 you want.

9 CHAIRMAN BABCOCK: Okay. Any other
10 comments about 749(c)? Has everyone had
11 enough time to look at it? All in favor of
12 749(c) raise your hand. That carries by a
13 vote of 12 nothing, the Chair not voting.

14 HONORABLE TOM LAWRENCE: Okay, 750. On
15 September 28th we voted to require the tenant
16 to post a supersedeas bond in order to remain
17 in possession during the appeal. On May 18th
18 we didn't take any other votes holding this
19 subject to see what happened with the
20 subcommittee, the ad hoc committee and the
21 subcommittee. Now what we have done in order
22 to aid I guess you'd say the readability is we
23 have carved out of 750 all those provisions
24 that talk about paying rent into the registry
25 of the court and put that in Rule 751 and then

1 changed the form of the supersedeas bond that
2 was 751 and made that 750(a). We thought that
3 having the supersedeas and the rent all in the
4 same rule was just too much and would be a
5 little bit easier to read and understand to
6 separate those. So that's the proposal of the
7 committee. Really I think part of this
8 discussion about, talking about Rule 750, I
9 think really we may want to talk about 751
10 which is the rent issue, not so much the
11 supersedeas bond issue.

12 Now on the supersedeas bond, Rule 750 we
13 had a couple of comments that came up about
14 that. One of the comments dealt with, one
15 dealt with Steve's issue about federal
16 government versus government. I think I made
17 that change in 750 and forgot to make it in
18 749(b), so --

19 CHAIRMAN BABCOCK: 750(e)(3) talks about
20 the federal government.

21 HONORABLE TOM LAWRENCE: No. That's a
22 negotiable obligation. I think that needs to
23 stay in there. That is TRAP rule language.

24 PROFESSOR CARLSON: It's different.

25 HONORABLE TOM LAWRENCE: The one thing

1 that did come up was in (h)(5). This is the
2 lesser the amount. And this was Larry
3 Niemann's suggestion also; but he was
4 concerned that the JPs there would I guess
5 abuse that by setting the amounts too low or
6 inappropriately, and that was part of what the
7 ad hoc committee discussed. And that was
8 brought up and really not much discussion
9 about it.

10 I think that Elaine pointed out that this
11 language is, and it is directly from the TRAP
12 rule, and that's the reason the subcommittee
13 put this language in there is that it did
14 mirror the TRAP rule and we wanted to keep
15 things consistent. And I think you had a
16 comment about that at the ad hoc meeting,
17 didn't you, about changing that lesser
18 amount?

19 PROFESSOR CARLSON: Oh, someone raised an
20 issue on subsection (f). Right?

21 HONORABLE TOM LAWRENCE: No. Well,
22 (h)(5). Yes, (h)(5), the lesser amount, this
23 is setting a lesser amount on the supersedeas
24 bond if the judge feels that there is some
25 just cause to do that.

1 PROFESSOR CARLSON: This language came
2 out of the TRAP rule; and the TRAP rule I
3 think tracks the statute on the Property Code
4 provision.

5 HONORABLE TOM LAWRENCE: Yes. That's it,
6 the Property Code, yes. And the subcommittee
7 didn't feel like we wanted to mess with that.

8 HONORABLE NATHAN L. HECHT: Isn't this
9 the Texaco amendment?

10 PROFESSOR CARLSON: Yes.

11 HONORABLE TOM LAWRENCE: And I guess from
12 my standpoint I'd like -- I think the judges
13 need to have the discretion to lower it where
14 the circumstances dictate it.

15 MR. NIEMANN: Mr. Chairman, I just want
16 to make our position clear. We're not against
17 the judges recording a lesser amount; but we
18 felt there really just needs to be another
19 protection there. If the third party
20 government was not paying the rent, then we
21 didn't think the lesser amount was justified;
22 and I think some of our language was to that
23 effect.

24 CHAIRMAN BABCOCK: Okay.

25 MR. HAMILTON: I have a question about

1 the rule in general.

2 CHAIRMAN BABCOCK: Yes.

3 MR. HAMILTON: This rule seems to be
4 directed at a tenant supersedeas bond, because
5 it talks about the amount of rent and so forth
6 that has to be a part of the bond. And is
7 there anyplace that tells us what the
8 plaintiff's supersedeas bond needs to be and
9 what it has to be?

10 HONORABLE TOM LAWRENCE: Well, the only
11 it would be the -- all right. (h) talks about
12 the amount of the supersedeas bond deposited
13 as security.

14 MR. YELENOSKY: The amount of the
15 judgment.

16 HONORABLE TOM LAWRENCE: Yes, the amount
17 of the judgment. But (2) in particular would
18 be the amount of the attorney's fees; and that
19 would really be about all a landlord
20 supersedeas bond would be plus maybe a \$5 jury
21 fee and that would be it.

22 PROFESSOR DORSANEO: The landlord
23 wouldn't be able to evict by posting a
24 supersedeas bond.

25 HONORABLE TOM LAWRENCE: No. All he

1 would do is be able to appeal by posting a
2 supersedeas --

3 MR. YELENOSKY: He would not be
4 superseding.

5 HONORABLE TOM LAWRENCE: -- to secure the
6 defendant's judgment.

7 PROFESSOR DORSANEO: He wouldn't be able
8 to get a relief he didn't get --

9 HONORABLE TOM LAWRENCE: That's right.

10 PROFESSOR DORSANEO: -- by posting a
11 supersedeas.

12 HONORABLE NATHAN L. HECHT: That's
13 right. Forestall --

14 PROFESSOR CARLSON: Execution.

15 HONORABLE TOM LAWRENCE: Execution on
16 attorney's fees, execution on the judgment.

17 CHAIRMAN BABCOCK: Any other comments
18 about this rule?

19 MR. YELENOSKY: And this rule, well, I
20 guess it's a comment. This rule under (j)
21 does what we voted on long ago and I was
22 referring to was in part was that for somebody
23 proceeding on an affidavit of indigence there
24 is no supersedeas.

25 CHAIRMAN BABCOCK: Right.

1 HONORABLE TOM LAWRENCE: We voted on that
2 in September I think last year.

3 CHAIRMAN BABCOCK: Now Judge Prindle had
4 given us written comments on that. Is there
5 anything you want to add to that, Judge?

6 HONORABLE SANDY PRINDLE: Well, I'm glad
7 Professor Dorsaneo is not troubled by the
8 Dillingham issue on payment of rent during the
9 pendency of the appeal. I'm not a landlord
10 and I hope no one feels that I have a personal
11 agenda on this issue. It's only an issue of
12 equity and fairness. And that is is that the
13 way I interpret (j) is that no rent has to be
14 posted during the pendency of the appeal if
15 there is an affidavit of indigency.

16 HONORABLE TOM LAWRENCE: That's not true.

17 MR. YELENOSKY: No. No. You have to pay
18 rent that comes due.

19 HONORABLE TOM LAWRENCE: That's not
20 true.

21 HONORABLE SANDY PRINDLE: Well, I'd like
22 for the -- if it's posted somewhere, because I
23 saw in Rule 751 that they have to keep paying
24 rent; but it talks about the supersedeas
25 bond. I didn't -- is there an affidavit of

1 indigence paragraph in Rule 751?

2 HONORABLE TOM LAWRENCE: Look at (c) in
3 751, 751(c).

4 MR. YELENOSKY: "Exists even if the
5 appeal is perfected by approval of an
6 affidavit of indigence" is the ending clause
7 there.

8 HONORABLE SANDY PRINDLE: 751(c).

9 MR. FUCHS: Page 30.

10 MR. YELENOSKY: You have to pay rent as
11 it becomes due; and it goes on to say "even if
12 the appeal is perfected by approval of
13 affidavit of indigence." And let me ask --

14 HONORABLE SANDY PRINDLE: I stand
15 corrected. I withdraw my comments under (j).

16 MR. YELENOSKY: And your earlier comment
17 about, and I'll ask if I could, Bill Dorsaneo
18 to respond to this. When you said, Bill, that
19 there wasn't a Dillingham problem with payment
20 of rent to remain in possession were you
21 referring to payment of rent as it becomes
22 due?

23 PROFESSOR DORSANEO: Yes.

24 MR. YELENOSKY: Because instead you might
25 think there is a Dillingham problem if in

1 order to remain in possession you have to pay
2 one month rent which might or might not be --

3 PROFESSOR DORSANEO: I think that is a
4 Dillingham problem.

5 MR. YELENOSKY: That is a Dillingham
6 problem. So I just wanted to get that
7 clarified.

8 CHAIRMAN BABCOCK: Any time somebody
9 writes us a letter that says "Floodgates of
10 abuse" we want to talk about it.

11 HONORABLE SANDY PRINDLE: I only read up
12 until where I thought the County Court at Law
13 took over; and I apologize.

14 PROFESSOR DORSANEO: I think it might be
15 good in that sentence to put the "may" part
16 first.

17 MR. YELENOSKY: In the (c) sentence?

18 PROFESSOR DORSANEO: Yes, in the (c)
19 sentence.

20 HONORABLE TOM LAWRENCE: Well, that's
21 751.

22 CHAIRMAN BABCOCK: Yes. We'll talk about
23 751 later. All right. Anything else on 750?

24 MR. NIEMANN: Well, may I make my main
25 pitch then?

1 CHAIRMAN BABCOCK: You can make your main
2 pitch briefly.

3 MR. NIEMANN: Perhaps the most important
4 problem we have is the potential abuse by
5 tenants who have lost at the eviction trial.
6 Then they file an affidavit of indigence, and
7 they will get a free ride all the way through
8 the issuance of the judgment of the court of
9 appeals. The affidavit of indigence can be
10 totally spurious, totally false; but what is
11 happening now and what will continue to happen
12 is when they file the affidavit of indigence
13 if there is a contest and they lose, then they
14 will appeal that decision to the county
15 court. It will take the county court 15 or 20
16 days to resolve that. Then it goes back down
17 to the JP court. Then he sends it on back up
18 to the county court for trial. The abuse is
19 happening right now and it will continue to
20 happen in the future. And if anybody
21 disagrees with me, tell me where I'm wrong.

22 MR. YELENOSKY: Let me point out one
23 thing. When you say "free ride" what happens
24 is you have a tenant let's say who didn't pay
25 rent for two months.

1 MR. NIEMANN: That's right.

2 MR. YELENOSKY: You go in and they get
3 eviction.

4 MR. NIEMANN: Right.

5 MR. YELENOSKY: They file an affidavit of
6 indigence.

7 MR. NIEMANN: That's right.

8 MR. YELENOSKY: Right. In order to
9 remain in possession they have to pay rent as
10 due. The first thing that has happened --

11 MR. NIEMANN: As due in the future.

12 MR. YELENOSKY: Right, as due in the
13 future. So while this stuff is going along
14 that you're talking about when rent becomes
15 due that landlord is actually in a position to
16 get rent whereas for two months he wasn't. So
17 all future rent is going to be paid or the
18 writ is going to issue and he's going to be
19 dispossessed. The only thing that is the free
20 ride is the back rent that was awarded as
21 judgment is delayed in payment. If it
22 ultimately has to be paid, that is delayed.
23 But any accrual of rent is subject to
24 immediate dispossession if they don't pay it.

25 MR. NIEMANN: No.

1 MR. YELENOSKY: Why not?

2 MR. NIEMANN: Because there is a time
3 line. You've already added five more days to
4 the picture by the 10-day retention of the
5 file. Then it has to go to county court. It
6 has to be docketed. He says it takes about 10
7 days to get docketed. Then you have to wait
8 eight more days for a trial. Then after you
9 get a county court judgment the statutes say
10 you can't issue that judgment, that writ for
11 10 more days. So if you allow the case, a
12 rent case to go to county court by affidavit
13 of indigency with no payment of rent tendered
14 by the tenant to JP court, the landlord is
15 losing anywhere from 20 to 30 days worth of
16 rent.

17 That is happening to you right now under
18 your current rules. Judge Cercone told me to
19 my face "I never even hear contest to
20 affidavit of indigency, because I'm doing the
21 landlord a disfavor because the tenants have
22 gotten to the point where they know that if
23 they file an affidavit and lose, then they
24 will appeal that to the county court, just the
25 ruling on the affidavit." It will come back,

1 and it will elongate the procedure even more.
2 If they don't file a contest of the affidavit,
3 it will get there that much faster; but the
4 mere filing of an affidavit of indigency
5 without a tender of rent gives that tenant a
6 free ride from that date until the date the
7 writ of possession is issued in county court,
8 and that's going to be in most cases 20 or 30
9 days.

10 MR. YELENOSKY: Well, and I mean I guess
11 somebody else who knows the days should
12 respond, because I'm not sure what you're
13 describing is what is currently happening or
14 what would happen under these rules, because I
15 thought the subcommittee tried to address as
16 best they could any gaps in the issuance of a
17 writ of possession. So maybe Judge Lawrence
18 can respond to that or tell us what the gap
19 is.

20 CHAIRMAN BABCOCK: Judge Lawrence, you
21 and your subcommittee have considered this
22 argument, I know.

23 HONORABLE TOM LAWRENCE: (Nods
24 affirmatively.)

25 CHAIRMAN BABCOCK: Let's, we'll think

1 about it one more time on a break which we're
2 going to take right now. And when we come
3 back Justice Womack is here with the Court of
4 Criminal Appeals' report about the TRAP rules
5 to us. We will do that right after the break,
6 and then we'll get back to this world of FED.
7 Let's take a break for about 10 minutes.

8 (Recess 2:58 to 3:15.)

9 CHAIRMAN BABCOCK: Back on the record.
10 Okay. Shall we get going? Justice Womack has
11 got some comments that he would like to make
12 about the TRAP rules; and we welcome his
13 participation and attendance as always.
14 Justice Womack, thank you.

15 JUSTICE PAUL WOMACK: Thank you for you
16 interrupting what you're doing. I'll only
17 take a couple of minutes, famous last words.

18 (Laughter.)

19 JUSTICE PAUL WOMACK: Justice Hecht has
20 been very patient and kind working with me on
21 the Rules of Appellate Procedure changes. And
22 I'm really here kind of to drop this packet
23 off to him and to the members of the committee
24 to let you know how things are going at my
25 court.

1 The only rule that impinges on the civil
2 side in any way I think is Rule 47 which I
3 know that you have done mighty labor on the
4 issue of publication of opinions and their
5 citation as authority or something else. And
6 I have to report to you that our court is, we
7 have discussed this, and the feeling is
8 although it's not been a formal decision is
9 that we want to retain the concept of
10 unpublished appellate opinions in criminal
11 cases. And the main rationale for that is
12 there is kind of a disincentive on the civil
13 side to bring a meritless appeal because it
14 costs money whereas a lot of litigants on the
15 criminal side they ask for an appeal whether a
16 lawyer would say there is a chance or not. So
17 it may be that this is less worthy of citation
18 and even distribution to the public. So I'd
19 put in the Rule 47, just kind of basically put
20 back in the part of the old publication rules
21 for criminal cases only.

22 I know that the plan here is for there to
23 be two classes. Instead of published and
24 unpublished on the civil side there will be
25 opinions and memorandum opinions; and it seems

1 to me that retaining publication in criminal
2 cases could just go hand in hand with that.
3 Surely 99.9 percent of the memorandum
4 opinions, criminal opinions would be qualified
5 as unpublished. So but of course we're very
6 interested to know if this is going to be a
7 problem and to hear from the courts of
8 appeals. The other --

9 MR. YELENOSKY: Let me ask a quick
10 question.

11 JUSTICE PAUL WOMACK: Please.

12 MR. YELENOSKY: Or would you rather me
13 wait?

14 JUSTICE PAUL WOMACK: No. No. I'm just
15 sorry to take up your time.

16 MR. YELENOSKY: Well, I was just going to
17 ask if the rationale or the concern is that
18 there are frivolous appeals, what that might
19 that indicate that you want to signal we do on
20 some cases that don't state any new law make
21 any memorandum opinions. What would the
22 reasoning be in your mind of refusing to allow
23 somebody to cite what probably no one is going
24 to want to cite anyway?

25 JUSTICE PAUL WOMACK: Well, of course, if

1 nobody is going to want to cite it, then why
2 do we need to let them cite it?

3 This brings me to the other rationale.
4 I'm not sure how these memorandum opinions are
5 going to develop in the practice. And it may
6 be that after a while we can just do the work
7 exactly as you say.

8 MR. YELENOSKY: Right.

9 JUSTICE PAUL WOMACK: And it will be of
10 virtually no precedential value anyway. But
11 at our court, and this is why I'm interested
12 in hearing whether the courts of appeals have
13 the same experience. In our court we're -- we
14 deliver unpublished opinions because we handle
15 a lot of cases, many more than the Supreme
16 Court does as the court of first resort.

17 The death penalty cases, and the post
18 conviction writs of habeas corpus in felony
19 cases we get over 6,000 of those a year. And
20 it's one thing to be sure that we're resolving
21 them correctly under the correct law; and it's
22 another thing to parse every one of those
23 opinions thinking about every word, whether
24 you're going to have to live with it 20 years
25 from now. And there may be a similar feel in

1 the courts of appeal. I don't know; but
2 that's one of the feelings on our court. It's
3 not the rule. It's not the result. It's the
4 dictum that has to be looked at so carefully
5 and negotiated over if everything is going to
6 be publishable and everything is going to be
7 citable.

8 MR. EDWARDS: Do you have any kind of
9 rule that with death penalty appeals that
10 they're all published or not?

11 JUSTICE PAUL WOMACK: No. They're not
12 all published.

13 MR. EDWARDS: If I'm sitting there and
14 somebody is going to put me on a table, I
15 think my appeal is important enough to be
16 published.

17 JUSTICE PAUL WOMACK: Well, they're not
18 published in the sense that they're not in
19 bound volumes in West; but they are on-line
20 with Lexux and WESTLAW.

21 MR. EDWARDS: Are they considered
22 precedential?

23 JUSTICE PAUL WOMACK: No. That's why we
24 thought that they shouldn't be published. Our
25 criterion on publication is is there any new

1 law in this? And a death penalty case is
2 mostly application of well settled law to the
3 particular facts of this case. It's not
4 something we have chosen to do. We're the
5 first court of direct appeal.

6 MR. EDWARDS: I understand what you're
7 saying. It seems to me that perhaps most
8 cases that it is important jurisprudence of
9 the state to see how you are applying facts to
10 determine that it's settled law.

11 JUSTICE PAUL WOMACK: Yes. That argument
12 is made, I understand what you're saying.

13 CHAIRMAN BABCOCK: Justice Womack, I've
14 done a little bit of -- I hesitate to call it
15 scholarship, so I'll call it writing about
16 this rule. And something that I've come upon
17 lately and in fact I mentioned it this morning
18 has to do with Rule 47.7. That's the rule
19 that has bothered me, and it was bothering me,
20 and I couldn't quite put my finger on it. And
21 I think I now know why. And that is because I
22 think this rule written is a prior restraint.
23 And because an organ of government is telling
24 a citizen that they cannot say something back
25 to the government. In other words, you're

1 saying to lawyers or to pro se litigants "You
2 may not tell us, you may not speak to us about
3 certain cases." And if this is a prior
4 restraint, then it meets a very heavy burden
5 under the First Amendment.

6 I mention this only because our prior
7 discussions which you attended did not flesh
8 this out at all much less completely, and you
9 might if the court, if your court is still
10 talking about this, discuss that issue. I've
11 looked at rules in the state systems of other
12 states and in the federal system, and
13 virtually every court has an unpublished
14 opinion rule; but very few of them have rules
15 that are as mandatory as this which say you
16 must not cite somebody as authority to the
17 court.

18 The 9th Circuit in the federal system has
19 a comparable, similar rule and upheld that
20 rule against an attack, a constitutional
21 attack under a different provision of the
22 federal constitution and not as a prior
23 restraint; but it seems to me that when a body
24 of government, particularly a court says to a
25 litigant that they may not speak about

1 something that that does raise prior restraint
2 issues.

3 Now lawyers can be gagged, as we all
4 know; but there have to be very stringent
5 circumstances for a lawyer to be gagged even
6 in a criminal case, an ongoing criminal case,
7 and it's always on a case-by-case basis; and I
8 can't imagine that if there was a rule of
9 court that said lawyers in criminal cases can
10 never speak to the media under any
11 circumstances, that that would be
12 constitutional. So I would say for the sake
13 of saying it that when the court is looking at
14 47.7 you might consider whether it might be
15 more appropriate to say "Opinions not
16 designated for publication by the court of
17 appeals under these or prior rules do not have
18 precedential value" and just stop right
19 there. And then if Bill Edwards sees a case
20 that you might not have thought raised
21 anything unique, but nevertheless his client
22 is in exactly the same factual circumstance
23 and wants to cite that case, he can, and the
24 court can do whatever it wants with it,
25 obviously not being bound by it, but could

1 look at it for whatever persuasive value that
2 it might have.

3 So that is the only thing I would add of
4 a new variety although I think that it was the
5 sense of this committee and I think the hope
6 of our committee that both courts would reach
7 the same conclusion on Rule 47, but
8 understanding where you're approaching it
9 from. Frank.

10 MR. GILSTRAP: Chip, just since we're on
11 the record, I don't think I need, want to let
12 your argument there go unchallenged. I mean,
13 there are plenty of things you can't say in
14 court, and no one has ever said they're prior
15 restraints. You can't put salacious material
16 in your brief. You can't ask an irrelevant
17 question. You can't present irrelevant
18 testimony, you know. And maybe someone in the
19 Arkansas Law Review has come up with the idea
20 that this is a prior restraint; but I'd like
21 to look at it real close before I just roll
22 over and let that go unchallenged.

23 CHAIRMAN BABCOCK: Well, for the sake of
24 argument, you can say salacious things, you
25 can say irrelevant things; but you can be

1 sanctioned for them, or what you say can be
2 struck or kept out of evidence. It's the
3 whole fundamental precept of the First
4 Amendment where you are certainly liable for
5 abuse of speaking; but only in rare
6 circumstances can the government keep you from
7 speaking in the first instance. And this rule
8 as a per se matter keeps somebody from
9 speaking in the first instance. And the
10 lawyer in the 9th Circuit who cited an
11 unpublished opinion was called before the
12 court on an ethics violation because they had
13 violated a court order, and the issue was
14 whether or not they were going to be
15 sanctioned. And that --

16 MR. GILSTRAP: Since he could say it and
17 was going to be sanctioned that's not a prior
18 restraint.

19 CHAIRMAN BABCOCK: Well, no. They said
20 that there has been some confusion because of
21 the constitutionality of the rule because of
22 the 8th Circuit opinion which we discussed at
23 length in committee, and so we're going to let
24 you off the hook. But Judge Kazinsky said in
25 no uncertain terms that if anybody does it

1 again, they're going to get sanctioned. The
2 prior restraint argument was not raised in
3 that case; and maybe the result would be
4 different if it was in front of a different
5 judge.

6 MR. GILSTRAP: I mean, "Counsel, if you
7 ask that question again, I'm going to put you
8 in jail," that's a prior restraint.

9 CHAIRMAN BABCOCK: Nevertheless it's
10 subsequent punishment.

11 JUSTICE PAUL WOMACK: Let me say this if
12 I may. This 47.7 was modeled after one of
13 three possible rules that were forwarded to me
14 by Justice Hecht; and I just picked one
15 because this was not a matter of final or even
16 preliminary decision. And it may -- I
17 appreciate the thought, the constitutionality
18 issue which I think is very interesting. And
19 it may be more accurate to say instead of
20 saying "must not be cited as authority" it
21 might be more accurate that they will not be
22 regarded as authority by the court or by a
23 court.

24 CHAIRMAN BABCOCK: Yes.

25 JUSTICE PAUL WOMACK: So you know, this

1 is not by any means a final draft.

2 CHAIRMAN BABCOCK: And that puts the shoe
3 on the other foot. And if the litigant wants
4 to waste time in their brief that has page
5 limitations on citing something that you have
6 already indicated you're not going to consider
7 because he feels or she feels it is most
8 compelling, then maybe that's okay.

9 JUSTICE PAUL WOMACK: And that seems to
10 be the present practice.

11 CHAIRMAN BABCOCK: Because although on
12 the civil side -- I don't do any criminal law;
13 but on the civil side I know that I frequently
14 come across cases for which there is no
15 authority on the civil side or which decides a
16 case under particularly unique facts which I
17 feel would be helpful to tell the court about
18 and yet am prohibited by this rule from
19 telling the court about it.

20 And there's all sorts of tricky ways to
21 do it. If Orsinger were still here, I mean
22 Orsinger gets up in court and says "Now I
23 can't tell you about this; but there are two
24 cases from Dallas right on point and but
25 they're unpublished and wouldn't presume to

1 violate the rule by citing them to you; but
2 you ought to know they're out there." And so
3 of course, their law clerk goes and gets on
4 Lexus and finds them.

5 JUSTICE PAUL WOMACK: Sure. And in the
6 brotherly and sisterly spirit of the law
7 you're trying to save the court from having to
8 reinvent this decision.

9 PROFESSOR DORSANEO: But I wonder is
10 there a paradigm?

11 CHAIRMAN BABCOCK: I wonder if that's
12 what we ought to be able having to play those
13 kind of games when it seems to me this
14 mechanism is self regulating because if the
15 litigant is so foolish as to spend his whole
16 brief on stuff that the court has indicated A,
17 is not precedential, and B, we're probably not
18 paying attention to, well, that's they get to
19 do that. Lawyers get to do that if they think
20 that's in the client's best interest. Yes,
21 Linda.

22 MS. EADS: You know, your discussion
23 about prior restraint reminded me of something
24 I had completely forgotten. It must have
25 occurred in '82 or '83. There was a

1 controversial grand jury investigation in
2 Denver about offshore banking; and one of the
3 DOJ lawyers was brought up for sanctions for
4 how he behaved toward witnesses in the grand
5 jury, and there was an appellate -- there was
6 a district court opinion really sanctioning
7 this DOJ lawyer, and the 10th Circuit agreed
8 with it. And the 10th Circuit ordered WESTLAW
9 not to publish its opinion, and WESTLAW
10 brought a lawsuit about that saying that's
11 prior restraint and won.

12 CHAIRMAN BABCOCK: Right.

13 MS. EADS: So along those lines I think
14 there is some argument to be made about we can
15 say it in the rule; but how enforceable it is
16 if anybody wanted to contest it is another
17 matter.

18 CHAIRMAN BABCOCK: Should you put lawyers
19 to the test who violate the rule and actually
20 be sanctioned for doing so? If there is a
21 compelling reason for it, sure you do. If
22 not, maybe you don't. And the only reason I
23 brought it up is that wasn't -- that was
24 probably the only thing that wasn't fully
25 fleshed out in the prior discussion about

1 Rule 47. Yes, Nina.

2 MS. CORTELL: I guess, Judge Womack, the
3 maybe only other thought I would have, and
4 maybe it's a little bit building on what Steve
5 said earlier is if you have a true memorandum
6 opinion at least as we think about it from
7 let's say the 5th Circuit, it's so nondescript
8 as to be meaningless anyway. So the fact that
9 it's out there -- "meaningless" is a little
10 strong. But certainly not a great case for
11 precedential value, not one probably --

12 JUSTICE PAUL WOMACK: Difficult for a
13 nonparticipant to evaluate.

14 MS. CORTELL: Exactly. Exactly. So it
15 sort of takes away it seems to me the
16 harshness of the dilemma about, you know,
17 should we be able to cite it or not cite it.
18 It becomes a little bit moot if in fact that's
19 how those memorandum opinions are going to
20 look.

21 Now I think you said at the outset that
22 that remains to be seen, and I think that's
23 fair. But if it's in fact a little bit after
24 the Fifth Circuit model, then it will answer
25 itself, I think.

1 JUSTICE PAUL WOMACK: Yes. This would
2 just wither away, I think. That would be
3 another way to handle it would be, and I
4 considered that, and certainly it's still
5 possible to say that memorandum opinions will
6 not be regarded as authoritative.

7 MS. CORTELL: Right.

8 JUSTICE PAUL WOMACK: I'm not sure we're
9 ready to say that now.

10 MS. CORTELL: Right. Right. I
11 understand.

12 CHAIRMAN BABCOCK: And I think the
13 way -- I don't know if it's in the transcript
14 or within a note or somewhere; but I think
15 that our view and recommendation to the
16 Supreme Court was that memorandum opinions are
17 a signal from the court that they have slight,
18 if any, precedential value, somewhat different
19 at opposed to no precedential value.

20 MR. YELENOSKY: And my understanding was
21 in part what we were trying to do was signal
22 to the lawyers you probably don't need to
23 waste your time with this.

24 CHAIRMAN BABCOCK: Right.

25 MR. YELENOSKY: But you might very well

1 waste your time with it and find a memorandum
2 opinion we said that not only the lawyer
3 thinks is quite helpful, but the judge does as
4 well. So I mean, I don't think there is a
5 constitutional problem with the court saying
6 generally these won't be considered as
7 precedent; but I also think that issue takes
8 care of itself. Either it's helpful or it
9 isn't; and I don't know that saying in a rule
10 that we decree that these are not helpful is a
11 good thing to say.

12 JUSTICE PAUL WOMACK: And the actual
13 concern is we want to be able to do something
14 different in this case without having to
15 overrule dictum in another opinion.

16 MR. YELENOSKY: Well, I guess the
17 counterargument would be that the next
18 litigant should be able to say you did
19 something different here, and I'm exactly that
20 same situation.

21 JUSTICE PAUL WOMACK: Okay.

22 MR. YELENOSKY: And I think that's sort
23 of, if I remember right, what the 8th Circuit
24 was talking about in the body of common law.
25 How can you say that you're following common

1 law when you take some things and say these
2 are exceptions that we will not consider in
3 the body of law? I mean, I think that's the
4 Circuit's rationale for it that you shouldn't
5 get to do that.

6 JUSTICE PAUL WOMACK: Yes. Yes. Well,
7 you're right. And if like cases are turning
8 out with unlike results, there is a problem.

9 MR. YELENOSKY: Right.

10 JUSTICE PAUL WOMACK: Our concern is that
11 language will be taken from a case and
12 imported into an unlike case and then we have
13 to deal with it.

14 MR. YELENOSKY: Uh-huh (yes). And that
15 may be an issue of judges and how judges read
16 one another's opinions.

17 JUSTICE PAUL WOMACK: Yes.

18 CHAIRMAN BABCOCK: Well, with that
19 digression, thank you for indulging us. What
20 else should we talk about, Justice Womack?

21 JUSTICE PAUL WOMACK: The only other rule
22 of significance is the first one in the little
23 packet, Rule 25.2 which has to do with, that
24 presently has to do with the form of notice of
25 appeal. The court since -- well, let me back

1 up. A person who has plea bargained and
2 gotten the sentence that he plea bargained for
3 has given up a lot of the right to appeal in a
4 criminal case. The statute enacted in 1977
5 said that those people can appeal only with
6 permission of the trial court or if they're
7 appealing a pretrial ruling essentially. And
8 the goal of this was to keep people from
9 staying out on appeal bond by taking a
10 meritless appeal that will nonetheless take
11 months or years to resolve and also to cut
12 down on the workload in the appellate system.

13 The way the court of criminal appeals
14 tried to do it was by requiring appellants to
15 say in their notice of appeal "I'm a plea
16 bargainer and I have permission of the trial
17 court," or "I'm a plea bargainer and I'm
18 appealing a pretrial motion."

19 This hasn't worked well. One problem is
20 that a sizable fraction of appellants seem not
21 to know this requirement. Their notice of
22 appeal just says "Me want appeal." And then
23 after the lawyer is appointed, the record is
24 prepared, the brief is filed, the court of
25 appeals discovers "Oh, you're not entitled to

1 appeal because your notice was in the wrong
2 form." The defendant has fallen into the
3 trap, and the public purpose of keeping such
4 people from, you know, appealing has been
5 frustrated at least to some extent. There has
6 been expense to the counties and to the
7 appellate system.

8 What I'm trying to do here is to have
9 this matter settled much earlier in the game
10 by instead of putting the responsibility on
11 appellants to put this in a notice of appeal
12 I'm putting it on the trial judges. A plea
13 bargainer has got to have the trial judge sign
14 off. Well, no. Every appellant has got to
15 have the judge sign off and say either this
16 guy is not a plea bargainer or he is a plea
17 bargainer and he has my permission or he is a
18 plea bargainer and he's appealing a pretrial
19 ruling.

20 Now there will still be a sizeable
21 fraction of appellants who will not do this;
22 but now it will be apparent as soon as the
23 notice of appeal gets to the court of appeals
24 that something is wrong. So if the notice of
25 appeal comes in that the trial judge has not

1 signed off on, I'm relying on the appellate
2 clerks under Rule 37.1, the appellate clerks
3 to say this is a defective notice of appeal
4 and then, you know, something starts
5 happening. The appellant has got to take care
6 of this immediately. So this should be
7 happening before a lot of record preparation
8 has taken place.

9 Maybe there will not have been any record
10 preparation before substantial amounts of time
11 have been put in by an appointed attorney.
12 And before the appellate court has got to get
13 that record, look in it, and verify that this
14 guy is entitled to appeal. It will keep
15 people who are not supposed to be appealing
16 from appealing at an earlier stage of the
17 game, so it will also serve that public
18 purpose of having these people, plea
19 bargainers either begin being punished or
20 begin being rehabilitated or both right after
21 the trial instead of after the appeal has run
22 its course.

23 Now I understand that there is a burden
24 here. Trial judges are going to have the
25 additional burden of having to sign notices of

1 appeal. According to the caseload in the
2 courts of appeals last year depending on how
3 many working days you say a trial judge has, I
4 hesitate to venture into that estimation on
5 how many working days there are a year for an
6 trial judge; but this would be in the
7 neighborhood of 25 notices of appeal every
8 working day in the entire state of Texas. So
9 I don't think it's going to be that big a
10 burden on the trial judges.

11 MS. BARON: I have a question.

12 JUSTICE PAUL WOMACK: Yes.

13 MR. BARON: On timing the person
14 appealing has a due date that they have to get
15 this accomplished by.

16 JUSTICE PAUL WOMACK: Yes.

17 MS. BARON: I'm a little concerned that
18 if it's not signed by the trial judge, that it
19 could be considered to be late, or if the
20 trial judge doesn't get to it in time, then
21 they may lose their right to appeal.

22 JUSTICE PAUL WOMACK: Maybe. Yes. I
23 guess if the trial judge stalls it, that could
24 happen. I may be able to write around that.

25 MS. BARON: Is there a way to have them

1 file their notice of appeal --

2 JUSTICE PAUL WOMACK: Appeal and then
3 have the trial judge sign off.

4 MS. BARON: -- and then have maybe the
5 appellate clerk send something to the trial
6 judge to certify?

7 JUSTICE PAUL WOMACK: I don't know. That
8 might be more work for the appellate courts --

9 MS. BARON: Yes. I'm just --

10 JUSTICE PAUL WOMACK: -- than we want to
11 have.

12 MS. BARON: I think --

13 JUSTICE PAUL WOMACK: That's why I'm
14 trying to float this out here is to get
15 reactions.

16 MS. BARON: Right. I guess I'm just
17 concerned that the burden now is on a party
18 who is trying to meet a deadline who may not
19 have liberty and, you know, have easy access
20 to the trial court to get this signed in a
21 timely fashion to get it back; and we don't
22 want that to be the reason that they lose
23 their appeal if they actually have a right to
24 appeal.

25 JUSTICE PAUL WOMACK: No, we certainly

1 don't. I need to look again at Rule 37.1,
2 because it seems to me there is some play in
3 that rule for people to get out of the late
4 filing trap when their notice gets to --

5 MS. BARON: I mean, it could be they
6 could file the notice and then this could be a
7 second step that doesn't affect perfection or
8 time, but this needs to be done as it's
9 docketed.

10 JUSTICE PAUL WOMACK: Yes. And another
11 advantage might be that you cut the defendant
12 and the defense lawyer out of it all
13 together. The communication would take place
14 between the court of appeals clerk and the
15 trial judge --

16 MS. BARON: Right.

17 JUSTICE PAUL WOMACK: -- saying, you
18 know, asking the trial judge "Hey, was this a
19 plea bargainer? And if he was, does he have
20 your permission to appeal?"

21 MS. BARON: Right. Because they are
22 already dealing a lot with something similar
23 at least in civil cases where when the court
24 of appeals gets the notice of appeal they send
25 out docketing statements --

1 JUSTICE PAUL WOMACK: Yes.

2 MS. BARON: -- for the parties. This
3 would just be like almost like a criminal
4 docketing statement that will go to the
5 judge.

6 CHAIRMAN BABCOCK: Yes, Justice Hecht.

7 HONORABLE NATHAN L. HECHT: You have,
8 this draft that you sent us leaves out current
9 (d) or (d) 25.2 which deals with amending
10 notices of appeal. I wonder if you meant to
11 do that.

12 JUSTICE PAUL WOMACK: No, I didn't.

13 HONORABLE NATHAN L. HECHT: I think that
14 might --

15 JUSTICE PAUL WOMACK: That's a computer
16 deal.

17 HONORABLE NATHAN L. HECHT: Yes.

18 JUSTICE PAUL WOMACK: I've got a version
19 of the rule in my computer that doesn't have
20 (d) in it.

21 HONORABLE NATHAN L. HECHT: "An amended
22 notice of appeal correcting a defect or
23 omission in an earlier filed notice may be
24 filed in the appellate court at any time
25 before the appellant's brief is filed. The

1 amended notice is subject to being struck for
2 cause on the motion of any party. After the
3 appellant's brief is filed, the notice may be
4 amended only on leave of the court of appeals
5 or appellate court."

6 MS. BARON: I guess the question is does
7 this count as the filing of the notice if the
8 judge has to sign it? Have you even started?
9 Do you have something to amend?

10 HONORABLE NATHAN L. HECHT: Right.

11 MS. BARON: And that could be a problem
12 if you don't.

13 MR. GILSTRAP: You could maybe have just
14 a proviso on there to say provided that the
15 certification can be added later or in the
16 amended notice of appeal or something like
17 that.

18 JUSTICE PAUL WOMACK: Yes. Thanks.
19 These are really good points.

20 CHAIRMAN BABCOCK: Stephen.

21 MR. YELENOSKY: This is just
22 wordsmithing. But 25(2)(a) let's see (2)(a)
23 (1) and (2) it says "The defendant in a plea
24 bargaining case may appeal only" and it gives
25 the two subsequent. And when I first read

1 that before I read down further the way it's
2 written it read to me as if (a)(1) wouldn't
3 ever need to get the judge's permission or
4 certification, and that and it also seems to
5 mix two notions. One is (a)(1) is the matters
6 that can be raised, and then (2) is only after
7 getting the court's permission to appeal.
8 Does that mean may appeal any matters that the
9 court gives permission to appeal?

10 I'm having trouble articulating the
11 problem I had; but when I first read this I
12 didn't see that you were going to have to get
13 permission under the subpart (1) because of
14 how it's written.

15 JUSTICE PAUL WOMACK: Well, if you're
16 under subpart (1), you don't have to get
17 permission.

18 MR. YELENOSKY: You have to get a
19 certification.

20 JUSTICE PAUL WOMACK: Right. Which every
21 appeal, every appellant has to get a
22 certification even if they're not a plea
23 bargainer.

24 MR. YELENOSKY: Well, they have to get a
25 certification that the appeal -- that they

1 have the right of appeal under Rule 25.28(2).

2 HONORABLE NATHAN L. HECHT: That's either
3 one. That's either one

4 MR. YELENOSKY: Okay.

5 JUSTICE PAUL WOMACK: It's not only
6 either one; but it's also a third class
7 there.

8 MS. EADS: Right.

9 JUSTICE PAUL WOMACK: It's the people who
10 are not plea bargainers.

11 MR. YELENOSKY: Okay.

12 MS. EADS: I was going to say the same
13 thing. I think the way it's structured you're
14 not sure what it means. I mean, (2)(a)(2) is
15 all the defendants in all criminal cases have
16 a right to appeal if they're not plea
17 bargainers. Right?

18 JUSTICE PAUL WOMACK: Right.

19 MS. EADS: And they also have to get a
20 certification. Right?

21 JUSTICE PAUL WOMACK: Uh-huh (yes).

22 MS. EADS: But then I would make the next
23 one I would make it under (2). I'd probably
24 make it a different paragraph, maybe (3).

25 JUSTICE PAUL WOMACK: Yes.

1 MS. EADS: And say "a defendant" so that
2 it's a whole different provision so you know
3 that that kind of defendant is different.

4 JUSTICE PAUL WOMACK: Yes. That's a good
5 suggestion.

6 MR. EDWARDS: Either that or if it's put
7 in there under (2) that all have a right to
8 appeal provided that if you're a plea bargain
9 defendant, you have to meet.

10 JUSTICE PAUL WOMACK: Yes. That's what
11 I'm thinking. Yes. I'm thinking that also.

12 HONORABLE NATHAN L. HECHT: If you look
13 down two pages at the form, you can see what
14 the trial judge has to check off. He has got
15 to check off something for everybody.

16 JUSTICE PAUL WOMACK: We tried to do a
17 little form thinking that may help. Well,
18 thank you for the suggestions. I'm sorry to
19 have taken up your time.

20 CHAIRMAN BABCOCK: Not at all. That's
21 what we're here for.

22 JUSTICE PAUL WOMACK: As I say, I solicit
23 reactions. And absent members may be
24 interested as well in coming up with some
25 suggestions.

1 CHAIRMAN BABCOCK: Is it all right to put
2 this on our website so people can access it?

3 JUSTICE PAUL WOMACK: I'd like it.

4 HONORABLE NATHAN L. HECHT: Did you say
5 that you had contact with the court of appeals
6 or they should be involved?

7 JUSTICE PAUL WOMACK: I have not. I
8 wanted to get through this forum to begin with
9 and then try to contact some of the individual
10 justices.

11 HONORABLE NATHAN L. HECHT: Okay.

12 JUSTICE PAUL WOMACK: May I be excused?

13 (Laughter.)

14 JUSTICE PAUL WOMACK: Thank you again.

15 HONORABLE NATHAN L. HECHT: We'd covet
16 your advice on the eviction rules.

17 JUSTICE PAUL WOMACK: Let these people,
18 let them stay in their apartments.

19 CHAIRMAN BABCOCK: All right. Back to
20 the FED rules. And here is another e-mail.
21 This one is from William Donovan, Justice of
22 the Peace, Bexar County and Marcia Weiner,
23 W-e-i-n-e-r, Justice of the Peace, Bexar
24 County. I'll just read it into the record
25 since it's relatively short.

1 "We would appreciate your consideration
2 of our concerns regarding the proposed
3 eviction rules that the Supreme Court Advisory
4 Committee will be voting on Friday, June 14th,
5 2002. We are concerned that the proposed
6 rules would create a hardship for pro se
7 parties on both sides. We want our courts to
8 continue to be pro se friendly, inexpensive
9 and provide a timely remedy to both defendants
10 and plaintiffs. Thank you for your
11 consideration of our concerns. Very Truly
12 Yours."

13 So with that in mind --

14 MR. YELENOSKY: Are you getting real-time
15 e-mails? I'm going to start sending you
16 e-mails.

17 CHAIRMAN BABCOCK: That's what Bobby is
18 trying to do to me.

19 MR. HAMILTON: Did you send that to him,
20 Bobby?

21 MR. MEADOWS: Yes. It's hard to get the
22 floor in here.

23 (Laughter.)

24 HONORABLE NATHAN L. HECHT: Before we
25 leave the appellate rules I should have said

1 this before Paul left. I guess what we will
2 do, I guess what my court will do is talk
3 about everything that is pending in the TRAP
4 rules I hope on Monday or Tuesday of this next
5 week, or if not, then the Monday or Tuesday a
6 week following which will be our next two and
7 only administrative conferences before the
8 summer break. And we've been waiting to talk
9 about all this to present the court of
10 criminal appeals' views on this. So then we
11 will know what those are.

12 Remember the process was we took the
13 recommendations, we had questions about some,
14 some we weren't sure about, we brought them
15 back, you commented on all those, we have
16 those comments. The court has not reviewed
17 those yet because we've been waiting on this
18 so we could do the whole thing at once. So we
19 will be ready to do that; but then we won't
20 have a chance to show you except informally
21 what the final work is before we send it to
22 the Bar Journal in the middle of July. So I'm
23 wondering if we have any suggestions. Bill.

24 PROFESSOR DORSANEO: I remember you asked
25 us at the last meeting whether there were any

1 cases cited lately where somebody requested
2 findings of fact when findings of fact were
3 not appropriate and then got bounced; and I'm
4 a few advance sheets behind right now, but
5 there was one that just kind of popped up.
6 You were asking for it to appear. So I will
7 e-mail it to you.

8 HONORABLE NATHAN L. HECHT: All right.

9 PROFESSOR DORSANEO: You probably already
10 have seen it.

11 HONORABLE NATHAN L. HECHT: Send his name
12 to the grievance committee too.

13 (Laughter.)

14 PROFESSOR DORSANEO: Well, --

15 HONORABLE NATHAN L. HECHT: Well, I mean
16 I guess I'm just thinking out loud here. We
17 will have to go ahead.

18 CHAIRMAN BABCOCK: Yes.

19 HONORABLE NATHAN L. HECHT: And Paul
20 sounds like he wants to make some more changes
21 and maybe even change the last part of 47, or
22 maybe they'll decide not to; but I think we
23 probably ought to try to still finish them up
24 and get them out. We can always change them
25 if there is public comment.

1 CHAIRMAN BABCOCK: Yes.

2 MS. BARON: Can they come back to the
3 subcommittee on the TRAP rules just to comment
4 on them?

5 HONORABLE NATHAN L. HECHT: I'm happy to
6 send them to you.

7 PROFESSOR DORSANEO: That would be good.
8 We're going to need to -- I'd thought I'd try
9 to recraft his combination of 47 because it
10 doesn't look right to me.

11 HONORABLE NATHAN L. HECHT: Right. It
12 didn't. We have to do some more. All right.
13 So that's what we will do. We will stay in
14 communication with them, see if he wants to
15 make any changes in reaction to the comments.
16 We will decide the issues that are back from
17 us. We will finish it up and send it to the
18 subcommittee; and we'll still shoot for
19 publishing the whole mess of them in the
20 September Bar Journal to take effect January
21 1st.

22 CHAIRMAN BABCOCK: Sounds good. Anybody
23 else besides the subcommittee and myself and
24 probably Buddy who wants to see these rules
25 when they come out?

1 HONORABLE NATHAN L. HECHT: We'll send
2 them to Debra and she can send it to
3 everybody.

4 CHAIRMAN BABCOCK: That will work. All
5 right. Back to FED. Okay.

6 HONORABLE TOM LAWRENCE: All right. We
7 were talking about -- we are actually as I
8 understand talking about Rule 750; but Larry
9 got off on Rule 749(a) which is the procedure
10 for affidavit of indigence or as it's called
11 now pauper's affidavit. And I'll go ahead and
12 comment on it even though we're not really on
13 that rule; but the proposed Rule 749(a) and
14 the mechanism and the procedure by which
15 someone applies for a pauper's affidavit is a
16 combination of the existing pauper's affidavit
17 rule and the new TRAP rule, the TRAP rule that
18 deals with affidavit of indigence. And we
19 followed the existing mechanism and existing
20 procedure in that almost to the letter with
21 one exception; and that one exception is that
22 there is a provision in the TRAP rules that
23 you're supposed to do it within five days; but
24 the judge can extend the time for the hearing
25 on the pauper's affidavit another five days.

1 So we -- that's in the TRAP rules, but not in
2 the existing rule in the pauper's affidavit,
3 so we went ahead and incorporated that because
4 it gives the JPs a little more flexibility
5 because the legislature is always passing
6 stuff that has to be done within X number of
7 days that we have to do. So this gives us a
8 little more flexibility if for some reason we
9 need to put off the hearing more than five
10 days.

11 Now we could take that out. That's not a
12 big deal; and that would potentially speed
13 about 10 days assuming that both the JP and
14 the county court at law judge extended it for
15 another four days the time of the hearing; but
16 you know, the subcommittee didn't perceive
17 that as being too big a problem.

18 Now the Houston Apartment Association
19 when we first started talking about the rule
20 their position was that they really didn't
21 care about the affidavit of indigence too
22 much. They tell their landlords don't even
23 contest it. Let it go up uncontested because
24 it gets it up to the county court quicker. So
25 they said they don't care about that. They

1 just want to make sure rent is paid into the
2 registry of the court, and that was their big
3 deal about it.

4 Now also on this rule we voted on
5 September 28th on Rule 749(a). We voted that
6 rent be paid into the registry of the county
7 court during the pendency of the appeal, and
8 the vote was 21 to nothing; and then we voted
9 May 18th. I'm sorry. That's, yes, that's
10 all we voted. We didn't vote on anything else
11 on that; but of course, that's the heart of
12 the rule. That is what we have already voted
13 on, none of which has anything to do with Rule
14 750 which is what we're actually on.

15 PROFESSOR DORSANEO: I think I'm
16 beginning to understand this maybe a little
17 better. But you have already the concept in
18 place of the obligation to pay rent during the
19 pendency of the appeal; but it seems to me
20 that there is a problem if the rent is not due
21 because the next rental date is --

22 HONORABLE TOM LAWRENCE: Exactly

23 PROFESSOR DORSANEO: -- 25 days from
24 now. Why can't we solve everybody's problem
25 by saying that you have to pay rent during the

1 pendency of the appeal; but you know,
2 accelerate or move forward, move backward the
3 date that you pay the rent so that you pay 30
4 days rent like from go at the appeal process?
5 You pay the future rent, instead of you know,
6 pay during the pendency of the appeal when you
7 file the appeal.

8 PROFESSOR CARLSON: You want to change
9 the contract by rule?

10 PROFESSOR DORSANEO: Yes.

11 HONORABLE TOM LAWRENCE: I'm not trying
12 to cut this off; but this is really a 751 Rule
13 issue.

14 PROFESSOR DORSANEO: Well, it may be. It
15 may be. 749 I think it's a 749(b) issue too,
16 because to me what would be fair is for
17 somebody who is appealing to not have the
18 obligation to rent suspended either by the
19 appeal or by virtue of the time gaps,
20 et cetera. So that if you just pay the rent,
21 I don't see that as a Dillingham problem
22 because that's not paying back rent. That is
23 paying rent to stay in possession during the
24 pendency of the appeal, because you're paying
25 the rent, but it solves Larry's problem too

1 because you won't be able to do this five
2 days, 10 days, four more days, filing,
3 docketing issue deal. Just move up the --
4 move back the payment date.

5 PROFESSOR CARLSON: There's no problem
6 with that, is there?

7 HONORABLE SANDY PRINDLE: I think one of
8 the concerns that tenants have had in the
9 discussion of this is that they've not wanted
10 to pay a month's rent, that they file an
11 affidavit of indigency, and then perhaps that
12 the trial was held or the deadline for the
13 filing of the affidavit falls on the 29th of
14 the month. They post a month's rent, and then
15 suddenly two days later they've got another
16 month due. Professor Dorsaneo has an
17 extremely good point here. We can simply -- I
18 don't see where it's necessary to
19 differentiate between that is past due and
20 rent that's due in a back rent case. Okay?
21 And if we had an amount of rent that has to be
22 submitted to the justice court, then that rent
23 payment is good for 30 days. If adjustments
24 have to be made in the future, they would be
25 made to the county court at law to go back

1 commensurate with the contract date 30 days
2 hence, and that way the tenant does not have
3 to pay anything but one month's rent for the
4 first 30 days during the pendency of the
5 appeal.

6 And also Larry isn't here. Mr. Niemann
7 is not here. I also have been making
8 discussions and things. His point about the
9 pauper's affidavit contest and all does have a
10 valid point in urban counties because in urban
11 counties you have more than one county court.
12 So it goes to the county clerk, and then four
13 or five days elapses before through the rotary
14 system that case is sent to a particular
15 court. So we have about 15 days that just
16 where things just absolutely fall through the
17 cracks.

18 And I don't pretend to be an expert on
19 the Dillingham issues; but from what I
20 understand from Professor Dorsaneo if the
21 justice court can issue a writ through default
22 in a pauper's affidavit if there is a default,
23 if I understand Professor Dorsaneo, that's not
24 a problem and they can still go forward with
25 an appeal as far as removing that judgment

1 later on if they win on appeal. Thank you.

2 CHAIRMAN BABCOCK: Elaine, did you want
3 to say something?

4 PROFESSOR CARLSON: Is everybody
5 following this discussion? I mean,
6 seriously.

7 MS. CORTELL: (Nods negatively.)

8 PROFESSOR CARLSON: Okay. Because we're
9 all talking about an issue that maybe we can
10 sort of look at fundamentally.

11 CHAIRMAN BABCOCK: Well, you know, Pam of
12 course is smarter than the average bear, so
13 she can follow all of this stuff. But it
14 occurred to me the way we got off on this was
15 we were talking about 749(b), and somebody
16 said "Wait a minute. We can't decide 749(b)
17 unless we talk about 750." And then we got to
18 talking about 750 and someone said "Well, it's
19 not really 750. It's 751."

20 PROFESSOR DORSANEO: 751 has the
21 problem. It says pay the rent when -- it says
22 pay the rent during the pendency of the
23 appeal; but the next rental payment is not due
24 until 25 days from now.

25 HONORABLE TOM LAWRENCE: Can we vote on

1 750 and get that since we've spent some time
2 on that before we got off on the other
3 issues? Then we can move on to 750(a) and
4 then 751 which is the rent problem.

5 CHAIRMAN BABCOCK: Yes. It strikes me
6 that that is the way to move expeditiously,
7 but cautiously.

8 MR. YELENOSKY: I move passage of 750.

9 MR. EDWARDS: Second.

10 CHAIRMAN BABCOCK: Any further
11 discussion? Everybody in favor of 750 raise
12 your hand. Anybody opposed? It carries 14 to
13 nothing, the Chair not voting.

14 750(a), the form of the supersedeas
15 bond.

16 HONORABLE TOM LAWRENCE: That's the form
17 of the supersedeas bond; and we have once
18 again added the phone numbers for the
19 sureties, work and home numbers.

20 CHAIRMAN BABCOCK: Anything else?

21 HONORABLE TOM LAWRENCE: No. We have not
22 added anything else. The subcommittee moves
23 passage.

24 CHAIRMAN BABCOCK: Does anybody second
25 that?

1 MS. EADS: Second.

2 MR. EDWARDS: Which one are we looking at
3 now?

4 HONORABLE TOM LAWRENCE: 750(a) Form of
5 Supersedeas Bond.

6 CHAIRMAN BABCOCK: It's been moved and
7 seconded. Anybody have discussion about
8 750(a), Form of Supersedeas Bond? Everybody
9 in favor of 750(a) raise your hand. Is that
10 your hand raised?

11 MS. MACNAMARA: Sure.

12 CHAIRMAN BABCOCK: That passes 15 to
13 nothing, the Chair not voting. So now we're
14 on to 751.

15 HONORABLE TOM LAWRENCE: All right. Let
16 me explain 751. This was carved out of 750.
17 This is the obligation to pay rent during the
18 pendency of the appeal. There are several
19 obligations on the part of the tenant who
20 loses a judgment. Now he can appeal the
21 judgment itself, the decision of the trial
22 Court by posting an appeal bond in accordance
23 with Rule 749 which is basically to secure the
24 cost only. He must also to prevent being
25 evicted post a supersedeas bond to secure the

1 judgment. Otherwise the landlord, the
2 plaintiff can execute on the judgment by
3 getting a writ of possession or a writ of
4 execution or however; but really the critical
5 thing is the writ of possession. So he must
6 post a supersedeas bonds unless he's an
7 indigent; and we voted that indigents would
8 not have to post a supersedeas to appeal.

9 Now the second obligation on the part of
10 the tenant is that they pay rent to the
11 registry of the court during the pendency of
12 the appeal, and that is rent as it becomes
13 due. And we voted already, as I indicated,
14 that rent be paid into the registry of the
15 county court.

16 Now the reason the rent needs to be paid
17 into the registry of the county court and not
18 the JP court the current rule is that if it is
19 an indigent who is appealing on a pauper's
20 affidavit, that's the current affidavit of
21 indigent language and it's a nonpayment of
22 rent case, then they've got to pay rent to the
23 registry of the court. Otherwise they can be
24 evicted.

25 So in talking to the landlords about that

1 it was the position of the landlords that it
2 doesn't make sense for it just to be paid, for
3 a writ to be paid for an indigent tenant on
4 nonpayment of rent. Any tenant should have to
5 pay rent to the registry of the court during
6 the pendency of the appeal, which made a lot
7 of sense to everybody.

8 PROFESSOR CARLSON: To stay in
9 possession.

10 HONORABLE TOM LAWRENCE: To stay in
11 possession. I'm sorry. To stay in
12 possession. That made sense to everybody. It
13 was consistent. So regardless of whether
14 they're indigent or not, regardless of the
15 cause of action everybody pays rent to the
16 registry of the court. And this is what the
17 landlords initially wanted, and so that was
18 put in there.

19 At the last meeting it became apparent
20 that some of the landlords had a different
21 idea about that; and the proposal came up that
22 they wanted rent. And Larry Niemann is here,
23 so he can correct me if I misstate it. But
24 the landlord's proposal at the May meeting was
25 that one month's rent be paid into the

1 registry of the JP court, not the county court
2 I think within five days after the -- either
3 five days after the judgment was signed or
4 five days after the appeal. I don't
5 remember. But one of the two. And then if it
6 wasn't paid, that you could have a writ of
7 possession, and that they only wanted that
8 rent paid for a nonpayment of rent case. They
9 didn't want it paid for anything else, for a
10 case based on a nonrent breach such as too
11 many dogs in a premises or hazardous
12 activities or whatever.

13 Now subsequently to that I talked to
14 Howard Bookstaff from the Houston Apartment
15 Association. He has changed his position on
16 that; and the Houston Apartment Association
17 now wants rent paid to the registry of the
18 court for everything, which is the existing
19 proposal that regardless of the cause of
20 action rent be paid into the registry of the
21 court. They still want it in the JP court.

22 Now the subcommittee when we were first
23 formulating this considered different ways for
24 this rent to be paid. And a couple of things
25 struck us was that, one, we didn't think it

1 could be for advanced payment of rent. And if
2 the justice court judgment is for rent, say,
3 to end of the month or for whatever period
4 that JP says to do it, then if you're asking
5 then to put another month's rent to the
6 registry of the court when a portion of that
7 rent has already been secured or already been
8 taken into consideration of the judgment, then
9 that's an advance payment of rent to stay in
10 possession; and we thought that would be a
11 problem.

12 So we considered all of that. There
13 really wasn't -- and the subcommittee's
14 proposal is that basically it stay like it is,
15 that rent be paid into the registry of the
16 county court as it becomes due, not into the
17 JP court, and that rent be paid on any kind of
18 lawsuit regardless of the cause of action,
19 that any tenant would have to pay it, indigent
20 or not, on nonpayment of rent or whatever,
21 that it's consistent.

22 And I guess it didn't make much sense to
23 the subcommittee from, you know, the
24 administration of the rules to have you try to
25 figure out well, when is rent paid to the

1 registry of the JP court, when is not paid to
2 the registry of any court. What if the cause
3 of action is for both nonpayment of rent and
4 for some nonrent breach which happens very
5 frequently? How do you handle that?

6 And I guess there is some way the rule
7 could be crafted for that. But you know, the
8 proposal of the subcommittee is that it be
9 done exactly like we've already voted to do
10 which is pay into the registry of the county
11 court as it becomes due. Now I know that
12 Larry Niemann has a comment about that
13 probably and probably Judge Prindle. Okay.

14 CHAIRMAN BABCOCK: Okay. Carl.

15 MR. HAMILTON: If the eviction is for
16 something other than nonpayment of rent, then
17 presumably the rent is paid up in that case.
18 And if we're dealing with a nonpayment of rent
19 and we say the rent is payable when it becomes
20 due, it's already due because it hasn't been
21 paid. That's why the suit. So let's say that
22 the suit is filed on the 15th and rent was due
23 on the 1st. You've got 15 days that are past
24 due and 15 days that should have paid. So why
25 wouldn't they be required to pay the second 15

1 days as a condition of staying on the
2 premises? And then when the 1st comes around
3 if we're still in the appeal, they've got to
4 pay another?

5 HONORABLE TOM LAWRENCE: Well, in Rule
6 748 the JP is going to make a determination on
7 the judgment how much rent he is awarding and
8 when that, what date that rent is through.

9 MR. HAMILTON: You're talking about past
10 rent now.

11 HONORABLE TOM LAWRENCE: I'm talking
12 about past rent or maybe rent for another
13 couple of weeks into the future depending on
14 what the lease agreement says. I mean, you
15 know, the example I gave earlier, if I render
16 a decision today, we'll say the 14th, I may
17 look at the lease agreement and decide the
18 lease agreement entitles the plaintiff for a
19 judgment for possession and back rent through
20 the end of the month in accordance with the
21 lease agreement. So that judgment may be for
22 the entire month of June, you know, the next
23 two weeks. It just depends on what the judge,
24 you know, how the judge finds and what he puts
25 down. But whatever he finds and whatever he

1 puts down at the point that the rent is due
2 again that's going to be on the judgment of
3 748. Then that's going to have to be paid
4 into the county court. And if not, then the
5 county court can issue a writ of possession.

6 MR. HAMILTON: But then you're giving him
7 16 days free.

8 HONORABLE TOM LAWRENCE: No. It's
9 secured by the judgment. That 16 days from
10 now until the end of the month is going to be
11 in the existing judgment that he's going to
12 have to post a supersedeas for.

13 MR. EDWARDS: The problem is with that
14 you've got the indigent problem with those 16
15 days. It's fine if you've got somebody
16 posting a supersedeas; but it seems to me that
17 regardless of whether the person who has to
18 pay rent is going to get to stay or not stay
19 you're going to have to pay rent to the end of
20 that period. And it seems to me you ought to
21 be able to define when it's due for purposes
22 of being able to stay in possession to include
23 that portion of any judgment for rent that is
24 from here to the next contractual pay period
25 which is what you're saying.

1 MR. HAMILTON: Yes. That's what I'm
2 saying.

3 MR. EDWARDS: In other words, it treats
4 everybody the same. If you've got one day
5 left, you have to put up, pay your one day
6 rent; and then tomorrow you have got a 31 to
7 pay. If you have 29 days left, you put up 29
8 days, and then your next one comes up in 29
9 days.

10 HONORABLE TOM LAWRENCE: Well, but that's
11 all going to be recorded on the judgment under
12 Rule 748 that the JP renders as to how much is
13 due, when it's to be -- you know, when that,
14 what date that reflects the rent being paid,
15 when the rent is due on the next day.

16 MS. CORTELL: Future rent days.

17 HONORABLE TOM LAWRENCE: Yes. So that's
18 all going to be on 748. But we thought it was
19 important that you not have to make a tenant
20 pay advance rent when there is already a
21 judgment for rent for that existing period of
22 time, that you can't make him pay rent in the
23 future that's not yet due.

24 MR. EDWARDS: But you're talking about
25 possession. You're talking about the right of

1 possession as opposed to the obligation for
2 rent.

3 MR. HAMILTON: Two different things.
4 Past rent is one thing and right to stay in
5 possession is another thing.

6 HONORABLE TOM LAWRENCE: Well, that's
7 right. But I mean, what the rules are saying
8 and what the existing rules reflect to a
9 degree is that if you don't pay rent as it
10 becomes due in accordance with your existing
11 contract or oral rent agreement or whatever it
12 is, then you can be evicted; but you have to
13 pay your rent as it becomes due. I think even
14 the tenants agree with that.

15 MR. HAMILTON: The problem is it's the
16 date when it comes due. It may be 29 days
17 down the road from the date that the eviction
18 judgment is signed.

19 HONORABLE TOM LAWRENCE: Well, and it's
20 going to be different all the time. That's
21 why the judge is going to have to -- I mean,
22 that's why the judgment is going to have to
23 have that information on it. That's the point
24 of having the wording in the judgment in 748
25 like it is so that that's clear.

1 MR. EDWARDS: And I think what --

2 HONORABLE TOM LAWRENCE: Maybe I'm
3 missing your point.

4 MR. EDWARDS: -- Carl and I are suggesting
5 is that it seems appropriate that that amount
6 of the judgment which deals with rent in the
7 future needs to be posted in order to secure
8 the right of possession in the future.

9 HONORABLE TOM LAWRENCE: Isn't that a
10 Dillingham problem?

11 PROFESSOR DORSANEO: I don't think it is
12 if you're doing it for the future, because I
13 don't think that's -- that's not affecting
14 your ability to appeal whether you were in
15 violation of the lease and should be
16 dispossessed for what you did in the past.
17 It's paying for what you're getting in the
18 future. You could say "Well, you need to pay
19 it contemporaneously like every morning."
20 Okay. But I don't think that that -- I think
21 that's too technical. You pay it for -- it
22 makes sense to me to pay it for the next or
23 for the remainder of the rental period that
24 you're talking about.

25 MR. EDWARDS: You still have the right --

1 PROFESSOR DORSANEO: And if you get
2 thrown out, then you get it back.

3 MR. EDWARDS: You have the right of
4 appeal anyway. The question we're talking
5 about now is the right of possession.

6 PROFESSOR DORSANEO: The right of
7 possession during the pendency of the appeal.
8 Now to me that goes back to the 749(b) is that
9 if you did that, that ought to be enough, not
10 supersedeas for the whole obligation. If you
11 did that, that ought to be enough because then
12 if you won and it turned out that you weren't
13 in arrears on the rent, that you had paid the
14 rent, and then you paid the rest of the rent,
15 then you're in possession, and that makes
16 sense to me. It doesn't make sense to me
17 while you're disputing, the tenant is
18 disputing I am not in breach of the terms of
19 this lease. And I understand to stay in
20 possession during the pendency of this appeal
21 I have make a rental payment.

22 And Mr. Niemann's point that there is a
23 problem there because that obligation needs to
24 be -- that separate obligation needs to be
25 secured, that it needs to be taken care of, I

1 would have it done, you know, right then. Not
2 15 days later. Granted there is a little bit
3 of, you know, a little bit of engineering in
4 that.

5 MR. YELENOSKY: If you're disputing, if
6 you are saying if the judgment is on today on
7 the 14th and your judgment is back rent for
8 the month of June and you didn't pay in June
9 and your appeal is "Yes, I did pay."

10 PROFESSOR DORSANEO: I did pay.

11 MR. YELENOSKY: "I did pay." You're
12 saying though to remain in possession that I
13 have got to pay the rest of this month which I
14 believe is paying again what I already did
15 pay.

16 PROFESSOR DORSANEO: Right.

17 MR. YELENOSKY: And if I'm right, I
18 probably don't have 15 days worth of rent to
19 pay you. And is that a Dillingham problem?

20 PROFESSOR DORSANEO: See, it's not as bad
21 a problem was what -- it may be arguably a
22 Dillingham problem; but in my mind as long as
23 I'm paying rent to stay in possession it's
24 kind of like a whole new plan because we have
25 a controversy about what happened in the

1 past. Okay? And if I'm right and I paid
2 through the other period, well, my rights get
3 vindicated.

4 MR. YELENOSKY: Right. But it is a
5 Dillingham problem to me if your ability
6 because, you know, if I don't pay that 15 days
7 that you're telling me I have to pay, I'm
8 going to lose possession and I'm going to lose
9 the ability to continue my appeal because my
10 appeal is only about possession, and the
11 reason I can't pay is because I did pay.

12 MS. BARON: And the reason, that's
13 already part of the judgment that has been
14 either superseded by a bond or by the pauper's
15 appeal.

16 PROFESSOR DORSANEO: I want to let you
17 stay in possession if you pay that rent. I
18 don't want to have to have you do a
19 supersedeas bond and pay the rent too.

20 MR. YELENOSKY: Well, all I'm saying
21 is --

22 MR. DOGGETT: That's the current rule.

23 PROFESSOR DORSANEO: Huh?

24 MR. DOGGETT: That's the current Rule
25 749(b) that's been scrapped.

1 PROFESSOR DORSANEO: Sorry. I'll be
2 quiet.

3 MR. YELENOSKY: It just seems to me I
4 have no problem saying I paid June and I'm
5 going to appeal that; but when July 1 rolls
6 around I agree I haven't paid that because it
7 hasn't come. I am obligated to pay that; but
8 we are arguing about whether or not I paid
9 June. And in order for me to continue arguing
10 about that I have got to pay either all of
11 June again under Larry Niemann's proposal or
12 I've got to pay at least 15 days of it under
13 your proposal when individuals who are in this
14 situation who pay rent based on, you know,
15 they live paycheck to paycheck. They are not
16 going to have it.

17 CHAIRMAN BABCOCK: Stephen, let me ask
18 you a question. Do you like the language in
19 751 as proposed by the subcommittee?

20 MR. YELENOSKY: Yes.

21 CHAIRMAN BABCOCK: Not to focus us on
22 what we're doing here.

23 (Laughter.)

24 MR. YELENOSKY: Yes, I do. And my
25 cohorts back here do too.

1 CHAIRMAN BABCOCK: Okay.

2 MR. FUCHS: Mr. Chairman, with one
3 exception, and it's more not with respect to
4 this discussion, but some of the language in
5 subparagraph (b)(1) I would have some concern
6 about the court language in (b)(1), that "the
7 court must issue a writ of position if there
8 is a default." I think the word "may," we
9 should go back to "may" because I can think of
10 situations where the appellant has been one
11 day late and the Court didn't want to issue a
12 writ of possession and they had paid the rent
13 by the time he had the hearing in county
14 court. And I think the county court judge
15 should have the discretion to say "Well, you
16 were one day late; but you got it paid" and it
17 shouldn't be "must issue a writ of
18 possession." It should be "may issue a writ
19 of possession."

20 CHAIRMAN BABCOCK: I may be wrong about
21 this. But didn't we discuss "must" and
22 "may"?

23 HONORABLE TOM LAWRENCE: We did. We had
24 "may" in there, and we were told to change it
25 to "must."

1 MR. FUCHS: I "must" have missed that. I
2 "may" have missed that.

3 (Laughter.)

4 CHAIRMAN BABCOCK: Frank.

5 MR. GILSTRAP: Can't the landlords neatly
6 avoid this problem by just not suing for the
7 current month's rent?

8 CHAIRMAN BABCOCK: I don't know.

9 MR. NIEMANN: No. The affidavit of
10 pauper gets you an appeal regardless.

11 MR. GILSTRAP: Okay. I know that. But
12 what I'm saying is if the landlord comes in
13 and say this is June 14th and says "I want to
14 evict this guy and I'm not seeking recovery
15 for the month of June." Then --

16 HONORABLE TOM LAWRENCE: Well, what was
17 he there for to begin with? What was the
18 original cause of action to get you into court
19 then?

20 MR. GILSTRAP: Well, he didn't pay his
21 rent for, you know, May. Do you see what I'm
22 saying?

23 CHAIRMAN BABCOCK: Okay. There is a, not
24 without opposition; but there is -- see, I can
25 feel these things happening.

1 MR. YELENOSKY: That's why you're the
2 Chair.

3 CHAIRMAN BABCOCK: There is a developing
4 consensus around 751. I think we've talked
5 about this on two or three occasions at some
6 length. So I'm going to suggest that the
7 subcommittee has made a motion and seconded
8 it.

9 MR. EDWARDS: Can I ask a question?

10 CHAIRMAN BABCOCK: Yes.

11 MR. EDWARDS: Frequency within which
12 there are appeals on the ground "I have paid
13 rent."

14 HONORABLE TOM LAWRENCE: What do you mean
15 frequency?

16 MR. FUCHS: Frequency of appeals where
17 there has been a tender of rent has been
18 refused by the landlord. It's been a tender
19 late.

20 MR. EDWARDS: Okay. Now if there is a
21 tender, of course the person has the money.

22 MR. FUCHS: That's right. That's right.

23 MR. EDWARDS: That's not a problem in
24 those cases. I'm talking about the problem
25 where the tenant says "I have paid and I don't

1 have the money now to pay because you already
2 got it." What percentage of the cases?

3 CHAIRMAN BABCOCK: Judge Prindle.

4 HONORABLE SANDY PRINDLE: I hope I can
5 answer that question after 20 years of
6 experience. The latest statistics that I have
7 say that the number of cases appealed from
8 justice court on an eviction case is 1.2
9 percent, 1.2 percent. As far as the issues as
10 far as the ones challenging you have two
11 different types of defenses brought up by a
12 tenant. One is that they dropped the money
13 order in the mail chute and the landlord
14 claims he didn't get it. That's the most
15 common of those. In my court, and I can only
16 speak for my court, sir; but that happens less
17 than three percent of the time. The rest of
18 the time you either have a suggestion that
19 they tendered the rent and it was refused or
20 they don't challenge the fact that the rent
21 was not paid at all.

22 CHAIRMAN BABCOCK: Okay.

23 MR. NIEMANN: Mr. Chairman, for the
24 record --

25 CHAIRMAN BABCOCK: Yes.

1 MR. NIEMANN: -- can I say I would be
2 happy to withdraw my proposal and go with the
3 Dorsaneo proposal.

4 PROFESSOR DORSANEO: I'm not even sure I
5 even like what I'm saying at this point.

6 MS. BARON: I don't like what you're
7 saying. It doesn't seem fair.

8 MR. NIEMANN: I personally think that the
9 frequency of a tenant having actually paid
10 rent and the landlord said it wasn't paid I
11 think that occurs only a fraction of the time,
12 that we are being abused by the affidavit of
13 pauper to get another month free rent. I
14 think the imbalance is way against us on
15 that. It's very unfair; and nothing has
16 been -- nobody had suggested how to solve that
17 abuse.

18 MR. YELENOSKY: Well, you're saying only
19 1.2 percent of the cases are appealed. What
20 percent of those are you saying are abusive?

21 MR. NIEMANN: In my experience a great
22 number of them. I can tell you it's so bad
23 that Judge Cercone up here in Dallas is
24 telling the landlords don't even think about
25 contesting this frivolous pauper's affidavit

1 because it will cost you another month. And
2 the tenants are learning that, and they're
3 just --

4 CHAIRMAN BABCOCK: Of those people who
5 are about to vote if you're persuaded that
6 this rule is defective because of what
7 Mr. Niemann is saying, you'll surely vote
8 against this rule. So I think we're ready to
9 take a vote. And this is not the last stop on
10 the railroad. Anybody who has had experience
11 with our committee the Court will frequently
12 reject completely what we say.

13 MR. YELENOSKY: Say it isn't so. Has
14 that ever happened?

15 CHAIRMAN BABCOCK: That has happened. So
16 the fact the whole point of this is to try to
17 create a record where all points of view are
18 expressed and within the time limits we have
19 as freely and as openly as we possibly can.
20 That's why we have these great court reporters
21 here to create this record. So there are no
22 winners or no losers; but we are going to vote
23 on this. So everybody in favor of 751 raise
24 your hand. All those opposed? By a vote of
25 11 to 3 the rule passes, and the Chair not

1 voting. Okay. Where do we go next, Tom?

2 HONORABLE TOM LAWRENCE: 753(a). No.

3 I'm sorry. 753. Excuse me.

4 CHAIRMAN BABCOCK: 753.

5 HONORABLE TOM LAWRENCE: What we did
6 there was some language that we had, we were
7 told to put in the last sentence. It says
8 "The notice shall admonish the defendant that
9 a default judgment may be taken unless a
10 written answer is filed with the clerk within
11 eight days after the transcript is filed in
12 the county court." I mean, that's the law;
13 but all this rule now says is that that is
14 also going to have to be on the citation. So
15 that was, and that was the only change from
16 last time. So we would move that be adopted.

17 MS. BARON: Can we use a different word
18 other than "admonish"? Maybe "notify" or
19 "state."

20 HONORABLE TOM LAWRENCE: That was the
21 language we came up with last time; but we can
22 put whatever. There is nothing magic about
23 that.

24 MS. BARON: Well, I think if a layperson
25 reads this, they won't know what "admonish"

1 means.

2 MR. YELENOSKY: How about "warn"?

3 MS. BARON: Or "warn."

4 MR. GILSTRAP: "Threaten."

5 (Laughter.)

6 HONORABLE TOM LAWRENCE: What do you-all
7 like?

8 MS. CORTELL: "Warn."

9 MS. BARON: "Warn."

10 HONORABLE TOM LAWRENCE: "Warn. "

11 All right. I will cause it to happen.

12 MR. YELENOSKY: Make it so.

13 HONORABLE TOM LAWRENCE: Make it so. Is
14 the Chair going to take any action now?

15 MR. ORSINGER: Yes, we are. Is there a
16 second for that motion?

17 MS. BARON: Oh, my God, this is scary.

18 MS. CORTELL: Let the record reflect this
19 is scary.

20 MR. YELENOSKY: We all knew one day this
21 was going to happen.

22 MS. BARON: He keeps moving closer and
23 closer to that.

24 MR. ORSINGER: It's just temporary.

25 Don't get upset. Is there a second to the

1 motion?

2 MS. BARON: Second.

3 MR. ORSINGER: Okay. Any further
4 discussion? All in favor raise your hand.
5 Twelve. Okay. And all opposed raise your
6 hand. None. So the Chair not voting. The
7 Chair does not vote. 12 to zero. 753 is
8 recommended.

9 HONORABLE TOM LAWRENCE: We're going to
10 skip 754(c) because we voted on 754 except for
11 (c); and that's discovery, so we're holding
12 off of that. So we'll go to 755.

13 MR. ORSINGER: And we're not going to
14 discuss 753(a)?

15 HONORABLE TOM LAWRENCE: We already voted
16 on that.

17 MR. ORSINGER: And that's already been
18 adopted.

19 MS. EADS: I'm not sure we voted on
20 749(b).

21 HONORABLE TOM LAWRENCE: We didn't.

22 MS. EADS: We're going to skip over
23 that.

24 HONORABLE TOM LAWRENCE: We didn't. 755,
25 the only change there from the proposal is

1 this is Niemann's suggestion that we add the
2 manufactured housing language so that it's in
3 755. And we were told to do that last time.
4 So I move that be adopted.

5 MR. EDWARDS: Second.

6 MR. YELENOSKY: Which one are we talking
7 about now?

8 PROFESSOR CARLSON: 755.

9 MR. ORSINGER: 755, the last sentence,
10 the last two sentences.

11 MR. YELENOSKY: Okay. There is some lack
12 of clarity. Frankly I don't -- on the 10-day
13 period.

14 MR. FUCHS: Mr. Chairman.

15 MR. ORSINGER: Yes.

16 MR. FUCHS: The concern from the tenant's
17 perspective here is that when the county court
18 at law issues the writ of possession or signs
19 the judgment the Property Code provides that
20 you have that the judgment may not be stayed
21 if the supersedeas is filed within 10 days.
22 So we wanted to make clear here that the writ
23 of possession should not issue or cannot issue
24 until the 11th day after the judgment is
25 signed. And there's an attempt to do that

1 with this added language; but I still don't
2 think it's sufficiently clear to the county
3 court judges that they cannot issue that writ
4 of possession until the 11th day after the
5 judgment because you've got 10 days to try to
6 supersede it and stay in possession if you're
7 going to appeal.

8 We just want to make it clearer to the
9 county court judges, that they understand,
10 because this is a current problem that they
11 can't issue that writ of possession until the
12 11th day after the judgment because the tenant
13 has 10 days in which to post a supersedeas.

14 HONORABLE TOM LAWRENCE: That language
15 was added. That sentence was added to combat
16 that exact problem.

17 MR. YELENOSKY: Right. But he's
18 saying it's --

19 HONORABLE TOM LAWRENCE: So how do you
20 want to change it then?

21 MR. YELENOSKY: Well, we could make it
22 clearer I guess now that I've heard it I guess
23 if we say "However if the defendant is leasing
24 a manufactured home lot" --

25 HONORABLE TOM LAWRENCE: No. Not that

1 sentence.

2 MR. FUCHS: I think the first sentence
3 needs to address it.

4 MR. YELENOSKY: But you could add it in
5 that sentence and say "The writ of possession
6 shall be issued 11 days" or whatever.

7 HONORABLE TOM LAWRENCE: I think we're
8 talking about two different problems. Now the
9 second to the last sentence is the one we
10 added last time. I don't think that is
11 related to the last which is a different
12 problem.

13 MR. FUCHS: I think we need to say --

14 HONORABLE TOM LAWRENCE: So I think
15 you're talking about the last sentence.

16 MR. FUCHS: Yes. And I think you need to
17 state it in the first sentence "The writ of
18 possession or execution or both shall be
19 issued by the clerk, the county clerk
20 according to the judgment rendered, but not
21 prior to the expiration of 10 days," something
22 to that effect somewhere in the first
23 sentence.

24 MR. YELENOSKY: Okay.

25 HONORABLE TOM LAWRENCE: What if we just

1 added a sentence at the end similar to what
2 the language is in 748 to keep it consistent
3 which says "No writ will issue"? Let's see
4 if I can find that.

5 MR. ORSINGER: Couldn't you just in the
6 first sentence say "shall be issued by the
7 clerk of the county court according to the
8 judgment rendered not less than 10 days after
9 judgment" or something?

10 MR. FUCHS: Yes. Uh-huh (yes).

11 PROFESSOR CARLSON: "Less than."

12 MR. DOGGETT: It's the "however" that
13 gets confusing if you add it to the bottom.

14 MS. CORTELL: I agree with that.

15 PROFESSOR DORSANEO: I'm not
16 understanding this either; but the last two
17 lines "unless within 10 days of the signing of
18 the judgment the appellant files a supersedeas
19 bond," add that to the beginning part of the
20 first sentence.

21 MS. BARON: I think the concern is the
22 way it's stated because it says --

23 MR. YELENOSKY: "Shall be issued."

24 MS. BARON: -- go ahead and issue it.

25 MR. YELENOSKY: Right.

1 MS. BARON: And then later it says --

2 MR. YELENOSKY: Wait 10 days.

3 MS. BARON: -- wait 10 days.

4 MR. ORSINGER: It doesn't really say wait
5 10 days. You have to infer that you have to
6 wait 10 days.

7 MS. BARON: Yes, exactly. It doesn't say
8 it directly.

9 MR. YELENOSKY: Why can't you just start
10 it out by saying "After the expiration of 10
11 days a writ of possession or execution or both
12 shall be issued"?

13 HONORABLE TOM LAWRENCE: Isn't this
14 language in the Property Code?

15 MR. NIEMANN: No. It's implied from the
16 right of the -- Fred is right. The defendant
17 can under the Property Code supersede the
18 judgment of the county court within 10 days.
19 So you certainly don't want the county court
20 to issue it after five days, and then the
21 tenant -- and then effectively destroy the
22 tenant's right to supersede it. So all you
23 have to do is to say "the writ of possession
24 shall be issued by the clerk of the county
25 court of judgment no sooner than 10 days

1 after."

2 MS. BARON: How about starting with an
3 "if" clause that says "If the tenant has not
4 posted the bond within 10 days, the writ of
5 possession shall be issued"?

6 MR. NIEMANN: That works.

7 MR. ORSINGER: Is that the last sentence?

8 MS. BARON: Well, we're adding it to the
9 first sentence. We're put an "if" clause on
10 the first sentence.

11 MR. NIEMANN: Either way works.

12 MR. YELENOSKY: So you could say "If
13 after the expiration of 10 days from the date
14 of the judgment the tenant has not filed a
15 supersedeas, the writ of possession shall be
16 issued."

17 MS. BARON: Yes.

18 HONORABLE TOM LAWRENCE: Say that again
19 slower.

20 MR. YELENOSKY: "If after the expiration
21 of 10 days from the date of the judgment," I
22 guess comma, "the tenant" --

23 MS. BARON: "The appellant" actually.

24 MR. YELENOSKY: -- "the appellant" --

25 HONORABLE TOM LAWRENCE: Well, no. It

1 would be "defendant."

2 MR. YELENOSKY: -- "defendant has not
3 filed a supersedeas bond" or I don't know
4 whether you want to say "supersedeas bond
5 complying with the county court," if you need
6 that language; but if they haven't, then the
7 rest of the sentence is as is.

8 HONORABLE TOM LAWRENCE: -- "then the
9 writ of possession are execution or both shall
10 be issued."

11 MR. YELENOSKY: Right.

12 MR. NIEMANN: Are you going to let the
13 pauper also appeal without putting up a
14 supersedeas bond?

15 MR. YELENOSKY: We already decided I
16 think actually on the county court, no, we
17 wouldn't.

18 HONORABLE TOM LAWRENCE: Thank God, he's
19 back.

20 (Laughter.)

21 MR. NIEMANN: You made him pay rent in
22 the county court, but not in JP court.

23 MR. YELENOSKY: No. I mean, oh, I
24 thought your question was do they have to post
25 a supersedeas to appeal from county court to

1 court of appeals?

2 MR. NIEMANN: Yes. You have said --

3 MR. YELENOSKY: I think we have said --

4 MR. NIEMANN: -- even the pauper has to
5 post a supersedeas in order to make that
6 appeal.

7 MR. YELENOSKY: I believe so.

8 HONORABLE TOM LAWRENCE: That's the TRAP
9 rule.

10 MR. NIEMANN: But he doesn't have to do
11 it in the JP court.

12 MR. YELENOSKY: I think what we
13 decided --

14 MR. NIEMANN: What is the rationale?

15 HONORABLE TOM LAWRENCE: I'm sorry. Say
16 that again.

17 MR. NIEMANN: What is the rationale for
18 allowing the pauper to appeal the JP court
19 decision to county court by affidavit, but not
20 allowing him to appeal the county court
21 judgment to the appellate court by affidavit?

22 MR. YELENOSKY: Oh, he can appeal by
23 affidavit.

24 HONORABLE TOM LAWRENCE: He can. That's
25 the --

1 MR. YELENOSKY: The question was
2 whether --

3 HONORABLE TOM LAWRENCE: -- TRAP rules.

4 MR. YELENOSKY: -- he has to post a
5 supersedeas.

6 MR. NIEMANN: That's what I'm talking
7 about.

8 HONORABLE TOM LAWRENCE: When you go from
9 county --

10 MR. NIEMANN: The supersedeas.

11 HONORABLE TOM LAWRENCE: -- to district
12 court.

13 COURT REPORTER: Wait. You-all can't all
14 talk at the same time, please.

15 CHAIRMAN BABCOCK: Yes, hold on.

16 MR. NIEMANN: I'm just saying in all due
17 respect you've got a double standard here.
18 You're saying that the pauper in order to stop
19 a writ has to post a supersedeas bond in order
20 to appeal to the appellate court, but doesn't
21 have to post a supersedeas bond or pay any
22 rent in order to appeal to the county court.

23 MS. BARON: Well, we actually have a
24 double standard on the court system because
25 the appeal from a JP to the county court the

1 appeal actually is de novo and the lower
2 court's judgment has no effect. Is that
3 correct?

4 HONORABLE TOM LAWRENCE: That's right.

5 MR. GILSTRAP: It does now.

6 MS. BARON: It does now. But it
7 doesn't. I mean it's de novo. It starts over
8 as opposed to when you appeal from the county
9 court to the appellate court the county court
10 has decided the facts and the appellate court
11 is just performing the appellate review. It's
12 not starting over. So we have got two
13 different kinds of review going on. Actually
14 we have only one kind of review, and then
15 we've got to start over. So there is a reason
16 for having different standards.

17 MR. YELENOSKY: But if Mr. Niemann if
18 you're proposing getting rid of the
19 supersedeas for appellate courts as well, I'll
20 support you.

21 MR. NIEMANN: No, I'm not. I saw the
22 opportunity to point out the discrepancy
23 between the two.

24 CHAIRMAN BABCOCK: Carl.

25 MR. HAMILTON: And the language that you

1 just stated, Stephen, wouldn't it be more
2 appropriate to say "unless the judgment has
3 been superseded," because the pauper doesn't
4 have to post a bond. Right?

5 PROFESSOR CARLSON: A supersedeas?

6 MR. YELENOSKY: No. They do.

7 PROFESSOR CARLSON: From district court
8 to the court of appeals, yes.

9 MR. YELENOSKY: They do.

10 HONORABLE TOM LAWRENCE: Yes. See if
11 you're talking about -- I mean, that's the
12 difference. We're letting at the JP to county
13 court we voted to let the pauper get out of
14 posting a supersedeas; but that's not the law
15 when you appeal from county to district court
16 to the court of appeals. A pauper has to post
17 a supersedeas.

18 PROFESSOR CARLSON: To suspend
19 enforcement.

20 HONORABLE TOM LAWRENCE: To suspend
21 enforcement.

22 MR. GILSTRAP: To appeal.

23 HONORABLE TOM LAWRENCE: No, not to
24 appeal; but to suspend enforcement. So we
25 have got a more liberal appeal JP to county

1 than county to district.

2 PROFESSOR CARLSON: That was the vote.

3 HONORABLE TOM LAWRENCE: But that was the
4 vote of the committee.

5 CHAIRMAN BABCOCK: So is there amended
6 language on the table here?

7 HONORABLE TOM LAWRENCE: "If after the
8 expiration of 10 days from the date of
9 judgment the defendant has not filed a
10 supersedeas bond, then the writ or possession
11 or execution or both," et cetera. Right?

12 MR. YELENOSKY: Yes.

13 CHAIRMAN BABCOCK: And that's replacing
14 what language?

15 HONORABLE TOM LAWRENCE: It's just it's
16 going before the first sentence.

17 MS. CORTELL: The clause is added to the
18 first sentence, but delete the "however."

19 HONORABLE TOM LAWRENCE: Yes. That's
20 going before the last first sentence.

21 MR. HAMILTON: You don't need the last
22 sentence.

23 HONORABLE TOM LAWRENCE: So we're
24 deleting the last sentence?

25 MS. CORTELL: Yes.

1 MS. BARON: Right.

2 HONORABLE TOM LAWRENCE: All right.

3 CHAIRMAN BABCOCK: Okay. Any more
4 discussion on that? Any more discussion on
5 Rule 755 in general? Are we ready to vote?

6 HONORABLE TOM LAWRENCE: Moved.

7 CHAIRMAN BABCOCK: Anybody second?

8 MS. BARON: Seconded.

9 CHAIRMAN BABCOCK: Seconded. All in
10 favor of Rule 755 as amended raise your hand.
11 14 to nothing in favor, picking up steam,
12 Chair not voting.

13 HONORABLE TOM LAWRENCE: Go back to
14 749(b) which we deferred until we do 750 and
15 751.

16 CHAIRMAN BABCOCK: And where we are in
17 this is we're focusing on the sentence that is
18 of the last sentence of the second paragraph,
19 and we propose to change it to say "If the
20 defendant does contest a judgment for
21 possession and fails to post a supersedeas
22 bond when required, the plaintiff may seek a
23 writ of possession, and the issue of
24 possession may not be further litigated in the
25 eviction action in the county court." And

1 that is the sentence we are focusing on, is it
2 not? And since we decided 751 in favor of the
3 subcommittee does that have any collateral
4 estoppel effect on this discussion?

5 HONORABLE TOM LAWRENCE: Well, it would
6 be inconsistent to change 748 now.

7 CHAIRMAN BABCOCK: It would what?

8 HONORABLE TOM LAWRENCE: I think it would
9 be inconsistent to change the language of 748
10 now.

11 MR. NIEMANN: I agree.

12 HONORABLE TOM LAWRENCE: 749(b). I'm
13 sorry.

14 CHAIRMAN BABCOCK: 749(b). I was
15 wondering what you were talking about.

16 PROFESSOR DORSANEO: To understand it all
17 though the person who proceeds with the
18 pauper's affidavit is excused from the
19 obligation to post a supersedeas bond, so that
20 sentence we're talking about doesn't have any
21 consequence.

22 MR. NIEMANN: Because of the way you
23 voted on 750 the Fuchs/Niemann language is
24 irrelevant now.

25 CHAIRMAN BABCOCK: Having --

1 PROFESSOR DORSANEO: This sentence only
2 affects people who are not indigent --

3 HONORABLE TOM LAWRENCE: That's right.

4 PROFESSOR DORSANEO: -- because they have
5 to pay the next rent and then post a
6 supersedeas bond. Or let's say if it was for
7 the full judgment for rent arrearage plus.

8 HONORABLE TOM LAWRENCE: Well, now wait a
9 minute. That sentence would apply to anybody
10 that gets evicted because they either A,
11 didn't post a supersedeas or didn't pay rent.

12 MR. YELENOSKY: Or didn't pay rent. But
13 it doesn't say that. It just says
14 "supersedeas."

15 HONORABLE TOM LAWRENCE: Well, --

16 MR. YELENOSKY: I mean, it would apply
17 to indigents; but it would be --

18 HONORABLE TOM LAWRENCE: That's in a
19 different area of the rule. It's the same
20 language.

21 MR. YELENOSKY: But that same language is
22 in there that the issue of possession may not
23 be further litigated if you fail to pay rent
24 when it comes due?

25 HONORABLE TOM LAWRENCE: Uh-huh (yes).

1 There is some dual language because of the,
2 you know, the dual issue of supersedeas and
3 appeal, so we used dual language in different
4 places.

5 MR. FUCHS: I can tell you who would be
6 affected by this. It's the person who tries
7 to do an appeal, loses. The justice court
8 says "You're not indigent," appeals to the
9 county court. The county court says "You're
10 not indigent." And both decisions are wrong.
11 The person is in fact indigent and cannot
12 afford to post the bond.

13 I just saw a case like that recently, and
14 the law firm representing him pro bono didn't
15 want to seek extraordinary relief in the court
16 of appeals, clearly couldn't pay the
17 supersedeas; but said there is nothing we can
18 do. He's given up possession. He would like
19 to still try the issue of possession and
20 proceed on appeal to remove the stigma of the
21 judgment and had a good defense on the merits;
22 but because he had not participated in the
23 justice court trial because he arrived 10
24 minutes late because he was slowed down by a
25 traffic accident, and when he gets there the

1 JP says "Sorry, too late" even though the
2 attorney is still there for the landlord. And
3 so he tries to do the appeal, and they find
4 him not indigent, not indigent on appeal to
5 the county court and he's out and can't appeal
6 the judgment.

7 If you had language here allowing in that
8 case for someone then to appeal for the
9 purpose of removing the stigma of the
10 judgment, which will be very few cases, I
11 think that would be good, and I think just as
12 a matter of constitutionality it's required
13 because there is an issue there. You may have
14 given up possession; but I don't think it's
15 moot in that case.

16 CHAIRMAN BABCOCK: Any further discussion
17 on that subject? Yes, Carl.

18 MR. HAMILTON: I still think there are
19 two situations. There is that, and then there
20 is the tenant who still wants possession; and
21 I think that tenant needs to have a right to
22 go on with the appeal.

23 HONORABLE TOM LAWRENCE: Well, he can
24 still appeal the judgment, just not the issue
25 of possession.

1 MR. HAMILTON: That doesn't do him any
2 good. He wants to appeal the right of
3 possession and if he wins, go back into
4 possession.

5 HONORABLE TOM LAWRENCE: Well, I know
6 he'd like to; but if he doesn't post a
7 supersedeas or pay rent to the registry, why
8 should he be able to stay in possession?

9 CHAIRMAN BABCOCK: We have discussed that
10 at some length.

11 HONORABLE TOM LAWRENCE: We've actually
12 already voted on this.

13 MR. HAMILTON: He can pay rent into the
14 registry and go on with his appeal and just
15 not supersede any of the back --

16 PROFESSOR DORSANEO: That would be my
17 preference; but --

18 MR. HAMILTON: Yes.

19 PROFESSOR DORSANEO: -- that's not the
20 way they have it engineered.

21 CHAIRMAN BABCOCK: Any further
22 discussion?

23 MR. EDWARDS: What happens on somebody
24 that is in there on a -- with a pauper's oath
25 and is paying rent -- fails to pay rent?

1 CHAIRMAN BABCOCK: Fails to pay rent.

2 HONORABLE TOM LAWRENCE: Well, he gets
3 evicted.

4 MR. HAMILTON: And he loses possession.

5 HONORABLE TOM LAWRENCE: Yes, he loses
6 possession.

7 MR. EDWARDS: Where does he lose
8 possession?

9 HONORABLE TOM LAWRENCE: County court.

10 MR. EDWARDS: No. Where does it say?

11 MR. YELENOSKY: 751.

12 HONORABLE TOM LAWRENCE: 751.

13 MR. EDWARDS: Does it say "writ of
14 possession"?

15 PROFESSOR DORSANEO: He loses possession
16 if the next time rent comes due and he doesn't
17 pay.

18 MR. EDWARDS: Where does it say?

19 HONORABLE TOM LAWRENCE: 751.

20 PROFESSOR DORSANEO: 751.

21 MR. EDWARDS: Does it say "writ of
22 possession"?

23 PROFESSOR DORSANEO: And 750 an 749(b)
24 say that if you're not an indigent, you have
25 to pay rent, you have to post a supersedeas,

1 and if you don't, you're out and you are dead
2 forever.

3 CHAIRMAN BABCOCK: Is there any --

4 PROFESSOR DORSANEO: And you're not
5 back.

6 CHAIRMAN BABCOCK: Is there any
7 opposition --

8 PROFESSOR DORSANEO: You're not coming
9 back.

10 CHAIRMAN BABCOCK: -- to the I think
11 cosmetic changes we made in 749(b) changing
12 the --

13 HONORABLE TOM LAWRENCE: That was
14 Stephen's language.

15 CHAIRMAN BABCOCK: The language, anybody
16 opposed to that? Okay. Does anybody want
17 to --

18 PROFESSOR DORSANEO: Anti middle class.

19 CHAIRMAN BABCOCK: Just to coin a
20 phrase.

21 PROFESSOR DORSANEO: Screw the college
22 students.

23 PROFESSOR DORSANEO: Does anybody want to
24 revote on 749(b)? We already voted on it
25 once and approved it. Does anybody want to

1 revote on 749(b)?

2 HONORABLE TOM LAWRENCE: Well, all we
3 voted on was that sentence about the
4 mootness. We haven't voted on anything else
5 yet.

6 CHAIRMAN BABCOCK: But maybe the entire
7 rule. Do you want to move that?

8 HONORABLE TOM LAWRENCE: I move to vote.

9 CHAIRMAN BABCOCK: Does anybody want to
10 second that?

11 PROFESSOR CARLSON: Second.

12 MS. BARON: All right. Any further
13 discussion on 749(b)? All right. All of
14 those in favor of 749(b) as amended by the
15 language I read a minute ago raise your hand.

16 MR. YELENOSKY: Do we have that language
17 and the defendant language? That's in there?

18 HONORABLE TOM LAWRENCE: Uh-huh (yes).

19 MR. YELENOSKY: That's in there.

20 CHAIRMAN BABCOCK: All opposed? It
21 passes by a vote of 10 to two, the Chair not
22 voting. And tell me that we're done with
23 these.

24 HONORABLE TOM LAWRENCE: No. We're done
25 with the easy ones.

1 PROFESSOR CARLSON: These are issues
2 coming up.

3 HONORABLE TOM LAWRENCE: Now that's the
4 easy stuff. Now we'll get to the hard stuff.

5 MR. EDWARDS: Did we look at the comments
6 on this stuff?

7 HONORABLE TOM LAWRENCE: I hope you did.

8 MR. EDWARDS: Were we voting on the
9 comments too?

10 HONORABLE TOM LAWRENCE: Yes.

11 MR. EDWARDS: Okay. You didn't talk
12 about them. I just wondered.

13 MR. YELENOSKY: Because you knocked the
14 fight out of us with the easy stuff.

15 CHAIRMAN BABCOCK: Yes. You knocked the
16 fight out of me. What else do we have?

17 (Laughter.)

18 HONORABLE TOM LAWRENCE: Well, we have
19 got several things. First is possession
20 bond. We've got to talk about possession
21 bond, discovery, motion for new trial. Those
22 are the ones that are controversial. And
23 we'll talk about possession bond first. We
24 have actually already voted on this, on a
25 concept of this.

1 The possession bond issue is where you
2 have got a tenant who is a danger, who is a
3 safety or health risk and they need to get him
4 out quick. The current rule, you know, is not
5 a very good rule. It needs to be changed; and
6 we came up with a variety of different ways to
7 change that. We had a meeting on that. There
8 were some good ideas that came out of the
9 meeting. Some of the ideas have been
10 adopted. We once again have two versions,
11 version one which is a jury trial if the
12 defendant wants it, version two which is no
13 jury trial.

14 CHAIRMAN BABCOCK: What rule are we
15 talking about?

16 HONORABLE TOM LAWRENCE: 740, page two.

17 MR. YELENOSKY: We could vote on jury
18 trial or no jury trial?

19 HONORABLE TOM LAWRENCE: Yes. Well, we
20 have actually already voted that we have a
21 jury trial for this; but there was still
22 concern that that would mean that the sense of
23 this being an immediate possession, you know,
24 it is not going to be immediate by any means.
25 It will be some point in the future. But, you

1 know, there is an issue. Can you deny
2 somebody a right to a jury trial?

3 So we did vote. The vote was taken on
4 November 2nd. It was 10 to 7 that we have
5 jury trials and not prohibit jury trial.

6 Some of the ideas that we came up with
7 through the ad hoc committee that met May
8 30th, one that the plaintiff could only use
9 this possession bond process if there is an
10 allegation that the tenant has committed some
11 serious criminal activity that is a health
12 problem or safety problem, so he's going to
13 have to allege that. That's one.

14 Two, it's going to speed up everything.
15 The trial date is going to be set four to
16 seven days. Instead of the normal six to 10
17 days which we have now it will be four to
18 seven. Now the four to seven is somewhat
19 arbitrary. That can be changed. We could go
20 three to six. The four to seven was in order
21 to give the JP the chance to manage his docket
22 to the extent you'd let the constable serve
23 it, estimate when it's going to be served and
24 set the trial time, so it's not something that
25 you have got to stop everything for. But

1 again, we can, you know, that language can be
2 tinkered with a little bit. It could be less
3 than that. It could be three to six. I don't
4 know if we can make it much less than that;
5 but it certainly could be three to six.

6 The trial would be held. If we go with
7 version one, the trial is going to be held
8 three to six days unless they ask for a jury
9 trial in which case you get the jury in
10 insofar as quickly as practicable. And after
11 the trial there is going to be three days to
12 appeal; and again, that is something that is
13 somewhat arbitrary. That could be two days.
14 I don't know that we would want to make it any
15 less than two days; but certainly we want to
16 speed it up more than three days.

17 The notice has to be returned within one
18 day of service, the citation, so the Court
19 knows what is going on with that case, when
20 the possession bond trial it going to be held
21 because you have to notice the other parties
22 in.

23 And then in (c) "If the defendant fails
24 to appeal for trial," the -- oh, the other
25 thing is that there is the JP's position, and

1 the subcommittee came to adopt this, is that
2 this only be for possession, that you not join
3 the question of rent, that it be for
4 possession, attorney's fees and court costs,
5 that there be no rent, no late charges or
6 anything else. So if it's truly a hazard and
7 you want to get him out quick, then it would
8 be limited to possession. The landlord has
9 not lost his right to sue in a separate action
10 for rent and other damages, which there
11 probably would be some in a situation like
12 that.

13 The appeal would be held in the same
14 way. The language in version one and version
15 two is identical. The only difference is that
16 version two says there is no jury trial. It
17 has to be a bench trial. So that's the
18 proposal. It speeds it up somewhat.

19 There were other alternative proposals
20 that were put forth. One was to let them get
21 out immediately and then have a possession
22 bond; and I mean literally evict them
23 immediately and have a trial on it seven days,
24 10 days later, you know, the danger being that
25 you may have to readmit them and lose the

1 possession bond. The landlords didn't like
2 that. They didn't want to go with that. So
3 this was the best that we could come up with.
4 There really was not a consensus of all the
5 groups as to exactly how to do it; but this is
6 I think I'll hazard to say this is fairly
7 close, about as close as we could get.

8 CHAIRMAN BABCOCK: And as I understand it
9 version one is jury trial and version two is
10 no jury trial?

11 HONORABLE TOM LAWRENCE: Version one is
12 you have a right to a jury if you make that
13 request.

14 CHAIRMAN BABCOCK: Right.

15 HONORABLE TOM LAWRENCE: Version two
16 there would be no jury trial.

17 CHAIRMAN BABCOCK: Okay. And didn't we
18 previously vote --

19 HONORABLE TOM LAWRENCE: We did.

20 CHAIRMAN BABCOCK: -- that were going to
21 do jury trial?

22 HONORABLE TOM LAWRENCE: 10 to 7, that's
23 correct.

24 CHAIRMAN BABCOCK: Are you suggesting we
25 revote on that?

1 HONORABLE TOM LAWRENCE: Well, I've
2 always suggested we revote on that. But I
3 mean, I've always felt that if you really want
4 to have it immediate, that you need to not
5 have the jury trial, that it needs to be a
6 bench trial only. There was a minority
7 opinion within the subcommittee that felt that
8 you shouldn't do that, that we need to reserve
9 jury trial. So anyway but that's really
10 the --

11 CHAIRMAN BABCOCK: Despite the closeness
12 of the vote I recall the vociferousness of the
13 gang of 10 that thought that a jury trial was
14 very important.

15 HONORABLE TOM LAWRENCE: Well, you know,
16 once again, whatever the will of the committee
17 is. If we say we're going with version one,
18 that's fine. We still need to talk about the
19 mechanism by which we do this.

20 CHAIRMAN BABCOCK: I just want to see
21 where we focus our attention. Is there any
22 appetite by anybody, although Justice Hecht
23 has a weighted vote on this, for revisiting
24 the jury versus nonjury issue?

25 HONORABLE TOM LAWRENCE: That's pretty

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21 where we focus our attention. Is there any
22 appetite by anybody, although Justice Hecht
23 has a weighted vote on this, for revisiting
24 the jury versus nonjury issue?

25 HONORABLE TOM LAWRENCE: That's pretty

1 clear.

2 CHAIRMAN BABCOCK: I don't hear any
3 shouting or clamoring for this. So let's why
4 don't we focus on version one.

5 HONORABLE TOM LAWRENCE: All right.
6 That's version one. (a) of one is the --

7 CHAIRMAN BABCOCK: Linda has got a
8 question.

9 MS. EADS: The language where you say
10 that "If the plaintiff alleges that the
11 defendant has engaged in criminal activity
12 within the previous 10 days," why do you limit
13 it to the previous 10 days?

14 HONORABLE TOM LAWRENCE: Well, the
15 thought being, and actually I've lifted this
16 language from Robert Doggett. He came up with
17 this language.

18 MS. EADS: It sounds like Robert.

19 HONORABLE TOM LAWRENCE: Except I
20 changed. I think he had the word something
21 other than "serious," "violent" or something.

22 MS. EADS: I was worried about the 10
23 days.

24 HONORABLE TOM LAWRENCE: Well, the
25 thought was that if this person truly is a

1 hazard and truly is causing disruption, why
2 would the landlord want to wait a long period
3 of time? It would seem like they'd want to
4 get in immediately and file this.

5 MS. EADS: What if the landlord didn't
6 know that? Let's assume it's a member of
7 al-Qaida. Okay.

8 MR. YELENOSKY: Call the police.

9 MS. EADS: Well, and the landlord, you
10 know, well, you're right. They may be able to
11 do it and they may not; but let's say the
12 landlord may not have known the activities
13 that had preceded it and it is not 10 days.
14 It's longer than that that the information
15 is. I mean, if I'm the landlord, I would like
16 to get that person out of my house and not
17 wait for the police to arrest necessarily
18 before I can do it.

19 HONORABLE TOM LAWRENCE: Well, I mean,
20 yes. There wasn't any attempt to try
21 to -- there was an attempt to make it as broad
22 as possible for the landlord to file this and
23 not put too many hoops for them to jump
24 through to make sure that there really was
25 that problem there and they weren't just

1 trying to evict somebody for nonpayment of
2 rent on an expedited basis.

3 MR. YELENOSKY: And if it's a status, I'm
4 sure there were other examples; but I mean, he
5 didn't, whatever. If the incident happened 10
6 days ago, but he doesn't continue to present a
7 threat, then you don't need this. If the
8 incident happened 10 days, but you still
9 allege that there's a threat that continues to
10 exist, I guess you would have an argument.
11 And I guess you're saying the language doesn't
12 allow you in those instances because --

13 MS. EADS: No.

14 MR. YELENOSKY: -- it talks about engaged
15 in serious criminal activity within the
16 previous 10 days.

17 HONORABLE TOM LAWRENCE: Then I'd rather,
18 if that's a problem, I'd rather take out
19 "within the previous 10 days" and just let the
20 JP ask the landlord the question "Well, why
21 are you coming in 30 days later" and have them
22 take that into consideration in setting the
23 possession bond.

24 MS. EADS: You're not immediately
25 evicted. You're going to have a trial to the

1 jury.

2 HONORABLE TOM LAWRENCE: Then I'd be in
3 favor of just taking out "within the previous
4 10 days."

5 PROFESSOR CARLSON: "10 days."

6 MR. DOGGETT: But the converse is true.
7 We're going to say, you know, 10 days. We
8 wouldn't want to limit the poor landlord not
9 knowing what to do after somebody shot
10 somebody yesterday. At the same time they're
11 going to give them notice to appear in four
12 days by alternative service. I mean, this is
13 a person not even being served personally.

14 MR. NIEMANN: Let me tell you where we
15 anticipate, or I would like to maybe have a
16 rebuttal to what Robert says.

17 One of the most common problems we are
18 having nowadays is somebody who lies about the
19 status as being a convicted rapist or a
20 convicted molester. Now that is an incident
21 that happens at the time of rental
22 application, and it's not going to happen
23 within the previous 10 days. And God help us
24 if you're going to say if you killed somebody
25 11 days ago, you can't get them out quick; but

1 if you killed them 10 days ago, you can.

2 MR. DOGGETT: You've got five days to
3 appeal. If you appeal on the sixth day,
4 you're out. There are cutoffs for
5 everything.

6 MR. NIEMANN: I rest my case.

7 CHAIRMAN BABCOCK: Just like the death
8 tax.

9 MR. NIEMANN: I would ask the committee
10 to please take it out.

11 MR. YELENOSKY: Well, if you don't
12 like -- I mean, I would like to leave
13 something in there. If you want to say, if
14 you don't want to use 10 days, if you want to
15 use something that indicates some kind of
16 proximity. However if you just take the 10
17 days out, it's completely unbounded.

18 CHAIRMAN BABCOCK: I suppose you can
19 always remove them at some point in time if
20 they have lied in a material way on the rental
21 application and you find out about it. If
22 this is just a matter of doing this on an
23 emergency type basis, reason for some period
24 of time whether it's 10 days or 14 if
25 something has happened which is indicative of

1 a dangerous situation that you want to move
2 quickly.

3 MS. EADS: I'm sorry. But if there is a
4 pedophile who moves nextdoor to my apartment
5 and that pedophile was convicted a year ago
6 and my landlord finds out about it, I want
7 that person removed from my vicinity of my
8 daughter as fast as possible. And this is not
9 a summary procedure. This is not evicting
10 them before they get their day in court. If
11 the information is wrong and if that person
12 wasn't convicted of this, then they can say it
13 to the judge. We're not evicting them and
14 then having a hearing. They're still in
15 possession. But leaving it to 10 days, I
16 mean.

17 And Robert, your issue about how much
18 time they get to have notice is fine and I
19 agree with you. I think it's too short right
20 now. That's a different issue. This is an
21 issue of whether or not you can take emergency
22 procedures, you can use emergency procedures
23 when you come to learn that someone is
24 arguably dangerous and not have some they have
25 to have that dangerous action 10 days before

1 you can do anything. That's very limiting to
2 a landlord and to the people who may be
3 affected by the landlord's action.

4 CHAIRMAN BABCOCK: Carl.

5 MR. HAMILTON: I have a question about a
6 couple of things. One is the word "serious,"
7 I'm not sure we need that. But does the
8 sentence mean to say that if someone has
9 engaged in the past, that they must now
10 constitute a threat, or is it that they
11 engaged in something in the past that
12 constituted a threat then, or is it both?

13 HONORABLE TOM LAWRENCE: I think the
14 intent was that it be a present threat.

15 MR. HAMILTON: So it has to constitute a
16 threat on the premises then?

17 MR. YELENOSKY: "Constitute a current or
18 continuing threat" maybe should modify
19 "threat," whatever you do with "days."

20 CHAIRMAN BABCOCK: Let's go back to
21 Linda's point for a second. Is it a breach of
22 the lease if the pedophile has accurately
23 disclosed that two or three years ago he was
24 convicted of pedophilia?

25 MS. SPECTOR: If he accurately disclosed

1 it?

2 CHAIRMAN BABCOCK: No.

3 MR. LAWRENCE: Larry, you're the expert.

4 MR. NIEMANN: No. If he says "Yes, I am
5 a convicted murderer, pedophile and rapist,"
6 and the landlord leases to him with that
7 knowledge, it's not a breach of the lease.

8 MR. YELENOSKY: And literally if this
9 were invalid, I guess you could come back
10 three years later and say criminal activity
11 which we now decide is a threat even though
12 nothing has happened in the last three years.

13 MR. NIEMANN: The landlord would have a
14 credibility problem --

15 MR. YELENOSKY: Right.

16 MR. NIEMANN: -- if he knowingly let's
17 somebody in and now says that the person is
18 despite my knowledge of being a threat.

19 CHAIRMAN BABCOCK: Well, I'm just trying
20 to get to the goal line. Maybe one could say
21 that if there has been criminal conduct within
22 a period of time or if there has been
23 misrepresentation about prior criminal
24 conduct; but having an open-ended situation
25 where, you know, if the guy was convicted of a

1 crime a couple years ago.

2 HONORABLE TOM LAWRENCE: That really
3 wasn't the intent of this rule.

4 CHAIRMAN BABCOCK: Right.

5 HONORABLE TOM LAWRENCE: The intent of
6 the rule is that it be some current condition
7 that's in existence that justifies getting him
8 out with a little bit of an expedited
9 proceeding. And I would not think. I mean,
10 we are not giving much of a remedy to the
11 landlords. We're just speeding the process
12 up. So I don't think we need to put too many
13 hoops for them to jump through; but we don't
14 want it to be abused, but I don't think we
15 want to make it too difficult for them to file
16 this if there really exists a problem.

17 MR. NIEMANN: I think if Judge Lawrence
18 doesn't think misrepresentation about past
19 sexual offenses or murder or whatever is a
20 continuing threat to my tenants, then I would
21 ask the committee to expand it to include
22 misrepresentations about criminal history in
23 the past. We view lying about criminal
24 history as a continuing threat. And if Bill
25 Edwards ever got ahold of one of my landlords

1 for failure to immediately take action to
2 evict them, he'd nail us to the cross.

3 CHAIRMAN BABCOCK: But he'd take no
4 pleasure in doing it.

5 (Laughter.)

6 MR. NIEMANN: Because he would argue very
7 eloquently that that pedophile is a continuing
8 threat to every child on the premises.

9 MR. FUCHS: Folks with criminal records
10 are in every apartment complex around.
11 Misrepresentation is something that occurs
12 regularly be is right or wrong in order to get
13 there. The conduct they ought to be -- this
14 process I really urge limit it to conduct that
15 is serious occurring on the premises and
16 affecting those tenants and let's not punish
17 him for something that supposedly I hope
18 they've already spent time in jail for.

19 MR. GILSTRAP: Chip.

20 CHAIRMAN BABCOCK: Yes.

21 MR. GILSTRAP: I would like to add to
22 that. I mean, there is for example I think
23 the statistics are that one out of every eight
24 persons in Wise County is on supervised
25 release. That was in the paper recently right

1 up here near Fort Worth.

2 CHAIRMAN BABCOCK: I've been to your
3 neighborhood.

4 (Laughter.)

5 MR. GILSTRAP: The point is we're trying
6 to strike a balance here. One the one hand we
7 want to give an expedited procedure in certain
8 cases. The problem is that that can be abused
9 in simple rent cases. I mean, if you just say
10 they can post a bond and get them out, that's
11 the problem. We have got to strike some kind
12 of balance. And where we strike it it has
13 just got to be a practical call. We made
14 this, I think we made it earlier is this was
15 where we were going to strike the balance.
16 Maybe we need to change it; but there's always
17 going to be examples on each side that you can
18 come up and say "Oh, the rule is going to be
19 abused." We have just got to have some
20 standard and get it and move on.

21 MR. HAMILTON: They don't just get them
22 out by posting a bond out. They have a
23 hearing.

24 MR. YELENOSKY: Trial.

25 PROFESSOR CARLSON: That's expedited.

1 MR. GILSTRAP: That's expedite.

2 MR. YELENOSKY: What about a serious
3 criminal activity that has come to the
4 attention of the plaintiff for 10 days, so if
5 you find out about a misrepresentation?

6 MR. EDWARDS: Well, the thing it seems to
7 me important about this entire process is the
8 part that says "constitutes a threat to the
9 health, safety or security." That's a present
10 threat, a present threat. It doesn't matter
11 when it was. You know, it doesn't matter
12 whether it was done yesterday if it's not a
13 present threat. It doesn't matter whether
14 it's a serious crime. Maybe just a minor
15 crime like throwing garbage or sewage out in
16 the street or something. It's not a serious
17 crime. It's a minor crime; but it's
18 nevertheless an immediate threat to the place
19 where it's being done. It seems to me I would
20 advocate taking out the word "serious" and
21 perhaps you put in there "constitutes an
22 immediate threat" and let it go at that.

23 MR. YELENOSKY: Or move "serious" in
24 front of "threat."

25 MR. EDWARD: "Serious," yes. I think

1 it's more the present serious threat than it
2 what the conduct was before. I mean you could
3 have the pedophile that we talked about that
4 gets released on parole from the penitentiary
5 after 15 years and moves into that apartment.
6 Now it's 15 years since he's done it; but he's
7 been locked up in jail for 15 years. I'd
8 consider that person an immediate threat.

9 MR. GILSTRAP: We've got a provisional
10 compromise substitution here; and that's
11 this: In line two delete "serious criminal"
12 and in lines two and three delete "within the
13 previous 10 days," and then in line three
14 before "threat constitutes" put in "present."
15 So it reads "If the plaintiff also alleges in
16 a sworn petition the defendant or defendant's
17 authorized occupants or guests had engaged in
18 activity that constitutes a present threat to
19 the health, safety or security of the
20 plaintiff" blah, blah, blah.

21 MR. NIEMANN: I'll go for that.

22 HONORABLE TOM LAWRENCE: I like that.

23 MR. HAMILTON: Yes. That sounds good.

24 MR. GILSTRAP: I move "present threat."

25 PROFESSOR DORSANEO: "Imminent" would be

1 slightly broader.

2 MR. EDWARDS: But nobody would know what
3 it means.

4 CHAIRMAN BABCOCK: Anything for more
5 business. The only lawyer who knows what it
6 means.

7 (Laughter.)

8 MR. NIEMANN: Wouldn't that leave us with
9 the ability to at least argue to the judge
10 that "Judge, this person lied about being a
11 pedophile six months ago, and we consider him
12 a present threat for having lied"?

13 MR. EDWARDS: Yes.

14 HONORABLE SANDY PRINDLE: I respectfully
15 submit that that would be a fact issue to be
16 tried and litigated.

17 MR. NIEMANN: Yes. But we could argue
18 it.

19 HONORABLE SANDY PRINDLE: Sure.

20 MR. NIEMANN: Okay. We could argue it.
21 I just want the ability to argue it and let
22 the judge decide.

23 CHAIRMAN BABCOCK: How does the left side
24 of the table feel?

25 MR. FUCHS: We can live with it though.

1 MR. EDWARDS: I don't know if Carl would
2 appreciate that remark.

3 (Laughter.)

4 MR. YELENOSKY: Yes. I mean we chatted
5 over here; and, yes, we can accept that. I
6 mean, we're not trying to protect somebody who
7 really is a threat. We're just trying to
8 protect the, --

9 MR. GILSTRAP: Someone who is not.

10 MR. YELENOSKY: -- yes, the landlord
11 acting in bad faith and make sure that the
12 language at least minimizes that.

13 CHAIRMAN BABCOCK: I hear a growing,
14 overwhelming consensus. So the sentence is
15 going to read "If the plaintiff alleges in the
16 sworn petition that the defendant or
17 defendant's authorized occupants or guests
18 have engaged in activity that constitute a
19 present threat to the health, safety or
20 security of plaintiff, plaintiff's agent or
21 other tenants, the plaintiff may file a
22 complaint seeking immediate possession." Is
23 that okay with everybody?

24 MS. CORTELL: Yes.

25 CHAIRMAN BABCOCK: Anybody opposed to

1 that? All right. This --

2 MR. EDWARDS: "Constitutes."

3 CHAIRMAN BABCOCK: Huh? "Constitutes"?

4 MR. EDWARDS: You've got an "or," so you
5 need an "s." "Constitutes," not
6 "constitute."

7 CHAIRMAN BABCOCK: Mine says
8 "constitutes."

9 MR. EDWARDS: I didn't hear you say it.

10 CHAIRMAN BABCOCK: Well, "constitutes."
11 Okay. So that --

12 MR. EDWARDS: The court reporter is
13 nodding her head. She didn't hear it either.

14 (Laughter.)

15 CHAIRMAN BABCOCK: So that sentence is
16 approved by acclamation. This is a good
17 stopping point unless everybody wants to
18 continue to slog through this rule.

19 HONORABLE TOM LAWRENCE: Well, let me
20 make one point. We have some people from out
21 of town. I don't know what their schedule is,
22 if it's going to allow them to come back
23 tomorrow. And some of the stuff that is on
24 that we still haven't done is discovery and
25 motion for new trial. That's really all that

1 is left. I mean, whatever the committee wants
2 to do; but I guess --

3 MR. YELENOSKY: We'd rather slog
4 through.

5 HONORABLE TOM LAWRENCE: -- I don't know
6 if these people can come back or not.

7 MR. DOGGETT: Have we voted on 740?

8 CHAIRMAN BABCOCK: No.

9 MR. DOGGETT: Just this issue?

10 HONORABLE TOM LAWRENCE: No. We voted
11 on --

12 MR. GILSTRAP: It's 5:00 o'clock. We're
13 trapped here anyway.

14 CHAIRMAN BABCOCK: I'm fine. I just want
15 to do whatever everybody wants to do.

16 MR. GILSTRAP: You live about three
17 blocks away.

18 MR. YELENOSKY: Well, I suggest we keep
19 going, and maybe we'll be able to get
20 through.

21 CHAIRMAN BABCOCK: That's fine with me.
22 Okay. What else about 740, version one?

23 HONORABLE TOM LAWRENCE: Okay. The last
24 sentence that is underlined on 740 is --

25 HONORABLE NATHAN L. HECHT: Justice Hecht

1 notes his dissent.

2 (Laughter.)

3 HONORABLE TOM LAWRENCE: Well, he does
4 have more votes. All right. It says "The
5 plaintiff may seek a judgment for possession,
6 costs, and attorney's fees; but no other
7 grounds of recovery listed in Rule 738 may be
8 joined with an action for immediate
9 possession." So we're saying it's going to be
10 limited just to possession, attorney's fees
11 and cost, no rent or late charges.

12 PROFESSOR CARLSON: That would have to be
13 a separate lawsuit.

14 HONORABLE TOM LAWRENCE: It would be a
15 separate lawsuit. Plaintiff can still sue,
16 but not in this action.

17 CHAIRMAN BABCOCK: Any discussion on
18 that? Does anybody have a problem with that?

19 MR. DOGGETT: I have one slight, very
20 insignificant think.

21 CHAIRMAN BABCOCK: Yes.

22 MR. DOGGETT: We used the word "emergency
23 possession." Are we sticking to "emergency
24 possession"? Is that right, or is it
25 "immediate possession"? To be honest I think

1 "immediate possession" implies the person is
2 going to get it right then and there; and of
3 course, that's not the case. I think
4 "emergency possession" is what this is all
5 about.

6 MR. YELENOSKY: So it's the title?

7 MR. DOGGETT: And so in other words, we
8 say those, we use those words; and I'd just
9 like to stick with one and so say so "with an
10 action for emergency possession" and since
11 that's the title of this. Just clerical; but
12 in case that's an issue I wanted to bring it
13 up. In other words, I would say where you say
14 the word "immediate" say "emergency" where it
15 says it in that sentence and it actually says
16 it in the prior sentence.

17 MR. YELENOSKY: And shouldn't the tile
18 also just be "Emergency Possession" then --

19 MR. DOGGETT: Right.

20 MR. YELENOSKY: -- and drop the rest of
21 that "Complainant May Have Immediate
22 Possession"?

23 MR. DOGGETT: Since that is the intent of
24 the body.

25 HONORABLE TOM LAWRENCE: Whatever.

1 Whatever you-all want to do is fine. So
2 you're proposing just to say "Emergency
3 Possession"?

4 MR. DOGGETT: Everywhere it says that.
5 That way it's the same.

6 MR. NIEMANN: Is it clear that the writ
7 can issue immediately after a default?

8 HONORABLE TOM LAWRENCE: Well, we haven't
9 gotten to that yet.

10 MR. DOGGETT: We haven't gotten there
11 yet.

12 MR. NIEMANN: Okay.

13 HONORABLE TOM LAWRENCE: So the title is
14 going to be "Emergency Possession" and we're
15 dropping the rest. And then everywhere it
16 says "immediate" --

17 CHAIRMAN BABCOCK: "Immediate possession"
18 it's going to say "emergency possession."

19 HONORABLE TOM LAWRENCE: Or how about and
20 where it just says "possession" it's going to
21 say "emergency possession" also?

22 MR. YELENOSKY: Well, except "The
23 plaintiff may seek a judgment for possession,"
24 I don't know that it's important to have it
25 there.

1 MR. GILSTRAP: What does "emergency
2 possession" mean if not immediate?

3 MR. DOGGETT: What is immediate? For
4 filing?

5 MR. GILSTRAP: It means right now.

6 MR. DOGGETT: Right now when you file you
7 get it?

8 CHAIRMAN BABCOCK: There is an emergency
9 situation that needs to be addressed
10 immediately. It doesn't matter what you call
11 it.

12 MR. GILSTRAP: Well, I understand that.
13 I guess the question let me --

14 PROFESSOR CARLSON: Instanter.

15 HONORABLE NATHAN L. HECHT: I was just
16 thinking that.

17 MR. GILSTRAP: But he just asked the
18 right question. When do they get possession?

19 PROFESSOR DORSANEO: Forthwith.

20 MR. YELENOSKY: Soon.

21 PROFESSOR CARLSON: Instanter.

22 MR. FUCHS: That's coming.

23 MR. DOGGETT: That's coming. Right.

24 MR. GILSTRAP: All right.

25 CHAIRMAN BABCOCK: With those changes any

1 problem with that? All right. Let's go to the
2 next sentence.

3 HONORABLE TOM LAWRENCE: "The trial held
4 under this rule will be the only trial held in
5 this cause." In other words, there is going
6 to be one eviction trial, not two on this
7 action.

8 CHAIRMAN BABCOCK: Any comments on that?

9 PROFESSOR DORSANEO: I don't like that
10 section.

11 CHAIRMAN BABCOCK: You don't like that
12 sentence?

13 PROFESSOR DORSANEO: I don't like it.

14 MR. YELENOSKY: It does make it sound
15 like --

16 PROFESSOR CARLSON: We don't really need
17 it.

18 MR. YELENOSKY: -- at least something
19 else we need to do if we can.

20 PROFESSOR CARLSON: I don't think we need
21 it. I think we can ax it.

22 HONORABLE TOM LAWRENCE: Okay.

23 PROFESSOR CARLSON: They'll be
24 surprised.

25 CHAIRMAN BABCOCK: Okay. What else?

1 HONORABLE TOM LAWRENCE: (b) (1) "The
2 answer date on the citation shall be the trial
3 date which must be set no less than four days
4 and no more than seven days from the date of
5 service, and such trial date shall be clearly
6 noted on the citation."

7 Now, you know, again four to seven is
8 arguable. We can change that. We certainly
9 don't want to go any longer; but we can go
10 three to six. It's just a question of docket
11 management by the JP courts.

12 CHAIRMAN BABCOCK: Carl.

13 MR. HAMILTON: I have two questions. One
14 is the (b) starts out "The justice court shall
15 notify the defendant of possession bond in the
16 same manner as service of citation." That
17 sort of implies that there isn't going to be a
18 citation; but yet elsewhere it talks about the
19 citation. I think that's a little confusing.
20 But then it says that the trial is going to be
21 four to seven days from the date of service.
22 Well, how do we know when the date of service
23 is?

24 HONORABLE TOM LAWRENCE: Well, just like
25 we know now. That's how we, that's what we

1 live with now. You estimate how long it's
2 going to take the constable to serve it and
3 you set your trial date somewhere within that
4 window. That's how we do forcibles now.

5 MR. HAMILTON: You just guess at the day?

6 HONORABLE TOM LAWRENCE: Well, yes.

7 MR. GILSTRAP: If they don't get served,
8 you pass.

9 HONORABLE TOM LAWRENCE: If they don't
10 get served; then you send it back and it's
11 redated.

12 MR. HAMILTON: But a citation is
13 required?

14 HONORABLE TOM LAWRENCE: Yes.

15 MR. HAMILTON: And then if you go over to
16 the comment, I don't know whether the comment
17 goes with the jury rule or not; but the
18 comment says the defendant must be served with
19 a possession bond and the rule says he shall
20 be notified that they filed a possession
21 bond.

22 CHAIRMAN BABCOCK: This comment --

23 MR. HAMILTON: Is that going to go with
24 this rule or not?

25 CHAIRMAN BABCOCK: I don't think so.

1 It's the version two.

2 MR. HAMILTON: The rules are supposed to
3 be the same except for the jury.

4 MR. HAMILTON: Yes. But this is talking
5 about how the trial has to be before the
6 judge.

7 HONORABLE TOM LAWRENCE: All right.
8 You're right. Okay. We can fix that. I
9 think part of this is that we some of this
10 language is original language with the
11 existing possession bond rule; and at one time
12 we were going to in the previous version this
13 made a little bit more sense; but changing it
14 this way the language is a little awkward.
15 You're right. It needs to be changed. It
16 really should be "such citation must be
17 served" I think would be more accurate.

18 MR. HATCHELL: Instead of "noticed"?

19 HONORABLE TOM LAWRENCE: Yes.

20 MR. HAMILTON: But there still has to be
21 a notice about the bond. Or do they get
22 served with the bond?

23 PROFESSOR CARLSON: It should be "a
24 defendant must be served with notice of the
25 filing" --

1 MR. HAMILTON: "Notice of the filing"?

2 PROFESSOR CARLSON: -- "of the possession
3 bond."

4 MR. HAMILTON: That would be together
5 with the citation, wouldn't it? Notice would
6 go with the citation?

7 HONORABLE TOM LAWRENCE: Yes.

8 MR. HAMILTON: Maybe you could just say
9 that, notice of the citation together with the
10 notice of the filing of the possession bond
11 together with the citation.

12 HONORABLE SANDY PRINDLE: You could say
13 "attached to the citation."

14 HONORABLE TOM LAWRENCE: Well, I guess
15 what I'd like to do is rather than try to fix
16 this right here is give me a little time to
17 fix that. I don't think that will be a big
18 deal. We can change that.

19 MR. GILSTRAP: We could probably do that
20 tomorrow.

21 HONORABLE TOM LAWRENCE: Yes.

22 MR. GILSTRAP: It's not going to require
23 a vote I don't think to fix it or certainly
24 contested.

25 MR. YELENOSKY: What do we need votes

1 on?

2 HONORABLE TOM LAWRENCE: Well, everything
3 that is underlined certainly.

4 CHAIRMAN BABCOCK: What do people think
5 about the four to seven? Is that the right
6 window?

7 MR. GILSTRAP: Is that the current
8 window?

9 HONORABLE TOM LAWRENCE: No. There is no
10 current window.

11 MR. DOGGETT: Six is the current.

12 MS. EADS: Four sounds short to me. What
13 do you-all think?

14 MR. FUCHS: I think it's short.

15 MR. YELENOSKY: You could have
16 alternative service. Right?

17 HONORABLE TOM LAWRENCE: If it's
18 alternative service, it's going to be a little
19 longer.

20 MR. HAMILTON: What do you do if you put
21 the trial date in there, say, six days and
22 then the defendant doesn't get served until
23 the sixth day or something?

24 HONORABLE TOM LAWRENCE: Well, if the
25 constables can serve it within that window,

1 then they bring it back and it's redated and
2 then you go again.

3 CHAIRMAN BABCOCK: If four sounds short,
4 you could say "unless it's a pedophile."

5 MS. EADS: This hobgoblin rule of mine is
6 consistency, and I have never been
7 consistency.

8 (Laughter.)

9 CHAIRMAN BABCOCK: Well, my point is
10 that, I mean, this rule is directed at
11 emergency situations and normally four in a
12 vacuum is too short; but I mean, if you've got
13 a guy that's wielding knives.

14 MS. EADS: Guns and knives. Well, I
15 don't know. I mean, four days sounds a short
16 time having to accomplish everything that
17 needs to be accomplished; but I'm not against
18 it. I'm just saying --

19 CHAIRMAN BABCOCK: I think what is going
20 to happen, and I've got no experience in this
21 area, so you guys; but I think that the degree
22 of threat is going to measure how quickly
23 people move on this thing. And if there is a
24 big, huge threat, then the judge and the
25 constable and everybody are going to be moving

1 quicker and the landlord is going to be moving
2 quicker.

3 MR. ORSINGER: If it's really huge, they
4 might be able to get him arrested in less than
5 four days.

6 MR. YELENOSKY: That's what I'm saying.

7 MR. PRINDLE: Yes, sir. But they're out
8 on bond. That creates the problem.

9 CHAIRMAN BABCOCK: So there, Richard.

10 MR. ORSINGER: The problem here is the
11 criminal justice system.

12 HONORABLE TOM LAWRENCE: Judge Prindle
13 says he thinks the JPs can live with three to
14 six, which if the committee wants to do that,
15 we're not going to get a lot of these.
16 There's not going to be a huge number of these
17 filed.

18 HONORABLE SANDY PRINDLE: I'd like three
19 to seven. May I speak just for --

20 CHAIRMAN BABCOCK: Yes. Sure.

21 HONORABLE SANDY PRINDLE: A lot of the
22 JPs in smaller counties only have evictions
23 one day a week and it's on a certain day. And
24 if we make it seven days instead of six, they
25 could lower the four to three and still have

1 maximum flexibility.

2 MR. FUCHS: But if you do the three to
3 six, Mr. Chairman, somebody they serve
4 alternate service say on a Friday, they've
5 gone out of town for the weekend, don't get
6 back until Sunday night.

7 CHAIRMAN BABCOCK: That was the reason
8 for four.

9 MR. FUCHS: That was the reason.

10 CHAIRMAN BABCOCK: If it was in a
11 weekend, wasn't it?

12 HONORABLE TOM LAWRENCE: It would have
13 been had I thought of that, certainly.

14 (Laughter.)

15 MR. FUCHS: That's right.

16 CHAIRMAN BABCOCK: Let's go with four to
17 seven.

18 HONORABLE TOM LAWRENCE: All right.

19 (b) (2) "In order to obtain a jury trial the
20 defendant must demand the same on or before
21 two days from the date the defendant is served
22 with citation and pay the jury fee. The
23 justice must hold the jury trial as soon as
24 practicable." It's just going to take a while
25 sometimes in an urban county and maybe even

1 some of the rural counties to get a jury in
2 right away. So putting a specific time limit
3 on when you have the jury in is just not going
4 to be practical, I don't think.

5 So what we're saying is that we want to
6 speed it up. They've got to make the request
7 two days from the date they're served which is
8 not, I mean, not unreasonable. They've got
9 two days to come in; and then you try to get
10 the panel and get them in as quick as possible
11 and get them served. So again it's faster
12 than it is now; but this is an emergency.

13 CHAIRMAN BABCOCK: Any comment? Okay.
14 What is next?

15 HONORABLE TOM LAWRENCE: (3), "The
16 officer or other authorized person serving the
17 notice complaint for immediate possession
18 shall return such notice to the justice who
19 issued same within one day after service." It
20 puts a little burden on the constable. The
21 problem is if you've got this hearing, this
22 trial that's expedited, you need to be able to
23 notice everybody; and you've got the
24 plaintiff, the landlord may have to get police
25 officers in. I mean, typically if I get one

1 of these, there is a police officer or two
2 that's going to testify because they came out
3 and made a scene or there's some other
4 witnesses, so you need to give as much time as
5 possible to get the parties in to know when
6 the date when it's going to be held, when the
7 trial is going to be held. So that's the
8 purpose of that. It's quicker notice for the
9 Court.

10 CHAIRMAN BABCOCK: Any comments about
11 that? You're on a roll, Tom. Keep going.

12 HONORABLE TOM LAWRENCE: All right. (c),
13 now (c), "If the defendant fails to appear for
14 trial, or if the verdict or judgment after
15 trial is for the plaintiff for possession,
16 costs and attorney's fees, then the plaintiff
17 may request a writ of possession from the
18 justice court after the expiration of three
19 days from the date the judgment is signed by
20 the justice."

21 So you have three days to appeal; and on
22 the fourth day you can issue a writ of
23 possession. And whenever a justice court
24 judgment under this rule, whenever a justice
25 court signs a judgment under this rule either

1 party may appeal in the same manner provided
2 for a nonemergency eviction trial. So the
3 mechanism of the appeal is the same. It would
4 be intended that the supersedeas and payment
5 of rent to -- well, not payment of rent; but
6 the supersedeas would apply in this,
7 supersedeas provisions and the appeal and 749,
8 the appeal bond provisions. So there wouldn't
9 be a requirement to pay rent to the registry
10 of the court, I guess. Well, I guess there
11 would be because we're saying you don't sue
12 for current rent; but unless we exempt it
13 there would be a requirement that they post a
14 supersedeas or a requirement that they pay
15 rent into the registry of the court when it
16 becomes due.

17 MR. GILSTRAP: Tom, what do costs and
18 attorney's fees have -- I think we talked
19 about that. But what do they have to do with
20 this? I mean, why should they have to prevail
21 for possession costs and attorney's fees?

22 HONORABLE TOM LAWRENCE: Well, because
23 the plaintiff may have to hire an attorney;
24 and I think they're entitled to get their
25 attorney's fees. They may in some cases be

1 required to have an attorney. I think they
2 need to get their attorney's fees. Also if
3 the tenant prevails and they hire an attorney,
4 they may be able to get attorney's fees.

5 MR. GILSTRAP: What I'm saying is suppose
6 they get possession, but they don't get their
7 attorney's fees. Then can a plaintiff request
8 a writ of possession?

9 MR. DOGGETT: You bet.

10 MS. CORTELL: You just don't want an
11 "and" in there.

12 MR. GILSTRAP: I think maybe it's "or."

13 MR. DOGGETT: You don't want an "or"
14 because if they get attorney's fees.

15 (Committee members speaking to each other
16 at the same time.)

17 MR. DOGGETT: Strike costs and attorney's
18 fees.

19 MR. GILSTRAP: I think you just want
20 possession.

21 MS. CORTELL: Why don't you just say
22 "possession."

23 MR. GILSTRAP: In other words, to get
24 possession they have to get an order for
25 possession; and whether they get an order for

1 costs or attorney's fees shouldn't have
2 anything to do with whether or not they get
3 immediate possession.

4 CHAIRMAN BABCOCK: So are you going to
5 strike costs and attorney's fees?

6 MR. GILSTRAP: What's that?

7 CHAIRMAN BABCOCK: Are you going to
8 strike costs and attorney's fees?

9 MS. CORTELL: That's the suggestion.

10 MR. YELENOSKY: And I think Judge
11 Lawrence was saying you would get those as a
12 matter of course if you got possession; but
13 you don't want to make getting the possession
14 bond contingent on getting costs.

15 MR. GILSTRAP: Contingent on whether they
16 get costs or attorney's fees. Do you see what
17 I'm saying?

18 MS. CORTELL: Yes. Right.

19 CHAIRMAN BABCOCK: So do you want to
20 strike those words out of this here?

21 MR. GILSTRAP: I think so, yes.

22 MR. DOGGETT: Along the same lines, the
23 word "verdict" I don't think you need there.
24 I think just "judgment," because that could
25 on an off chance a verdict is different than

1 the judgment if you just won a judgment. On
2 the off chance if the tenant were to win the
3 jury trial and JP JNOVs.

4 MR. GILSTRAP: "Verdict or."

5 MR. YELENOSKY: Yes. "Verdict or."

6 HONORABLE TOM LAWRENCE: No. "If the
7 defendant fails to appear for trial or if a
8 verdict or judgment."

9 MR. DOGGETT: But you have to have a
10 judgment. You can't issue anything unless you
11 have a judgment.

12 MR. YELENOSKY: You can have a judgment
13 based on a verdict in a bench trial; but
14 you've still got to have a judgment.

15 MR. NIEMANN: Judge Lawrence mentioned
16 that the shortening of the appeal date to
17 three days. Where is that, Judge Lawrence?

18 HONORABLE TOM LAWRENCE: That is in (c),
19 the first sentence.

20 MR. NIEMANN: It says if they request a
21 writ of possession. Where does it say the
22 appeal deadline is three days? Does it say
23 the appeal deadline?

24 MR. YELENOSKY: It doesn't say it
25 implicitly anywhere.

1 HONORABLE TOM LAWRENCE: Well, I guess
2 it's sort of inferred though. I guess we
3 could put it in.

4 MR. NIEMANN: On a nonemergency eviction
5 file it's five days.

6 PROFESSOR CARLSON: That's right.

7 MR. NIEMANN: It needs to say three
8 days. You're going to have the writ issued on
9 the third day, for example. But he can still
10 appeal it on the fifth day?

11 HONORABLE TOM LAWRENCE: No.

12 MR. NIEMANN: What is there going to be
13 appealed?

14 MR. YELENOSKY: He's just saying he's
15 going to add the language in to make it
16 clear.

17 MR. NIEMANN: I think it needs to be
18 clear that the appeal date is three days if
19 you're going to allow appeal.

20 HONORABLE TOM LAWRENCE: So are we saying
21 that we don't want the landlord to be able to
22 get costs and attorney's fees, or are you just
23 saying we need to put in another sentence?

24 PROFESSOR CARLSON: You don't need to put
25 that in there.

1 MR. GILSTRAP: The writ of possession
2 doesn't need to be conditioned.

3 HONORABLE TOM LAWRENCE: I know. But are
4 you saying do we want to put that in another
5 sentence somewhere else?

6 MR. HAMILTON: It's already in the
7 sentence over on the next page.

8 CHAIRMAN BABCOCK: Carl.

9 MR. HAMILTON: Sue for those. It says
10 you can sue for those.

11 HONORABLE TOM LAWRENCE: It says it on
12 the next page.

13 MR. HAMILTON: Well, the first sentence,
14 the first phrase of (c) I think needs to be
15 changed to say "in the event of a default
16 judgment," because if the tenant fails to
17 appear, you still have to have a judgment I
18 would think before you can get the writ of
19 possession.

20 MR. YELENOSKY: Why don't we just have
21 then why didn't it just say "if the judgment
22 is for the plaintiff for possession, then
23 after the expiration of three days the
24 plaintiff may request the writ"? However you
25 get it you have got to have a judgment like

1 you're saying.

2 HONORABLE TOM LAWRENCE: All right. Say
3 that again.

4 MR. YELENOSKY: "If the judgment," so you
5 strike "defendant fails to appear for trial or
6 if the verdict." So we've got "If the
7 judgment" and you don't need "after trial,"
8 because you've got a judgment or you don't.
9 "If the judgment is for that plaintiff for
10 possession," strike costs and attorney's fees,
11 "then," and then here you just insert the
12 "after the expiration of three days from the
13 judgment from the date of the judgment the
14 plaintiff may request a writ of possession."
15 I don't know that you need "from the justice
16 court" either. Do you want me to read it
17 again?

18 HONORABLE TOM LAWRENCE: Yes, read it
19 again.

20 MR. YELENOSKY: "If the judgment is for
21 the plaintiff for possession, then after the
22 expiration of three days from the date of the
23 judgment the plaintiff may request a writ of
24 possession" period.

25 MR. NIEMANN: Could you also clarify?

1 PROFESSOR DORSANEO: Eliminate "then."

2 Yes, you don't need "then."

3 MR. NIEMANN: Could you also clarify that
4 is a revised appeal deadline? Because the
5 last sentence implies that the appeal will be
6 as in other cases, other cases.

7 MR. YELENOSKY: Yes. That was just
8 taking care of that sentence. Your suggestion
9 was to clarify; and Judge Lawrence, I think
10 you were saying that you would at least agree
11 to a clarification.

12 HONORABLE TOM LAWRENCE: Oh, yes. Yes.

13 MR. YELENOSKY: So then you would have a
14 sentence saying either there or somewhere else
15 that the defendant has whatever it is, three
16 days to appeal.

17 HONORABLE TOM LAWRENCE: How about "may
18 appeal within three days"?

19 MR. NIEMANN: "No later than three
20 days." "May appeal no later than three days"
21 would be good.

22 MR. HAMILTON: You could say that the
23 appeal is the same as in other cases except
24 that the time is three days.

25 MR. NIEMANN: That would work too.

1 MR. YELENOSKY: Actually to make this
2 parallel to that other one we were working on
3 where we put "after the expiration of 10 days
4 if there is no supersedeas," don't we have to
5 say something "if there is no" -- well, I
6 guess is there a supersedeas in this
7 situation?

8 HONORABLE TOM LAWRENCE: Well, there
9 would be.

10 MR. DOGGETT: Yes. It's the same thing.

11 MR. YELENOSKY: It's the same thing.

12 MS. CORTELL: If there were attorney's
13 fees.

14 HONORABLE TOM LAWRENCE: If there are
15 attorney's fees, it could be.

16 MR. YELENOSKY: So we have to be
17 parallel.

18 HONORABLE TOM LAWRENCE: All right. Are
19 you thinking that we're striking out "costs
20 and attorney's fees"? Are you thinking that
21 that's going to be automatic somehow without
22 us saying it?

23 PROFESSOR CARLSON: It doesn't go there.

24 MR. YELENOSKY: Well, this paragraph is
25 not talking about what you get. It's talking

1 about one of the things you get which is
2 possession; and that was my understanding.
3 And the very first 740(a) says you can get
4 costs and attorney's fees.

5 PROFESSOR DORSANEO: Why does the appeal
6 have to be fast?

7 HONORABLE SANDY PRINDLE: It's an
8 emergency.

9 PROFESSOR DORSANEO: No. Not now.

10 HONORABLE SANDY PRINDLE: Why not now?

11 PROFESSOR DORSANEO: He can appeal. He
12 can appeal, you know, the first amended
13 anyway.

14 HONORABLE SANDY PRINDLE: We're fixing to
15 discuss that.

16 PROFESSOR DORSANEO: If the person is
17 out, it's not an emergency anymore.

18 MR. NIEMANN: Well, if he's not getting
19 him out sooner than three days as I think was
20 contemplated by Judge Lawrence and the
21 subcommittee, then if there is an appeal by
22 supersedeas bond or affidavit, you can't get
23 him out. And that is another issue that needs
24 to be addressed. Let the pedophile stay there
25 by appealing it as a pauper.

1 HONORABLE SANDY PRINDLE: Or appealing it
2 in any way.

3 MR. YELENOSKY: Well, or a rich pedophile
4 who pays the supersedeas, I mean, either way.

5 MR. NIEMANN: Either way. In the
6 meantime Bill Edwards is just salivating to
7 sue us.

8 CHAIRMAN BABCOCK: Have you got this
9 language down in this paragraph?

10 HONORABLE TOM LAWRENCE: I think so.

11 CHAIRMAN BABCOCK: Do you want to read
12 it?

13 HONORABLE TOM LAWRENCE: No.

14 CHAIRMAN BABCOCK: He's getting a little
15 feisty here late in the afternoon. He wanted
16 to stay, and now he won't perform. Like a
17 show dog.

18 HONORABLE TOM LAWRENCE: All right.
19 "If the judgment is for the plaintiff for
20 possession, then" --

21 MR. EDWARDS: Strike "then."

22 HONORABLE TOM LAWRENCE: All right.
23 -- "the plaintiff may request a writ of
24 possession after the expiration of three days
25 from the date of the judgment." Is that

1 correct?

2 MR. YELENOSKY: I'd just put that clause
3 before. I'd put "the expiration of three
4 days" prior to "the plaintiff."

5 HONORABLE TOM LAWRENCE: Then "Whenever a
6 justice court signs a judgment under this rule
7 either party may appeal within or no later
8 than three days in the same manner as provided
9 for a nonemergency eviction trial." Is that
10 correct?

11 MR. HAMILTON: What was the answer to
12 Bill's question which provided an appeal time
13 that's different?

14 HONORABLE TOM LAWRENCE: Well, just to
15 speed things up is the only answer I have.

16 COURT REPORTER: I couldn't hear you,
17 Carl. State your question again, please.

18 MR. HAMILTON: What was the answer to
19 Bill's question as to why the appeal time has
20 to be any different?

21 PROFESSOR DORSANEO: I think they said
22 the guy might still be in there one way or
23 another, whatever might still be in there one
24 way or the other.

25 MR. GILSTRAP: He could supersede.

1 PROFESSOR DORSANEO: And that we have to
2 hurry.

3 HONORABLE TOM LAWRENCE: It's just to
4 generally speed the process up wherever we can
5 speed the process up. I guess that's the only
6 answer I have.

7 CHAIRMAN BABCOCK: Got you. Okay.
8 Anything else?

9 HONORABLE TOM LAWRENCE: That's it.

10 CHAIRMAN BABCOCK: We've gone --

11 HONORABLE SANDY PRINDLE: Mr. Chairman, --

12 CHAIRMAN BABCOCK: Yes.

13 HONORABLE SANDY PRINDLE: -- there is one
14 other issue that I addressed in my letter to
15 the group --

16 CHAIRMAN BABCOCK: Okay.

17 HONORABLE SANDY PRINDLE: -- about
18 automatically negating a writ out of a justice
19 court. We have two additional options in
20 addition to the language proposed, and these
21 are emergency situations. One, and the
22 current rule right now is if you have a
23 default case and a defendant does not appear
24 after they've been notified of the immediate
25 possession bond and all that, a writ can be

1 issued immediately upon a default whether they
2 appeal or not. And you know, we have
3 potential explosive situations here, and maybe
4 perhaps we ought to discuss whether or not the
5 justice can issue a writ for emergency
6 possession after the matter is litigated.

7 PROFESSOR CARLSON: After a default.

8 HONORABLE SANDY PRINDLE: After a
9 default. That's current rules as we have
10 right now. And under the proposal they simply
11 can be -- the defendant can not come to trial,
12 can simply come in and file an appeal within
13 three days, and the whole emergency process is
14 rendered moot.

15 CHAIRMAN BABCOCK: So what you're saying
16 is the defendant doesn't show up, and three
17 days later or within three days following he
18 appeals and supersedes it, and that you can't
19 get him out?

20 HONORABLE SANDY PRINDLE: Yes.

21 MR. NIEMANN: We would hope that you
22 would if it's a default judgment situation,
23 then an immediate writ can be issued and he
24 can appeal within three days to get it off his
25 record only.

1 MR. DOGGETT: And the problem is we've
2 reduced it down from six days down to four
3 days; and alternative service we are now
4 absolutely increasing the number of default
5 judgments absolutely when you're now reducing
6 the time. So now we're shortening it from six
7 to four and still allowing for alternative
8 service and two days now to request a jury
9 trial. And so the result is they can issue
10 now the writ immediately.

11 CHAIRMAN BABCOCK: And as we said before,
12 once they're out they're out.

13 MR. DOGGETT: Exactly. And so I think
14 that's unreasonable. It's three days they
15 have if they no-show or not. And you know, as
16 everybody knows on these immediate
17 possessions, if they truly are the rapists and
18 murderers, they don't show. So
19 consequently --

20 CHAIRMAN BABCOCK: They usually don't
21 appeal.

22 MR. DOGGETT: Exactly. They don't
23 appeal, the ones that are truly the rapists or
24 murderers. And by the way, right now the
25 current system is they can appeal and whatnot;

1 and I haven't heard that as the big clamoring
2 that we haven't been able to get out the
3 rapists and murderers. That has not been the
4 biggest.

5 MR. NIEMANN: I assure you the people who
6 lie on their applications when they have a
7 judgment against them will utilize the appeal
8 process to stay there while they're
9 relocating. And that's not the answer to the
10 pedophile problem.

11 MR. DOGGETT: Or the bad check case or
12 the --

13 CHAIRMAN BABCOCK: I mean, I think --
14 yes. I'm sorry. Go ahead

15 HONORABLE SANDY PRINDLE: We really never
16 talked about pedophiles previously. We have
17 talked about threatening situations with
18 firearms, serious confrontations, threats to
19 kill, these type of scenarios, and we have
20 proceeded under this premise. And if someone
21 does come in and asks for a jury trial,
22 Mr. Doggett, there is not a default. And you
23 know, I don't think that that can be coupled
24 under the time frames that you're performing,
25 because if they come in and ask for a jury

1 trial, there is no default.

2 MR. DOGGETT: I understand.

3 CHAIRMAN BABCOCK: Yes. But the point is
4 with it being so short like being four days
5 there is it seems to me a great deal of
6 possibility that somebody is going to default,
7 but not in an intentional way, not in a way
8 that they're ignoring the proceeding. And now
9 if you immediately dispossess them the day
10 they default, that there may be a large group
11 of people who have some defense, maybe not
12 meritorious, but have some defense that you
13 have just dispossessed them and they have no
14 way to cure that when they didn't get notice.
15 And it just seems so draconian to add that
16 wrinkle to it, I would think.

17 HONORABLE SANDY PRINDLE: May I address
18 that, Mr. Chairman?

19 CHAIRMAN BABCOCK: Oh, yes. Sure. You
20 guys are in the trenches. I'm not.

21 HONORABLE SANDY PRINDLE: Okay. But we
22 see this and we deal with this and we're very
23 concerned about the explosive situations. We
24 submit respectfully to this committee that
25 those tenants know what is coming because of

1 the notice to vacate. They are required to BE
2 given a reason under Chapter 24 of the
3 Property Code on the reason and they know this
4 is coming. I can think of no case in 20 years
5 in my court to where we have had a Code of
6 Conduct eviction and the tenant left town and
7 had no inkling that this was coming.

8 I'm more concerned about the vast
9 majority of the cases with explosive
10 situations and our ability to deal with them
11 because lives can be at stake here, not only
12 to the landlord and his agents, but to the
13 surrounding tenants as well who may very well
14 come to testify against this alleged miscreant
15 if they can be given some semblance of
16 protection of immediate removal of this person
17 from their midst.

18 And, you know, and I agree with everyone
19 else. This needs to be litigated. Once it's
20 litigated I still think that we ought to
21 consider an emergency approach from the
22 justice court level in a default.

23 CHAIRMAN BABCOCK: Okay. Any other
24 comments? Carl, on the left.

25 MR. HAMILTON: Well, it's really kind of

1 no different from a peace bond. You can order
2 somebody to put up a peace pond; and if they
3 don't, you put them in jail. Right?

4 HONORABLE SANDY PRINDLE: Yes, sir. That
5 is a remedy.

6 MR. HAMILTON: It's kind of like that.
7 Maybe you ought to have the power to keep them
8 out of this property like you're suggesting.

9 HONORABLE SANDY PRINDLE: All right.
10 Well, peace bonds of course are not an
11 injunction. It requires a respondent to put
12 up a certain amount of money with the registry
13 of the court in order to perform with the
14 bond. If they don't, then they can go to jail
15 for up to one year; but a peace bond and
16 removing a person from a property to where
17 they are creating a danger to others in the
18 rental community probably is two different
19 things.

20 MR. HAMILTON: I'm saying you can
21 piggyback one on the other.

22 HONORABLE SANDY PRINDLE: Yes, sir. And
23 I'm not saying that we can't. But, you know,
24 when we're dealing with these emergency
25 situations we're not only dealing with the

1 tenants here. We're dealing with their
2 guests. That's also things that come up. And
3 I deal with these a lot.

4 CHAIRMAN BABCOCK: Nina.

5 MR. CORTELL: The trouble I'm having is
6 distinguishing between those situations where
7 you have a true emergency and true potential
8 of immediate physical harm, and that's one
9 situation. And contrast that with what
10 Mr. Niemann has been saying which is that
11 someone six months ago lied on an application
12 and, you know, they violated some law, and now
13 he's going to go in and argue they're an
14 immediate threat, and some judge may agree
15 with that. Okay. Let's just assume that.

16 That's just a very different scenario
17 where I mean are all of us willing to abrogate
18 rights and risk improper defaults and so
19 forth? And so that's the trouble I'm having.
20 So if I hear "Yes, someone has got a gun,"
21 it's easy to say immediate writ, send them
22 out. But if we're also going to, if this net
23 is also going to encompass someone who fibbed
24 on an application and now we're going to argue
25 they're an immediate threat, then I can't go

1 with abrogation. And I don't know the answer
2 to that; but that's the problem I've having
3 with the debate.

4 MR. GILSTRAP: Yes. That's it, you
5 know.

6 CHAIRMAN BABCOCK: She's so eloquent.

7 MR. GILSTRAP: I've been having problems
8 too. I just couldn't say it.

9 CHAIRMAN BABCOCK: Okay. Anybody else?

10 HONORABLE SANDY PRINDLE: Mr. Chairman, I
11 think this is an excellent point she brought
12 up. This is something that we discussed, the
13 three of us, Fred and Larry and I when we had
14 our meeting. And we intended for this to be
15 an immediate threat, not something that was in
16 the future. If anyone needs further
17 clarification in this rule to tie down the
18 true emergency to where it is exigent and it's
19 immediate, we have no problem with that; but
20 we want the tools to save lives out there if
21 it comes to that.

22 MR. DOGGETT: And everybody agreed to
23 take the 10 days out. I mean, something
24 really happened 10 days ago where someone
25 really was harmed, not someone fibbed three

1 years ago and now we think he might do
2 something again.

3 HONORABLE SANDY PRINDLE: Well, that's
4 again --

5 MR. DOGGETT: So we tried to strengthen
6 the rule and now we're sort of piecemealing
7 it, taking it apart.

8 CHAIRMAN BABCOCK: But wait a minute.
9 We're starting to replot old ground. What
10 we're talking about now is whether or not we
11 are going to add a weapon in the arsenal of
12 the judge which is that on the day of default
13 no waiting around for appeals. We're just
14 going to dispossess him. That's what we're
15 talking about.

16 HONORABLE SANDY PRINDLE: Or one day
17 after.

18 CHAIRMAN BABCOCK: Or one day or whatever;
19 but not three days. And so the way we have
20 done this, the way we have done the "that
21 constitutes a present threat to the health,
22 safety or security of the plaintiff,
23 plaintiff's agents," et cetera, that is
24 leaving the argument open for the landlord,
25 for the plaintiff to say, you know, "He was

1 convicted of. You know, this is Charles
2 Manson, Judge, and he didn't tell us about it.
3 And the multiple murders may have been only,
4 you know, two years ago; but he didn't tell us
5 about it. And so now we need to get him out
6 of there." That argument is preserved under
7 the rule as we've talked about it. It may not
8 win ever; but it's still preserved. So now
9 what we're talking about is giving another
10 weapon to the judge which is basically taking
11 away their appeal.

12 MR. GILSTRAP: So we have to have a
13 higher standard to do that.

14 CHAIRMAN BABCOCK: You're effectively
15 taking away their appeal it seems to me.

16 MR. GILSTRAP: A higher standard to do
17 that.

18 MS. SPECTOR: I'd like to raise the
19 possibility that the person who is the tenant
20 who may be evicted because of the immediate
21 threat may actually be the victim of some
22 violence. And in a domestic violence
23 situation it's often the case where the
24 ex husband or the boyfriend comes onto the
25 property, shoots the gun, threatens the

1 neighbors, and the landlord is trying to evict
2 the mother and the children. In that case
3 where the tenant defaults, she couldn't get to
4 the court on time, she arrived a few minutes
5 late, the threat of the immediate
6 dispossession with no opportunity for appeal
7 is especially egregious. So I would urge the
8 committee to retain the appeal process in this
9 provision.

10 MS. EADS: I think that's a really good
11 example. I know a number of women who face
12 that, and maybe not eviction, but have faced
13 where they're threat to their neighbors is not
14 their fault; and they need to have an appeals
15 process for the situation.

16 MR. FUCHS: I just had a case with an
17 ex boyfriend who fired into the front door of
18 the woman living at the apartment complex, and
19 she was served with a notice to vacate. She
20 got a protective order against the guy, gave
21 it to the landlord, and he insisted he was
22 going to still proceed with the eviction. He
23 didn't care. And we ended up filing a Fair
24 Housing complaint and it went away; but he was
25 going to file an eviction against her. He

1 didn't care that she had gotten a protective
2 order.

3 CHAIRMAN BABCOCK: It was fair to him
4 that he had a tenant that had people
5 shooting.

6 MS. SPECTOR: Those aren't isolated.
7 They happen all over.

8 MR. FUCHS: It was the ex boyfriend not
9 living on the premises.

10 CHAIRMAN BABCOCK: Okay. I think, and
11 this is interesting debate here. Every side
12 has got good points. So the vote we'll take
13 is Rule 740 with the various amendments that
14 we have made to the language, but otherwise as
15 is. And so everybody in favor of that raise
16 your hand.

17 MR. YELENOSKY: So that keeps the three
18 days for appeal?

19 CHAIRMAN BABCOCK: Right.

20 MR. GILSTRAP: As is with the changes we
21 voted on.

22 CHAIRMAN BABCOCK: All those opposed? By
23 a vote of 11 to nothing the rule as modified
24 by the language we've discussed on the record
25 is passed.

1 MR. NIEMANN: Mr. Chairman, may I ask a
2 clarification?

3 CHAIRMAN BABCOCK: Yes.

4 MR. NIEMANN: Can the appeal be on a
5 pauper's affidavit, and does the pauper have
6 to put up a supersedeas bond in these
7 dangerous conduct cases?

8 MR. YELENOSKY: Well, what we just voted
9 on is no. The appeal can be, yes. And it's
10 true they don't put up a supersedeas, no,
11 because we said "in the same manner" except
12 for shortening the time frame.

13 MR. NIEMANN: I was just calling it to
14 your attention and actually wondering whether
15 that is wise for somebody to stay in what the
16 judge has considered a dangerous situation,
17 danger to other people simply by saying "I'm
18 broke." Are we protecting? Is it more
19 important to protect him or the other people
20 he may be a danger to? Would you consider
21 blowing off the affidavit when he constitutes
22 a threat to neighbors, other tenants and
23 management?

24 MR. YELENOSKY: You're saying that they
25 shouldn't -- I mean, do you feel any more

1 comfortable if they get to stay because they
2 can afford the supersedeas? I mean, all you
3 end up doing then is assuring that the truly
4 indigent threat is out. You don't get the
5 person out. Unless you're going to eliminate
6 the right of appeal you're not getting out the
7 person who has the means to pay the
8 supersedeas. Right?

9 CHAIRMAN BABCOCK: I see the point that
10 is being made; but it seems to me it's the
11 same point in a slightly different variation
12 as what we have just discussed, whether or not
13 immediately upon default immediately to kick
14 somebody out.

15 MR. YELENOSKY: Right. I mean, I think
16 there is a fair question, a policy question
17 for society about how quickly and who and what
18 and the rights; but the line you're cutting is
19 not -- is one that's based on ability to pay
20 or at least alleged ability to pay.

21 MR. NIEMANN: I asked the question; and
22 that's all I wanted to know.

23 MR. YELENOSKY: Yes.

24 CHAIRMAN BABCOCK: That's good. We're
25 good at answering questions.

1 MR. NIEMANN: So that there is a record
2 of how everybody feels.

3 CHAIRMAN BABCOCK: Yes.

4 MS. EADS: Well, you're saying that for
5 the record. If you have a situation like
6 that, you've got other things. First of all,
7 the landlord has taken reasonable steps. The
8 landlord's liability is somewhat protected by
9 this. Secondly, you've got restraining
10 orders. You've got peace bonds. You've
11 got -- you do have law enforcement. I mean,
12 it's not -- it's not the society is now
13 unprotected or that the tenants are
14 unprotected. In fact, if you'll take my sorry
15 example about pedophilia, we now have public
16 records of it, so tenants are somewhat
17 protected from that also. So we're not
18 without protection.

19 CHAIRMAN BABCOCK: Yes. And after we're
20 done I'll tell you a funny story about that.

21 MR. EDWARDS: In Nueces County you might
22 have a sign.

23 CHAIRMAN BABCOCK: All right. Does
24 everybody want to keep slogging away? The
25 subcommittee, and Pam looks like she is

1 praying. So we will take up again at 9:00 in
2 the morning. Let me just -- I don't know
3 where we got 8:30 started; but it was a bad
4 tradition.

5 What we have for tomorrow is to finish
6 this up which hopefully won't take the whole
7 time. And what else do we have that we can
8 discuss? I don't want to take up cameras in
9 the courtroom, Richard, with seven people
10 here.

11 MR. ORSINGER: We have an issue on the
12 right to vote, right to introduction, 76(a)
13 issue.

14 MR. GILSTRAP: What's that?

15 CHAIRMAN BABCOCK: 76(a). Judge Lawrence
16 has got an execution issue.

17 HONORABLE TOM LAWRENCE: (Nods
18 negatively.)

19 CHAIRMAN BABCOCK: No, he doesn't. He's
20 not ready on it; but he will be by September.
21 We've got -- Bobby, are you going to be here
22 tomorrow?

23 MR. MEADOWS: I'll be here.

24 CHAIRMAN BABCOCK: You've got Rule 202
25 just to report on?

1 MR. MEADOWS: Well, there's been no
2 action on it. I've received some letters, and
3 Chris forwarded me some cases that deal with
4 it, and I've read all of that; but --

5 CHAIRMAN BABCOCK: Well, just tell the
6 committee what it is we're going to be talking
7 about.

8 MR. MEADOWS: All right.

9 CHAIRMAN BABCOCK: Orsigner, have you got
10 Rule 21? Is that something you can talk
11 about?

12 MR. ORSINGER: No. You know, Luke Soules
13 has supposedly got something about that; but I
14 have never found out. No one knows. I think
15 it may be a typographical error.

16 CHAIRMAN BABCOCK: Will you check before
17 the next meeting and see if it is?

18 MR. ORSINGER: Okay. I can't find a
19 living person who knows what that is.

20 MR. GILSTRAP: And Chip, don't we have
21 some unfinished business on offer of
22 judgment? Was there something that was going
23 to be transferred or did we conclude that?

24 CHAIRMAN BABCOCK: I thought we concluded
25 it. Well, no. We completed it for this

1 time. There is some stuff we need to go back
2 on; and then there is going to be a Jamail
3 committee meeting on Wednesday, and then we're
4 going to talk about it again in September
5 unless the Court has already ruled by
6 September. So that, you know, maybe we'll
7 take it up to 12:00. It doesn't look to me
8 like we will.

9 PROFESSOR CARLSON: All we have is Tom
10 and Richard.

11 MR. GILSTRAP: And let me say we've got
12 some stuff on FED that is still going to be
13 tough. Discovery is still there.

14 CHAIRMAN BABCOCK: Yes. Yes. Oh, I
15 know. I know. I wasn't trying to minimize
16 that.

17 HONORABLE TOM LAWRENCE: Discovery and
18 motion for new trial.

19 MS. CORTELL: So what is on for
20 tomorrow?

21 CHAIRMAN BABCOCK: FED, Rule 76(a), and
22 Rule 202 just for Bobby to tell us what the
23 issue is; and that's all.

24 MS. BARON: Not 18(c)?

25 CHAIRMAN BABCOCK: Well, I just don't

1 think we ought to do that again with like
2 seven, 10 people here on a Saturday morning.

3 MS. BARON: Yes, I agree. I agree.

4 CHAIRMAN BABCOCK: We've done that
5 before.

6 (Adjourned 5:50 p.m.)

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CERTIFICATE OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

I, ANNA RENKEN, Certified Shorthand
Reporter, State of Texas, hereby certify that
I reported the above hearing of the Supreme
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