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7 **MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**
8 November 20, 2009
9 (FRIDAY SESSION)
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19 Taken before *D'Lois L. Jones*, Certified
20 Shorthand Reporter in Travis County for the State of
21 Texas, reported by machine shorthand method, on the 20th
22 day of November, 2009, between the hours of 9:04 a.m. and
23 4:58 p.m., at the Texas Association of Broadcasters, 502
24 E. 11th Street, Suite 200, Austin, Texas 78701.
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1 **INDEX OF VOTES**

2

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

4

5 *Vote on* *Page*

6 Proposed Rule 737.10 19231

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12 **Documents referenced in this session**

13 09-31 SB 1448 Task Force Final Report (11-16-09)

14 09-32 SB 1448 Supplemental Information (11-19-09)

15 09-33 NICS Disability Review memo from Judge Evans (11-18-09)

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2 CHAIRMAN BABCOCK: We have a full agenda
3 this month, so we will be meeting tomorrow morning, and
4 with that, we will hear as usual from Justice Hecht.
5 HONORABLE NATHAN HECHT: We have a new
6 justice at our court, Eva Guzman of Houston, appointed by
7 the Governor, and she'll be running for a full term next
8 year to replace Justice Brister, proving once again the
9 importance of this committee as a steppingstone to
10 greatness. And the Court has issued the Texas
11 Disciplinary Rules for the Bar, and they are out for
12 public comment. This represents an enormous amount of
13 work by two lawyer groups who have been working at it for
14 years literally, based upon work done by the American Bar
15 Association and the American Law Institute for years
16 preceding that, and trying to adapt those ideas to the
17 Texas situation and traditions. So that's an enormous
18 project that is out for comment and will be voted on by
19 the Bar at a referendum to be determined later.
20 MS. PETERSON: And we've discussed potential
21 dates with some State Bar committee representatives, and
22 it sounds like the referendum may begin on the first day
23 of the annual meeting, which would be June 10th, and then
24 it would be a 30-day voting period.
25 HONORABLE NATHAN HECHT: And many of the

1 changes are just updates, but some of them are new and
2 some may be controversial, so we look forward to getting
3 comments on that. Kennon spearheaded that effort through
4 the Court, and it just took an enormous amount of time,
5 just hundreds of hours to do all of that, and the Court
6 itself spent a lot of time discussing those rules. So
7 they are very difficult, it's a very difficult area, so
8 anyway, that's done, and as I say, we look forward to the
9 comments on those rules.
10 And then the only other thing I have is that
11 we had the swearing in of new lawyers last week, or
12 earlier this week I guess, and I thought I saw the name
13 Tipps on the list of 2,300 new lawyers.
14 MR. TIPPS: One more Tipps around.
15 HONORABLE NATHAN HECHT: So we congratulate
16 his family for that. That's all I have.
17 CHAIRMAN BABCOCK: Okay. Great. Thank you,
18 Justice Hecht. We will turn to the third item on our
19 agenda, which is the Senate Bill 1448 and the proposed
20 Texas Rule of Civil Procedures 737.1 through .16. Judge
21 Lawrence.
22 HONORABLE NATHAN HECHT: Could I say
23 something to start this?
24 CHAIRMAN BABCOCK: Yeah.
25 HONORABLE NATHAN HECHT: This is a bill by

1 Senator West and Representative Thompson, and it requires
2 the Supreme Court to adopt rules by January the 1st, this
3 coming January the 1st. This is a procedure that really
4 has to be built from the ground up, and so we appointed a
5 task force right away to look at this, and I really don't
6 know what we would do without Tom Lawrence. He's just --
7 he's done an enormous amount of work on this and so many
8 other projects in the past. So we're indebted to him as
9 well as Justice Keith Baker of Bexar County. I'm just
10 going to call the names because they did so much work.
11 Robert Doggett of the Texas RioGrande Legal Aid; David
12 Fritsche in San Antonio; Fred Fuchs here in Austin, Legal
13 Aid here in Austin; Tom Morgan at the Realtors
14 Association; Justice Connie Mayfield of Navarro County;
15 Wendy Wilson, who is getting to be a regular here at our
16 meetings, from the Apartment Association; and Justice
17 James Woltz of the -- of Galveston County; and also Tom
18 pointed out that the Bar and the law library and the
19 Center for the Judiciary were good enough to provide space
20 for the committee members to meet, and some other people
21 pitched in as well. So for all of those people and all of
22 that work we are deeply grateful, and the Court will
23 promulgate rules next month to be effective January the
24 1st.
25 And as we have done in the past when we've

1 had this quick deadline set by the Legislature, we'll
2 honor the deadline and get comments after the rules become
3 effective and may make changes in response to the
4 comments, which is different from the procedure that we
5 usually use and different from the Rules Authority Act,
6 but we had this situation come up several instances in
7 House Bill 4 and other times, and we take the position
8 that when the Legislature has specified a deadline, that
9 that trumps the comment period, so we'll go ahead and make
10 them effective, get comments, make any changes that we
11 need to and use that procedure rather than the usual.
12 CHAIRMAN BABCOCK: Great. Judge Lawrence.
13 Thank you.
14 HONORABLE TOM LAWRENCE: Okay. And let me
15 also mention Kennon Peterson was a big help. She attended
16 most of the meetings and a lot of comments and will be the
17 person that's going to have to put all of this together
18 after we finish, too.
19 MS. PETERSON: Can't wait.
20 HONORABLE TOM LAWRENCE: Well, Senate Bill
21 1448, as Justice Hecht said, you would think it's a really
22 simple project because it's only 10 lines in the bill.
23 You think, well, this isn't going to take much, but it is
24 actually pretty complicated. There is a section of the
25 Texas Property Code that deals with repairs. When a

1 tenant feels the landlord should have repaired something
2 and didn't then the tenant can actually go to court and
3 get an order ordering the landlord to repair something and
4 ordering that the rent be reduced, getting a judge to
5 order the rent be reduced; and to award actual damages,
6 for example, if they have to move out and move into a
7 hotel; statutory damages, which is one month's rent, plus
8 $500, plus attorney's fees and court costs.
9 Now, the section of the bill dealing with an
10 order to repair and an order reducing rent is rarely used.
11 I don't know that -- I think maybe somebody on the task
12 force had seen it used maybe in Austin once or twice. I
13 talked to county court at law judges in Houston that had
14 never seen it in over 10 years, and one reason is that the
15 order to repair could not be filed in justice court. It
16 was excluded. It had to be filed in county and district
17 court. So what this bill did is it took away that
18 exemption from JPs to hear these types of suits. So now
19 you can file a suit in JP court to get the JP to order the
20 landlord to repair something and order the rent to be
21 reduced, as well as the other things. So that's probably
22 going to result in more of these types of suits, but the
23 bill also put a kicker in there that you have to hold
24 these hearings within 6 to 10 days.
25 It's like an eviction case, and it also caps

1 the -- the judgment at $10,000, and it also says that
2 included in that is the order to repair, and that's kind
3 of significant. We'll talk more about that later, but
4 that is what these rules are all about, and the rules have
5 to be somewhat complicated because you've got all of these
6 issues to deal with of the parties coming in, there are a
7 lot of defenses to the landlord's ability to repair, and
8 this 6 to 10 days requires everything to be expedited, so
9 we've built in a lot of provisions for safeguards in the
10 rules, and we'll get into all of this. We have modeled
11 this for the most part after the eviction rules and after
12 the rules for justice court suits and to a limited extent
13 after the small claims court rules, so we borrowed heavily
14 from all those existing JP court rules in order to do
15 this.
16 Now, most of what you have in this packet --
17 and there is the 29-page packet and then there is a
18 four-page handout that I brought today, some thoughts I
19 had late yesterday afternoon as I was reading over this
20 again. The first 17 pages of this deal with statutes and
21 laws that I have provided to form the background that
22 we're going to need, sections of the Property Code, the
23 Government Code, some Rules of Civil Procedure, and a
24 number of other things that we'll be referring back to,
25 but let's go ahead and get started. Page 18, if you

1 would.
2 We suggest that this be put in Rule 737.
3 Now, Rule 737 was I think repealed a number of years back,
4 so it's vacant right now, and it is in the special
5 proceedings section, which I think this would logically
6 be, so we think this is a good place so we're going to
7 suggest 737.1, 737.2, and so forth in order to fit it
8 within there. We're going to call this "A tenant's suit
9 in justice court to enforce landlord's duty to repair."
10 Kind of a cumbersome title, but these suits are only going
11 to be for enforcing this narrow provision of the Texas
12 Property Code, which is found in 92.0563 of the Texas
13 Property Code, which you have in your materials. We
14 suggest putting a comment after the title to try to help
15 people understand what this is all about, and the comment
16 would be that "Rule 737.1 through .16 are promulgated to
17 provide procedures for a tenant's request for relief in a
18 justice court pursuant to Section 92.0563(a) of the
19 Property Code. The procedures in Rules 523 through 574b
20 also apply to the extent they're not inconsistent with the
21 procedures in Rules 737.1 through .16." That's in there
22 because we didn't want to reprint all of these provisions,
23 particularly the service of process and a lot of other
24 things. We tried to make these rules as free-standing as
25 possible, but in order not to have to reprint everything,

1 where there is no inconsistency and these rules are silent
2 then you would refer back to the justice court rules for
3 guidance.
4 "Except where otherwise specifically
5 provided, the terms in Rules 737.1 through .16 are defined
6 consistent with Section 92.001 of the Property Code,"
7 which as you can imagine is where they -- is a section on
8 definitions that talk about lease and landlord and tenant
9 and dwelling and premises and all the things that we're
10 going to be referring to. "All suits must be filed in
11 accordance with the venue provisions of Chapter 15 of the
12 Civil Practice and Remedies Code," which are the specific
13 venue provisions for JP court. "A suit seeking an order
14 to repair or to reduce rent may only be filed in justice
15 court under Rule 737 or in county or district court."
16 Now, you might wonder, well, isn't that the
17 point of these rules? Well, there are two different types
18 of lawsuits you can file in a JP court. One are under --
19 one set are under the Government Code, Chapter 28, which
20 are referred to as small claims court, and the other is
21 what we refer to as justice court rules, which are under
22 the 523 through 574. Now, you can't really file a suit
23 for an order to repair in a small claims court proceeding
24 because small claims court is only for money judgment.
25 You can only recover a money judgment in small claims

1 court, so while you could file the suit for the statutory
2 damages, civil penalty, and attorney's fees and court
3 costs under this section of the Property Code, you
4 couldn't file the other. So if somebody just wants to
5 file for statutory damages, they can file under the small
6 claims court, but we're trying to let people know that if
7 you want to sue for order to repair or to reduce rent,
8 then that has to be filed in a justice court suit. So
9 that's the comment. Simple, isn't it?
10 CHAIRMAN BABCOCK: I'm just sitting here
11 thinking about this. The tenant who wants to get their
12 toilet fixed --
13 HONORABLE TOM LAWRENCE: Uh-huh.
14 CHAIRMAN BABCOCK: -- is going to have to
15 navigate some fairly rocky harbor to the --
16 HONORABLE TOM LAWRENCE: Well, it's not that
17 we tried to make it complicated on purpose.
18 CHAIRMAN BABCOCK: No, there's nothing you
19 could do about it.
20 HONORABLE TOM LAWRENCE: We really tried to
21 make it as simple and straightforward as we possibly
22 could, but this section of the Property Code, this
23 habitability section of the Property Code is not a simple
24 set of statutes, and there are all sorts of -- when we get
25 to Rule 2 there are all of these things that have to be

1 listed in the petition, and that's because of various
2 provisions in the Property Code that set up defenses for
3 the landlord and hurdles that the tenant has to overcome,
4 so we're trying to cover all of these things.
5 CHAIRMAN BABCOCK: Yeah.
6 HONORABLE TOM LAWRENCE: But, you know, we
7 spent a lot of time trying to -- we recognize that it's
8 going to be pro se tenants that are going to be filing 90
9 percent of these, and believe it or not, we tried to make
10 it as simple as we could.
11 CHAIRMAN BABCOCK: No, I wasn't being
12 critical.
13 HONORABLE TOM LAWRENCE: No, it's a valid
14 concern. Yeah. Okay.
15 CHAIRMAN BABCOCK: Yeah, Elaine.
16 PROFESSOR CARLSON: Judge Lawrence, are the
17 conditions in 92.056 implicated, meaning a tenant can only
18 seek this order to repair or remedy in damages if the
19 repair materially affects the physical health or safety?
20 HONORABLE TOM LAWRENCE: That's correct.
21 The standard -- in other words, a tenant can't -- if your
22 cabinet -- I had an eviction case Tuesday, and the tenant
23 said he wasn't paying rent because the cabinets weren't
24 fitting properly. Well, that's not the kind of thing that
25 you could come into court on because that doesn't

1 materially affect the health or safety of an ordinary
2 tenant. That's the standard by which a landlord has to
3 fix something. A landlord doesn't have to fix everything.
4 There are also conditions that notices be given, that
5 reasonable time to repair, let's see, what else, various
6 other defenses that are all covered in here, but, yeah,
7 that's the standard, and that's -- you know, we'll get to
8 that a little bit later, but that is the standard, yes.
9 Okay. 737.1, "A tenant may file a suit in
10 justice court to seek judicial remedies under subchapter
11 (b) of Chapter 2 of the Texas Property Code." 737.2,
12 "Requisites of petition. The petition must be in writing
13 and must include the following." Now, here there was a
14 difference of opinion on the task force about the
15 petition. Some felt that the petition -- or the majority,
16 I guess it's fair to say, and Wendy and Kennon, correct me
17 if I misstate something, but I believe the majority felt
18 that the petition does not need to be sworn to, and the
19 logic was that this is an unliquidated claim that would
20 have to be proven up in court with sworn testimony and
21 evidence, so it should not be sworn to. The minority
22 opinion said that it should be sworn to because you're
23 going to have some provisions later that deal with
24 alternate service, putting it different locations that the
25 landlord may be served and, you know, that's something

1 that should be required to be sworn to.
2 Now, as an aside, suits in eviction suits
3 have to be sworn to, small claims suits have to be sworn
4 to, but suits in justice court do not have to be sworn to,
5 so we've got kind of a mix there, but that was the opinion
6 of the task force that it not be sworn to. Okay. And
7 then in (a) --
8 CHAIRMAN BABCOCK: Hang on for a second.
9 Carl, you got a comment about that?
10 MR. HAMILTON: On the requisites of the
11 petition, shouldn't the petition have to state how the
12 repair -- the lack of repairs is affecting the physical
13 health or safety?
14 HONORABLE TOM LAWRENCE: We're going to get
15 to that a little bit later. Let me see if that's --
16 MR. MUNZINGER: Subsection (f), .2(f) talks
17 about the condition of the premises the tenant seeks to
18 have repaired or remedied.
19 HONORABLE TOM LAWRENCE: Yeah, I don't think
20 we -- we did not require them to specifically state that
21 it affected their health or safety, but I don't think the
22 task force would have any problem with putting that in if
23 the committee wanted it.
24 CHAIRMAN BABCOCK: Judge Christopher.
25 HONORABLE TRACY CHRISTOPHER: I know y'all

1 have done a lot of work on this, and while I think it's
2 great that a petition would have all of these things in
3 it, if we're talking about mostly pro se people why are we
4 making it so difficult for them to file something versus
5 filing a regular lawsuit? I mean, when you put "must,"
6 you know, "must" be in there, if they miss one of them,
7 does the landlord get to come in and say, "Didn't include
8 that, can't have the hearing"? Are we going to have
9 endless redrafting of a petition by a pro se? I mean,
10 when I look at, you know, claims for relief under Rule 47,
11 it just it's so different from what has to be and what I
12 would hope would be something -- since they have to come
13 down and present evidence anyway, you can sort of help
14 them along at that point, but if we have this very
15 detailed pleading requirement I just think it would be
16 very hard. So I wondered what was the thinking of the
17 task force on that.
18 HONORABLE TOM LAWRENCE: Well, the task
19 force I think had two primary concerns in mind. One is
20 that the requirement that this be 6 to 10 days is so fast
21 that we wanted, first of all, for the landlord to have
22 sufficient notice as to what this is all about, because
23 the landlord is going to have to come in and give the
24 court some idea of what it's going to cost to repair this
25 condition, whatever it is, and the landlord needs some

1 notice as to what the condition is. There also are a
2 number of defenses that are in the statute to the landlord
3 having to repair. For example, the notices, who caused
4 the condition, all of these things need to be -- are going
5 to have to come out at the trial at some point, and the
6 judges wanted some advance notice as to what was going on
7 with this, wanted this organized so that when the case is
8 presented 6 to 10 days after it's served that you can look
9 at the petition and have an understanding of what's going
10 on. The landlord would have -- would be on notice as to
11 the dates the notices were given, the exact condition,
12 what happened, because the landlord may not have a clue.
13 The landlord may not know that any of this has occurred,
14 and that happens frequently.
15 So that was the reason, and, you know, help
16 me out if I'm overlooking something, but that was the
17 reason that we thought we needed to get everything we
18 could up front in the petition so it's all there, that
19 everybody knows what this suit is about; and, you know,
20 tenants should understand that just because they think the
21 landlord didn't fix the cabinet or shampoo the carpet that
22 that's not necessarily something that they can come into
23 court and get relief on, that they need to understand that
24 they have to jump over all of these hurdles before they
25 can get any relief. That was the thinking of the task

1 force.

2 CHAIRMAN BABCOCK: Justice Gray, then Jeff,

3 and then Lonny.

4 HONORABLE TOM GRAY: Was there any thought

5 given to a promulgated form to accompany the rule for the

6 petition? Once upon a time I had the opportunity to file

7 a case in small claims court. The JP handed me a petition

8 form, and it worked very well for that circumstance,

9 although it was quite a bit broader than this, and it

10 would seem that by a form with a number of boxes to check

11 or slots to write information in it would greatly

12 facilitate this process.

13 HONORABLE TOM LAWRENCE: If you look at your

14 little four-page handout, page three of that is a sample

15 petition form, and page four is a sample judgment.

16 HONORABLE TOM GRAY: Was it proposed that --

17 I know you just said these were in what you were thinking

18 about last night. Were these something that y'all were

19 thinking about doing as an attachment to the rules?

20 HONORABLE TOM LAWRENCE: No. The task

21 force, no, we were not thinking about promulgating any

22 forms as a part of the rule, but what I anticipate

23 happening is this petition -- the task force never looked

24 at this. This is something I did this week just to try to

25 get a handle on how everything was going to flow, but I

1 would anticipate the JP training center is going to
2 promulgate some forms that will be used, and I would think
3 probably -- I don't see anybody from RioGrande Legal Aid,
4 but typically the legal aid groups also have some petition
5 forms that they give out. So I think there are going to
6 be forms that are going to be promulgated that are going
7 to help the tenant fill all of this out, but everything
8 that is in the petition, this draft petition I have, would
9 be information they would need, and you just go through
10 and fill in the blanks basically.
11 CHAIRMAN BABCOCK: Jeff, did you have --
12 MR. BOYD: Well, yeah. I kind of wanted to
13 say the same things Tracy and -- that have already been
14 said, but --
15 CHAIRMAN BABCOCK: Well, say it again.
16 MR. BOYD: I'll say it again. She doesn't
17 have anything else to do today. But maybe hone it in a
18 little bit more, is if 90 percent of them are pro se how
19 will they even know that they have to include these things
20 in their petition? That's the problem. I mean, as a
21 lawyer, somebody called me about it, I would have to
22 research to find the rules to even know it, but if they're
23 pro se I'm not sure they would even find it, and what
24 Tracy said, my concern is, well, if they file it's almost
25 setting them up to fail because they're going to file the

1 lawsuit, they're not going to have listed everything in
2 it. The landlord who does this all the time potentially
3 is going to know that, you know, we just come in and
4 "Judge, move to dismiss. They haven't met the
5 requirements of the rule."
6 HONORABLE TOM LAWRENCE: Well, of course, a
7 high percentage of landlords are pro se, too. You have
8 apartment managers for the most part. Every once in a
9 while you get attorneys, but a lot are pro ses. This is
10 based on the statutes. We're not setting any hurdles up
11 that are not already existing in the law in the Property
12 Code. We're just trying to put everything up front so
13 that everybody understands to begin with what they're
14 going to have to prove up in order to get relief. If we
15 don't do this then in six days when I've got the parties
16 before me for the hearing nobody is going to have this
17 information. Everything is going to have to be reset.
18 The landlord is not going to know what the condition is.
19 They're going to say, "Judge, I need a continuance, I had
20 no idea that they had a leaky toilet. They've never said
21 anything. I need to get a plumber out and find out what's
22 involved in this. I need a reset," and the tenant is
23 going to say, "Yeah, I gave notices. No, I left those at
24 home. I need a reset to go back and get them." But if
25 all of this stuff is in the petition and they know about

1 this then the likelihood is high that we're going to be
2 able to dispose of this thing without having to reset and
3 go back again.
4 MR. BOYD: But unless you either give them a
5 form -- when they come in and say, "I want to file a
6 lawsuit against my landlord," you either give them a form
7 to fill out or give them a copy of the rule, you're going
8 to be doing that in 90 percent of the cases anyway because
9 they're going to file an insufficient petition. The
10 landlord is going to come in. Six days later you'll have
11 the hearing. The justice will look at it and say, "Well,
12 your petition doesn't say what it has to say. You're
13 going to have to replead it."
14 HONORABLE TOM LAWRENCE: Well, I don't know
15 that it will have to be repled. I think most -- and I
16 don't want to speak for all the JPs in Texas. Most JPs
17 would just say, "You need to amend this." They're not
18 going to make them refile the case. I think you're giving
19 maybe landlords a little bit too much credit for knowing
20 the law also, because most landlords that come in are pro
21 se. They may know a little bit more about the law, but
22 they're not going to have all of this in-depth knowledge.
23 And, Wendy, correct me if you think I'm misstating it.
24 And Robert Doggett, who is also on the task force, with
25 RioGrande Legal Aid just walked in also.

1 Most JP courts have forms for everything.
2 We have forms for small claims court, for justice court,
3 for evictions, for writs of re-entry. Most courts have
4 these forms available. I won't tell you that every court
5 is going to have these forms, but most JP courts and
6 clerks are pretty good about helping both sides fill out
7 whatever paperwork needs to be filled out. So I think
8 these forms are going to be promulgated out there. I
9 think legal aid, the various offices, are going to
10 probably have forms of this type to file. Wouldn't you
11 say?
12 MR. DOGGETT: Yes, sir.
13 CHAIRMAN BABCOCK: Lonny, and Richard
14 Munzinger.
15 PROFESSOR HOFFMAN: I want to continue
16 building on the same topic. So, I mean, I'm strongly
17 inclined to agree that -- of the following. There should
18 be in the rule a specific reference to a form. If you --
19 if you fill out form 2.5, whatever the number is, it
20 complies with this rule, and that form promulgated
21 pursuant to these rules would be made available -- will be
22 available in the JP court so that we don't rely on good
23 intentions or the vagaries that one JP has it or another
24 -- reminds me even more extreme of the conversation we had
25 last time about some courts are open sometimes and others

1 are gone -- you know, 3:00 o'clock gone fishing, and I
2 mean, you know, so for here what we're dealing with is
3 we're dealing with a very specific issue, how do you get
4 into court on this, and so you have the problem that -- a
5 priori that people won't know where the rule is to even
6 look for it.

7 HONORABLE JANE BLAND: Or Latin either.

8 PROFESSOR HOFFMAN: What?

9 MR. ORSINGER: She was mocking you.

10 PROFESSOR HOFFMAN: Then the other point I
11 want to make is about the contents of the -- that you've
12 got here in 737.2. So you said before that, you know,
13 these are the things that have to be in there to give
14 notice to the other side, to give the landlord, so they
15 won't have to restart this thing all over because they're
16 going to show up and say, "We don't know what this thing
17 is about." If you look at these provisions here, some of
18 them are easy, and that makes sense and that matches, but
19 others I don't follow. So look at (e). "The date any
20 notice was given." Well, I mean, there may be a fight
21 about that. There may be disagreement, but it's not clear
22 to me why that's some essential condition to have in the
23 pleading, one that you would throw out.

24 Look at (g). "The statement that the
25 landlord had a reasonable time to repair." Well, I mean,

1 heck, I mean, if you have a sentient tenant they're going
2 to check the first box, and if they either check -- but if
3 they check neither box, what difference does it make? I
4 mean, the landlord is going to contest that if they're
5 going to contest it. It's not like the landlord is going
6 to show up and say, "Hang on, I've got some more
7 information I want to provide on that point."
8 Look at (h). "A statement of how the
9 condition occurred." Does the landlord need to know that
10 detail in order to defend?
11 HONORABLE TOM LAWRENCE: Yes.
12 PROFESSOR HOFFMAN: They need to know that
13 it's about the toilet that doesn't work to defend, but
14 they don't need to know that it happened because -- you
15 know, let's leave the rest out, but -- and then (j), why
16 is it essential that the tenant properly plead the amount
17 in controversy? Again, yeah, I get that it's legally
18 required, but why isn't that a thing, as Tracy said a few
19 minutes ago, we can nudge them through.
20 So, again, if the basic issue for why we're
21 going to require a such detailed fact pleading of pro se
22 plaintiffs is because we want to make it efficient so we
23 don't have to adjourn when we have this time clock that's
24 running, it seems like we should limit it to the absolute
25 bare bones to make that possible. But the primary point I

1 want to make, again, though, is I don't see why if we're
2 going to promulgate anything it wouldn't be with a form
3 that would make everything easier.
4 HONORABLE TOM LAWRENCE: Well, I don't think
5 the task force would have any problem with the Court
6 promulgating a form. I mean, that's easier to promulgate
7 and amend than a rule is, I think, if I recall. To take
8 your points, (e) is required because the landlord doesn't
9 have to fix anything unless the proper notice has been
10 given, so that's why we need that information in (e).
11 PROFESSOR HOFFMAN: But just to be clear,
12 Tom, why do they have to plead it? So, in other words,
13 obviously we're not having a fight about the substantive
14 law. The question is why are you making that a specific
15 factual averment that has to be -- well, otherwise the
16 landlord gets to come in and say, "This thing is
17 deficient, throw it out."
18 HONORABLE TOM LAWRENCE: Well, the notice is
19 integral to whether or not -- the date the notice is given
20 and how the notice is given is very important to the
21 outcome of the suit. The reduction of the rent goes back
22 to the date the notice was given, the proper notice was
23 given. So you need the date that notice was given in
24 order to calculate when the rent is reduced from, what
25 date it's reduced from. Some notices can be oral in some

1 situations, so you need to know if it was written or oral.
2 The landlord is -- needs to be on notice as to when these
3 notices are given and who they were given to and the date
4 they were given. (f), the condition of the -- well, I
5 think it was (g) you asked about.
6 PROFESSOR HOFFMAN: Yeah.
7 HONORABLE TOM LAWRENCE: Well, that's
8 another element that's in the Property Code, is that the
9 landlord has a reasonable time to repair something. You
10 can't give the landlord a notice today that you want it
11 repaired and then file a lawsuit Monday because he didn't
12 repair it. So he's got to be given a reasonable time, and
13 there's some -- there's a whole section of the Property
14 Code that talks about the reasonableness and the actions
15 that can be taken.
16 (h), how the condition occurred, that needs
17 to be in there because there are defenses. Depending on
18 who caused the damage, the landlord may or may not have an
19 obligation to repair that, and the landlord needs to know
20 all of these things in order to be able to present any
21 kind of defense, because the appearance date is the trial
22 date. I mean, we're going to trial 6 to 10 days after
23 this notice is filed, so the more information you have
24 available to everybody, the smoother the process is going
25 to be.

1 CHAIRMAN BABCOCK: Richard Munzinger, and
2 then Sarah had her hand up, and then Orsinger.
3 MR. MUNZINGER: I agree with what the
4 professor said. On the point of the advisability of a
5 form, we ought to make the courts open to those who need
6 relief. If a form is adopted as part of the rule, it
7 satisfies all the prerequisites to the suit if properly
8 completed. It leaves nothing to chance. It doesn't have
9 a pro se litigant thrown out because of some technicality,
10 which we all know is not justice or shouldn't be justice,
11 so we ought to adopt the form or a form and make it part
12 of the rules so that if a form is completed then people
13 come to court and address the issue.
14 The only other comment I would make is that
15 I think the phraseology in the second line of subsection
16 (e), "who specifically the notice was given to" seems to
17 be clumsy and might be better stated, with my apologies to
18 the member of the committee who wrote it.
19 CHAIRMAN BABCOCK: Sarah.
20 HONORABLE SARAH DUNCAN: To press Lonny's
21 point and ask a question, I understand all those things,
22 Tom, are subject matters of proof and that when appearance
23 day and trial day comes it's all going to have to get
24 proved up or it's not going to get granted. Is there
25 anything that prevents the landlord from just calling or

1 going by and asking the tenant "How did this happen? Who
2 do you think you gave notice to, because I didn't get it?"
3 I mean, why does it all -- certainly matters of proof.
4 That's fine. You're statutorily required, but why do they
5 all have to be in the petition?
6 HONORABLE TOM LAWRENCE: Well, I mean, I
7 don't know how to articulate it any differently. Another
8 aspect was that a tenant comes in and they pay their $92
9 or whatever it is to file the lawsuit. Wouldn't you want
10 that tenant to have some idea that there are all these
11 hurdles you have to jump over, and if you haven't crossed
12 all these T's and dotted all these I's then your suit
13 doesn't have a chance? So by putting all this out front
14 it may show the tenant that, "Oh, well, we need to go back
15 and do this. We've got to go give a notice then. We
16 didn't know that." Robert.
17 MR. DOGGETT: Can I respond briefly? One
18 thing is if you have a general pleading -- and, of course,
19 my advocacy is on behalf of tenants, you understand. We
20 were concerned about the level of detail as well. These
21 are statutorily required. The other thing is if we have
22 this general, you know, plead a cause of action, we're
23 going to have special exceptions, and it's going to happen
24 where somebody goes back into court and says, "Judge, I
25 can't the defend this. I'm not ready. I need to know

1 more information." Well, if it's right in the code, if
2 it's right in the pleading, you know, there it is, and so
3 we can move this case quicker. And the whole idea, and
4 the Legislature tried to give us guidance there, is we
5 need to do these quickly, and so that's what's going to
6 help move this case along under the -- you know, under the
7 rules that we've been given, and so from a tenant
8 perspective we certainly like the idea of just saying, you
9 know, plead a cause of action. That's the rule. But
10 we're going to have landlords understandably not knowing
11 what they're up against, requesting a special exception,
12 and now we have more judge time spent on whether or not --
13 you know, what's the level of detail required in order to
14 defend this case. Instead we're going to have a rule that
15 says exactly what we should plead so you'll know.
16 CHAIRMAN BABCOCK: Richard Orsinger, and
17 then Harvey Brown.
18 MR. ORSINGER: In the context of knowing
19 that pro ses are going to be bringing this lawsuit, it
20 reminds me of when we were grappling with how to handle
21 the parental bypasses, which we were expecting to be
22 initiated by single mothers who didn't have any legal
23 assistance or otherwise, and we promulgated forms, and we
24 put them on the Supreme Court's website, and we spread
25 them around everywhere, and they became available to the

1 pro ses I think pretty successfully, and it would seem to
2 me that once we have a form we should do the same thing.
3 We should put it on an official website, and we should
4 have signs everywhere telling people where they can go on
5 the worldwide web to get this form.
6 The other thing that occurs to me is that
7 while I do understand the feeling that we don't want to
8 throw people out because their pleadings don't comply,
9 these pro ses are not going to know what's in the Property
10 Code unless we tell them, and if we tell them what's in
11 the Property Code in the pleading and they see the
12 pleading online, then for purposes of their pretrial
13 activity, like whether they give notice or proper notice
14 or how much notice, if the pleading is like a checklist of
15 what they have to do to get the lawsuit off the ground,
16 they'll use the pleading as a checklist for their pretrial
17 behavior. Then when they show up for trial, if the
18 pleading has basically laid out everything they have to
19 prove to win then the pleading is a checklist of what they
20 testify to when they're pleading their case.
21 So I know that -- I know that it's bad that
22 people might not even get to court successfully because
23 they don't plead it correctly, but I think it's worse if
24 we don't give them a guideline on what they have to do
25 before trial and during trial to win, and so as between

1 the two I think a detailed form that step-by-step tells
2 them what they have to do and prove in order to win the
3 lawsuit actually works to the benefit of the pro ses more
4 so than saying we are making it too complicated for them
5 to plead their way into court.
6 CHAIRMAN BABCOCK: Harvey.
7 HONORABLE HARVEY BROWN: I think there is a
8 real advantage to having a checklist for the pro ses, but
9 I want to go back to the word "must." Why do we have to
10 say "must"? What if they just missed one? Why not say
11 they "should"? That way it functions as a checklist. It
12 tells them what they have to do, but if they miss one but
13 prove it in court, which is all they're really required to
14 do is to prove in court, they can still get their remedy
15 that day, but if they just skip one inadvertently or they
16 don't have an explanation good enough, while some judges
17 might be fairly liberal on that, they wouldn't have to be.
18 They could technically just knock it out on a
19 technicality. It seems like to me the word "should" takes
20 care of the efficiency concerns, Judge Lawrence, that you
21 want but gives a little flexibility if the pro se makes
22 the mistake like a pro se might do.
23 CHAIRMAN BABCOCK: Richard Munzinger.
24 MR. MUNZINGER: Remember that this is only
25 used in situations where there is a potential material

1 effect on health and safety of a tenant so that a rigid
2 requirement for a pleading actually helps meet the
3 requirement of a prompt resolution of a health or safety
4 issue, and I think that's probably what the committee had
5 in mind as well. It's not an ordinary lawsuit. There are
6 considerations here that we all love to plead generally
7 because we can't be tied down with judicial admissions and
8 what have you, but this has a societal interest of health
9 and safety, and to put the onus on the tenant but give him
10 a form that allows him to meet the law satisfies that
11 societal interest and gets the matter before a judge who
12 can cure the matter promptly and does so fairly to the
13 tenant.
14 CHAIRMAN BABCOCK: Judge Christopher.
15 HONORABLE TRACY CHRISTOPHER: I had the same
16 comment about "must." I was surprised to see in the
17 Government Code that "must" creates or recognizes a
18 condition precedent, so I think "must" would be a bad word
19 to use there. "Shall" I think would be better or
20 "should." Plus, although I understand -- I understand
21 that the idea behind these requirements is to meet the
22 legal standard, it doesn't tell the tenant what the legal
23 standard is. So, for example, the date of any notice
24 given to the landlord, there's not a statement that says,
25 "You must have given notice to the landlord before filing

1 this suit." So, I mean, if we're trying to make it easy
2 and try to avoid the $92 for no good reason in terms of
3 filing the lawsuit then we need to tell them you had to
4 have given notice, you had to have waited a certain amount
5 of time to let them fix the condition, this condition must
6 affect health and safety, how does this condition affect
7 health and safety. I mean, the way you've written it here
8 it doesn't provide enough information, while at the same
9 time making it very difficult to plead. I think.
10 CHAIRMAN BABCOCK: Yeah, Elaine.
11 PROFESSOR CARLSON: Maybe a fix for that
12 would be to add a sentence after Rule 737.1 that's
13 parallel to our Rule 22 that says, "The suit is commenced
14 by filing a written petition," maybe "in substantial
15 compliance with 737.2," and I agree with Judge
16 Christopher, the conditions, if this is a checklist then
17 we do need to include the conditions materially affecting
18 the physical health or safety and the tenant is not
19 delinquent, which 92.056 subsection (6) requires.
20 My second comment is on the sworn versus
21 unsworn. This is, in effect, an injunction?
22 HONORABLE TOM LAWRENCE: Well, we're going
23 to have a long and spirited discussion about that later in
24 the morning, but --
25 PROFESSOR CARLSON: Okay. Okay. I'll wait

1 for that then.

2 CHAIRMAN BABCOCK: You predict.

3 HONORABLE TOM LAWRENCE: It's sort of an

4 injunction, maybe.

5 PROFESSOR CARLSON: Well, you know, the

6 injunction rules are -- of course, the TRO rules can be ex

7 parte, and I assume this can never be ex parte. You have

8 to get some kind of service?

9 HONORABLE TOM LAWRENCE: Uh-huh.

10 PROFESSOR CARLSON: Even if it's the

11 substitute service of leaving with someone over 16.

12 HONORABLE TOM LAWRENCE: Right.

13 PROFESSOR CARLSON: There's a lot of

14 protections built into the injunction rules on sworn

15 pleadings and bonds and all kinds of things, which I

16 understand JP courts lack jurisdiction to order, but

17 apparently now they do to this extent.

18 HONORABLE TOM LAWRENCE: Well, JP courts do

19 not have injunctive powers, it's true, but yet the JP

20 courts have been given quasi-injunctive powers, for want

21 of a better term, in writs of re-entry and writs of

22 restoration. For example, in a writ of re-entry, if a

23 landlord doesn't readmit a tenant then we can put the

24 landlord in jail until the landlord readmits them, which

25 would seem to be counterintuitive, but that's the way the

1 law is. So we have broad powers that are not specifically
2 called injunctions, and this is yet a -- this is the third
3 in a series of statutory provisions that the Legislature
4 has given to JP courts that one would think is an
5 injunction but is not called an injunction. It just says,
6 "Do it or go to jail," but it's not an injunction per se.
7 PROFESSOR CARLSON: It's a super injunction.
8 HONORABLE TOM LAWRENCE: Yeah, a super
9 injunction.
10 MR. ORSINGER: It's a threat, legal threat.
11 CHAIRMAN BABCOCK: You're skipping the
12 injunction part and going right to the contempt.
13 HONORABLE TOM LAWRENCE: That's right.
14 CHAIRMAN BABCOCK: Yeah, Justice Gray, and
15 then Buddy.
16 HONORABLE TOM GRAY: Whether you go with the
17 "must" or "shall" with regard to the nature of the
18 pleadings, we've been following that language in some
19 circumstances and statutes with language like
20 "substantially comply," "must substantially comply,"
21 "shall substantially comply." That way if they deviate
22 from a promulgated form, which I do think is a good idea,
23 and use their own form, it doesn't matter, as long as they
24 substantially comply with that requirement.
25 CHAIRMAN BABCOCK: Buddy.

1 MR. LOW: Chip, we have several rules which
2 do have forms. For instance, home equity loan
3 foreclosure, it says, "The notice shall be sufficient if
4 it substantially follows the form." And then we have a
5 justice rule on -- that says, "and an affidavit which
6 substantially complies to the evidence rules for this
7 provision shall suffice." In other words, it doesn't say
8 "must," but "substantially complies," and that gets around
9 "must" and "shall."
10 CHAIRMAN BABCOCK: Very good. Lonny.
11 PROFESSOR HOFFMAN: Yeah, so just to kind of
12 build on that, that's a great reference. So to be
13 precise, my specific suggestion is -- and following on
14 what Elaine was saying, I would -- my suggestion would be,
15 is to drop 737.2, to replace it instead with effectively
16 22, a civil suit, you know, seeking relief under
17 subsection -- "a suit to repair," whatever the section
18 number is, "shall be commenced by filing a petition," and
19 then track off the language that the petition will be
20 sufficient if it's substantially in the following form and
21 then literally have that form thereafter follow with very
22 -- and, again, while I think, Tom, you know, you've done
23 tons of work, and obviously you just threw this together,
24 to tweak this to include, as Tracy was suggesting, the
25 specific.

1 So, for instance, the form you have here
2 under the tenant suit, the draft you have, doesn't say
3 anything about the health or safety being a necessary
4 condition. Put that in there. Instead of having this
5 check box, they had a reasonable time, I would say, you
6 know, they were given notice on blank day, which is at
7 least, you know, whatever the minimum is that you need for
8 that to be considered reasonable under the substantive
9 law.
10 So, again, just to be precise, I'm
11 suggesting that there are costs, collateral costs, that
12 tenants -- apparently not all tenants -- should be
13 concerned about, but -- or are concerned about, by having
14 a heightened pleading standard; and even if there are
15 efficiencies to be gained, those collateral costs are
16 sufficiently great, we can achieve the same result you
17 want by having it generalized; and by saying the form
18 complies, everyone will go there, particularly if we give
19 clear notice to where one should go.
20 CHAIRMAN BABCOCK: Okay. Any other
21 comments? All right. Great. Why don't we move right
22 along?
23 HONORABLE TOM LAWRENCE: All right. You
24 want me to go through each condition of .2?
25 CHAIRMAN BABCOCK: I don't know if we need

1 to go through each condition of .2. I don't think so.
2 HONORABLE TOM LAWRENCE: Okay.
3 HONORABLE TOM GRAY: Well, if you're not
4 going to go through each one, I would comment on (c), is
5 that in the first -- "the address of the landlord or the
6 address of the landlord's agent," and then in (d) we say
7 "the telephone numbers of the landlord and landlord's
8 agent," which seems to be -- we probably only need one
9 phone number in (d). I can tell Tom had a specific reason
10 for the "or" in one and "and" in the other.
11 HONORABLE TOM LAWRENCE: Yeah. This is
12 really kind of a problem area of landlord-tenant law
13 because you've got a specific provision of the Property
14 Code, 92.003, that says that if the landlord has given the
15 tenant written notice of the management company and their
16 address, then that becomes the -- in essence the
17 registered agent, so to speak, and the communications be
18 through them, but that's not always clear if that notice
19 has been given, and we've tried to keep that in mind
20 throughout these rules when we get to the service of
21 process section. But what we're trying to do here,
22 because of this 6 to 10 days is so expedited, the more
23 phone numbers we have, the better off, because a lot of
24 these things may have to be reset, something may come up,
25 and if we have the phone numbers to get in touch with

1 people, that's why we're requiring the tenant's phone
2 number, and we want the landlord's phone number if they
3 have it so we'll be able to get in touch with these
4 people. So that's why we need all of that.
5 HONORABLE TOM GRAY: Would it be better to
6 have in (c) the address of the landlord and the address of
7 the agent of service of process?
8 HONORABLE TOM LAWRENCE: Well, if the
9 landlord has given that written notice then the person
10 that is the management company becomes the agent, so
11 that's why it's "or" and not "and."
12 HONORABLE TOM GRAY: Okay.
13 CHAIRMAN BABCOCK: So there.
14 HONORABLE TOM LAWRENCE: And believe it or
15 not, we talked at length about that.
16 CHAIRMAN BABCOCK: We have no doubt. Let's
17 go to .3.
18 HONORABLE TOM LAWRENCE: .3, citation.
19 "When the tenant files a written petition with the justice
20 court, the justice shall immediately issue citation
21 directed to the landlord commanding the landlord to appear
22 before such justice at the time and place named in the
23 citation. The appearance date must be not earlier than
24 the 6th day and not later than the 10th day after the date
25 of service of citation." This is very similar to rule --

1 to the eviction rules and the rule in 520 something or
2 other, the JP's rule.
3 "The citation shall inform the landlord that
4 upon timely request and payment of a jury fee, no later
5 than five days after the landlord is served with citation,
6 the case shall be heard by a jury." And that parallels
7 the eviction rules.
8 CHAIRMAN BABCOCK: Okay. Yeah, Carl.
9 MR. HAMILTON: Two questions. It says "to
10 appear." Should it be "appear or answer," or do they have
11 to actually appear?
12 HONORABLE TOM LAWRENCE: Well, we're going
13 to talk about that in a later rule, in Rule 737.7. In
14 essence the appearance date is the trial date.
15 MR. HAMILTON: Okay. And the next question
16 I have is how do you fix a date for trial that's dependent
17 upon the date of service when you don't know when the
18 service is?
19 HONORABLE TOM LAWRENCE: We do this in
20 evictions all the time, and stuff has to be sent back and
21 redated all the time, but we set eviction dates and we set
22 the date, send the citation to the constable, and the
23 constable, we try to give them enough lead time to get it
24 served, but if they can't get it served then they return
25 it to court and we redate it and they go out and do it

1 again. So that's the way it works in eviction cases.
2 CHAIRMAN BABCOCK: Okay. Any other comments
3 about .3? Justice Hecht.
4 HONORABLE NATHAN HECHT: If it's similar to
5 other citation provisions, is there a reason to have it
6 restated here as opposed to just referring to the citation
7 in evictions?
8 HONORABLE TOM LAWRENCE: Well, it's similar,
9 but it's not exactly the same as what we have in the
10 eviction rule and the justice court rule.
11 HONORABLE NATHAN HECHT: And what's the
12 reason for the difference? I mean, does the statute
13 specifically refer to citation here?
14 HONORABLE TOM LAWRENCE: Well, the statute
15 referred -- no, the bill refers to 6 to 10 days.
16 HONORABLE NATHAN HECHT: So it's the time
17 period that's --
18 HONORABLE TOM LAWRENCE: Yeah, but that time
19 period is the same as we have in the eviction rules.
20 Let's see, it may be -- let me check the eviction rules
21 real quick, because it may be that this is almost
22 identical to 742 -- or 740, I think it is. I guess that
23 we were trying to make these rules as free-standing as
24 possible without reprinting everything, and this seemed to
25 be a -- this seemed to be a basic thing that ought to be

1 in the rule so that a tenant and a landlord could for the
2 most part look at these rules and not have to go anywhere
3 else. I think that was the idea behind it, so there may
4 be some similar language, and this may be, in fact, almost
5 exactly like 730, but it's not -- it's modeled on 739, but
6 it's not identical to it. We think we improved 739 a
7 little bit, frankly, so --
8 HONORABLE NATHAN HECHT: Okay.
9 CHAIRMAN BABCOCK: Okay. Buddy.
10 MR. LOW: Chip?
11 CHAIRMAN BABCOCK: Yeah.
12 MR. LOW: Judge, when you say in the second
13 line "directed to the landlord," and other places you've
14 talked about "or the designated agent" because they
15 have -- do the definitions include the designated agent so
16 you wouldn't have to state that here? Because a landlord
17 may be a conglomerate of five or six people that own a
18 building, and property managers are the agents.
19 HONORABLE TOM LAWRENCE: Well, the landlord
20 is the person responsible. You may serve the management
21 company, but it's the landlord that's on the hook for all
22 of this.
23 MR. LOW: Well, but there are people that
24 manage multi properties, and different people own them,
25 and this person is not truly the landlord unless the

1 property management company, so --

2 HONORABLE TOM LAWRENCE: Well, "landlord" is

3 defined in the Property Code.

4 MR. LOW: Well, yeah, it's defined here, but

5 the definitions might not -- well, maybe it includes it.

6 That's all. If you're satisfied with it, I'm pleased.

7 HONORABLE TOM LAWRENCE: On the task force,

8 just to give you an idea, we had the general counsel of

9 the Texas Apartment Association, general counsel of Texas

10 Association of Realtors, two JPs that are attorneys that

11 practice law also, and we had two lawyers with RioGrande

12 Legal Aid, both of whom have extensive experience in

13 landlord-tenant, and three of the people on the task force

14 were involved in the statute, involved in the bill.

15 MR. LOW: For instance, "Landlord means an

16 owner, lessor, sublessor of a dwelling, but does not

17 include a manager or agent of the landlord," and property

18 management companies are the ones that come down and

19 handle that. The owner of the property usually doesn't.

20 HONORABLE TOM LAWRENCE: Well, that's right.

21 And there's a rule that allows them, both in evictions and

22 in these types of suits, that's going to allow an agent to

23 represent them, but it's still the landlord that's the

24 person responsible.

25 MR. LOW: Okay.

1 HONORABLE TOM LAWRENCE: They can have their
2 management company come down if they want to. That's
3 permitted in evictions, just like the tenant can have an
4 agent come down.
5 CHAIRMAN BABCOCK: Carl.
6 MR. HAMILTON: But who do you serve? Do you
7 serve the landlord or the agent?
8 HONORABLE TOM LAWRENCE: Well, we're --
9 yeah, 92.003 talks about the landlord's agent for service
10 of process if they have designated someone. If they have
11 not then you would serve the landlord, and the landlord
12 may be the owner of the apartment complex. The landlord
13 may be the owner of the house. We talked about a number
14 of different scenarios, but the term "landlord" would
15 be -- that's how the statute refers to the person
16 responsible for this. That's how the Property Code
17 defines them.
18 MR. HAMILTON: Shouldn't the citation,
19 though, be directed at whoever is going to be served?
20 HONORABLE TOM LAWRENCE: Well, the service
21 of citation in .4 -- in Rule 4 and Rule 5 we're going to
22 talk about the service of that, but the citation itself is
23 going to direct the landlord to appear, not the -- you
24 know, the agent for service of process could be the
25 management company, it could be a real estate agent that

1 is handling for an absentee owner. It could be just a
2 rent collector that's a relative of somebody that's living
3 out of state.
4 CHAIRMAN BABCOCK: Richard Munzinger.
5 MR. MUNZINGER: Judge, agent for service of
6 process in my mind means the person so designated with the
7 Secretary of State. Is that what is included here?
8 Because, my goodness, if the property is owned by Buddy
9 Low Properties in Beaumont, and he names Skip as his agent
10 for service in Austin, and the apartment house is in El
11 Paso, how can a tenant get relief? I mean, I would be
12 stunned. We're talking about something that's six days
13 because it's a matter of health and safety, and that's the
14 problem that Buddy has been talking about. If you're
15 going to have to serve the agent for service of process
16 designated by the Secretary of State, for god sakes, and
17 you're a pro se tenant with 92 bucks struggling to pay to
18 get into court to have your toilet fixed so your children
19 don't get sick, you've got a real problem.
20 HONORABLE TOM LAWRENCE: Well, most -- for
21 the most part for people living in apartments the agent is
22 going to be the management company that manages the
23 apartment complex, and that's going to be a high
24 percentage of the time. You're going to have a smaller
25 number that are going to be rent houses where you've got a

1 real estate company or some individual or maybe the owner
2 that's collecting the rent, but the landlord is the person
3 that is the defendant, so to speak, in the suit that is on
4 the hook for this, and it's the landlord that you want to
5 have notice of this to appear in court to defend it. The
6 management company or the rent collector is just somebody
7 that may be collecting the rent. They may or may not have
8 authority to even fix these things.
9 So you've got a lot of different types of
10 landlord-tenant relationships, all of which are taken into
11 consideration in the definition in chapter -- in 92.003 of
12 the Property Code that talks about landlords -- well, I
13 think 90.001 is the definitions, but all of this is
14 governed by the Property Code, which is a well-established
15 body of law that defines who a landlord is and who the
16 registered agent for service of process is.
17 And, fellow task force members, consider
18 yourselves codefendants in this process today, so feel
19 free to --
20 MR. DOGGETT: I would be happy to respond.
21 Also, remember, if there's somebody collecting the rent on
22 behalf of this shell of an organization and often as might
23 be in court requesting an eviction, so, remember, it works
24 both ways. The agents that are involved in collecting the
25 rent and enforcing the rules are also those same

1 individuals that may be subject to service of process. So
2 we understand -- as a tenant advocate understand that
3 difficulty, but it's not something insurmountable and that
4 the justice of the peace courts do a lion's share of the
5 work trying to, not assist, but at least try to imply that
6 you don't need to be suing the management company or the
7 manager, you need to be suing the owner of the property,
8 who serves a different person. And, you know, it's a
9 difficult problem, but it's something that the Property
10 Code has had for a long time and we've managed to deal
11 with for a long time, and, remember, it works both ways.
12 You know, there's people that are trying to collect rent
13 and file suits for evictions, so those same people are
14 involved on the other side.
15 CHAIRMAN BABCOCK: Okay.
16 HONORABLE TOM LAWRENCE: We were trying not
17 to have a situation where a tenant is trying to sue, for
18 example, a homeowner, and the homeowner may be out of
19 state, but they may have a rent collector or a management
20 company, so we don't want them to try to send the citation
21 to Massachusetts and them ducking service and it never
22 getting served and nothing ever happens. So there needs
23 to be a way to serve an authorized agent to move this
24 process forward. So it is the landlord that has to
25 ultimately be on the hook for this and be responsible,

1 given the notice to appear, although he may be served
2 through his rent collector or management company, may be
3 served directly, but it's most of the time going to be the
4 apartment manager that's going to be involved in this.
5 MR. MUNZINGER: Because of the definition in
6 92.003. I understand, and I appreciate it. I'm sorry I
7 took your time.
8 CHAIRMAN BABCOCK: No problem. Let's go to
9 .4, service.
10 HONORABLE TOM LAWRENCE: Service of
11 citation. We have, for want of a better word, adopted a
12 convention to try to comply with Rule 103. "The sheriff,
13 constable, or other person authorized by law," meaning a
14 private process server, "who receives the citation shall
15 serve the citation by delivering a copy of it, along with
16 a copy of the petition, including any exhibits, to the
17 landlord at least six days before the appearance
18 date." This was something that the tenants' lawyers felt
19 strongly about, that they wanted a copy of the -- not only
20 a copy of the petition to go with the citation but any
21 exhibits. So a tenant, if a tenant wants exhibits, like
22 the notices, for example, or maybe other things, but if
23 the tenant wants an exhibit then the tenant would have to
24 give the court copies of these exhibits that would be
25 attached to the petition and the citation and delivered

1 that way.
2 Bear in mind that just like in eviction
3 these may ultimately end up being tacked to the door so
4 that we're going to get to that in the next rule about
5 alternate service, but oftentimes these are going to be --
6 sometimes hand-delivered and sometimes slid under the door
7 or sometimes attached to the door or put through a mail
8 slot.
9 There was a difference of opinion on the
10 task force as to whether or not exhibits needed to be
11 attached, but I think, if I remember the philosophy, it
12 was that -- it was that they wanted the landlords to have
13 copies of these notices to see the written notices that
14 were given. I guess, Robert, is that correct?
15 MR. DOGGETT: Absolutely. Because we feel
16 like whatever the tenant files with the court, the
17 landlord has to get the same thing that the court has, and
18 that's just a matter of fairness. So far I feel awkward,
19 but we want to make sure that the process is fair, so that
20 landlords, you know, have everything they should have so
21 when they walk into court they can't say, "I didn't get
22 that, Judge. You got that, I didn't get that. I didn't
23 have time to investigate it." We want this process to be
24 as fair as possible, and, frankly, it goes back to
25 evictions when landlords file things with the court. We

1 think it ought to be the same rule that if a landlord
2 files notices and things with the court, the tenant should
3 get a copy of those. So, in other words, what's good for
4 the goose is good for the gander.
5 CHAIRMAN BABCOCK: Carl.
6 MR. HAMILTON: Are you talking about serving
7 exhibits that are not attached to the petition?
8 HONORABLE TOM LAWRENCE: No, I think these
9 would have to be -- I think what is anticipated is that a
10 tenant comes in with his petition and a copy of his notice
11 to -- of the condition, notice to the landlord, and that
12 he would have an original and then he would have to
13 provide a copy of any of these attachments or exhibits
14 that would have to be served. The court is not going to
15 make copies. He's going to have to bring in the copies
16 that he wants attached to the petition to be served.
17 MR. HAMILTON: But they are going to be
18 attached as exhibits to the petition, though.
19 HONORABLE TOM LAWRENCE: Yes.
20 MR. DOGGETT: And those are optional. The
21 exhibits are optional. Some people just want to file
22 things, and that's great, but we want to make sure if they
23 file something, that all parties have to get a copy of it.
24 If they say, "Oh, if I don't want to make copies of this,
25 then forget it," they can pull it back and say, "No, I

1 just want to file this petition." So exhibits are
2 optional, but whatever is filed with the court we want to
3 make sure the defendants get it, too.
4 CHAIRMAN BABCOCK: Okay. Anything else on
5 that? Yeah, Elaine.
6 PROFESSOR CARLSON: Judge Lawrence, what is
7 different about 737.4 and service and return under 536 and
8 537? Are they -- is all of that applicable?
9 HONORABLE TOM LAWRENCE: Well --
10 PROFESSOR CARLSON: Except for attaching
11 exhibits.
12 HONORABLE TOM LAWRENCE: Well, one thing
13 that's different is that we want the citation returned at
14 least one day prior to the day assigned for trial, and
15 that's a problem with evictions, because the constables
16 can return these citations on the day of trial, so if the
17 docket is at 9:00 o'clock, we can't proceed until we get
18 the citation back, so -- and we have to reset. So we want
19 these things at least one day before so we know that we
20 have the citation before we go to trial. That's one thing
21 that's different. I don't know that it's exactly like
22 536. We looked at 536 and 537. We also looked at 739,
23 740 and 742 and 742a in these next two rules. I don't
24 know that they're identical, but they were modeled on
25 those rules, if that's what you're asking.

1 PROFESSOR CARLSON: Well, I guess what I'm
2 asking is I see, for example, in 536a, for example, if an
3 authorized person accomplishes service of citation they
4 file a verified return. Are you incorporating that here,
5 or is this different?
6 HONORABLE TOM LAWRENCE: Well, the last
7 sentence -- we were trying not to reprint everything in
8 536.
9 PROFESSOR CARLSON: Right.
10 HONORABLE TOM LAWRENCE: So we put the
11 basics in there, and then the last sentence we intended,
12 "The person serving process shall return and serve it in
13 accordance with the justice court rules in part five of
14 the Rules of Civil Procedure."
15 PROFESSOR CARLSON: So that's an additional
16 requirement, whatever is in 536 and 536a that's not
17 different than what's in 737.4 is supposed to be complied
18 with?
19 HONORABLE TOM LAWRENCE: Yes.
20 PROFESSOR CARLSON: Because I got confused
21 on what the officer is supposed to be doing.
22 HONORABLE TOM LAWRENCE: Well, we were
23 trying to avoid reprinting that entire text of what's in
24 536.
25 PROFESSOR CARLSON: Okay.

1 HONORABLE TOM LAWRENCE: But we can do that
2 if that troubles anybody. But we thought that we hit the
3 highlights of that and then referred to the rule. I don't
4 think there's anything that's inconsistent, other than the
5 requirement that it be returned one day prior, and that
6 really is more an eviction rule type of problem, not
7 necessarily a justice court rule problem.
8 PROFESSOR CARLSON: So if the citation can't
9 be served then the officer would need to comply with 536a
10 and set forth the diligence used and --
11 HONORABLE TOM LAWRENCE: And that's in
12 alternate service that we get to. The serving someone
13 over the age of 16 and attaching it to the door is going
14 to be the next rule that we get to.
15 CHAIRMAN BABCOCK: Okay. Speaking of that,
16 let's go to that.
17 HONORABLE TOM LAWRENCE: Okay.
18 CHAIRMAN BABCOCK: .5. Yeah, Justice
19 Gaultney. Sorry.
20 HONORABLE DAVID GAULTNEY: Maybe I'm missing
21 something, but if there are no exhibits attached to the
22 petition, can any exhibits be offered at trial?
23 HONORABLE TOM LAWRENCE: Certainly. It's
24 not --
25 HONORABLE DAVID GAULTNEY: This says

1 "including any exhibits." That just means anything that
2 is voluntarily attached?
3 HONORABLE TOM LAWRENCE: Yes. Anything that
4 the plaintiff brings, the tenant brings in, and says, "I
5 want this attached to the petition," then under this
6 proposal they would be attached to the petition served.
7 HONORABLE DAVID GAULTNEY: So this is not a
8 strict notice requirement of any exhibits you're going to
9 intend to offer at trial?
10 HONORABLE TOM LAWRENCE: No, you don't have
11 to attach anything if you don't want to, but you can
12 attach whatever you want to attach, if you choose to; and
13 what Robert's saying is that some tenants just feel the
14 need to attach all sorts of things, letters, notices. Not
15 all on the task force thought that exhibits ought to be
16 attached, but that was the majority view.
17 CHAIRMAN BABCOCK: Okay. Anything else?
18 Okay, .5.
19 HONORABLE TOM LAWRENCE: This is alternate
20 service. We ran all of these citation rules by a couple
21 of deputy constables, both of whom have served on another
22 task force that are familiar with this process, and they
23 didn't have any problems with the way we're doing it, but
24 what we're trying to do is overcome the problem with
25 alternate service where you've got a landlord that can't

1 be found or the agent that can't be found for whatever
2 reason. So if you don't get them served then nothing is
3 ever going to happen, so you've got to have some mechanism
4 in order to serve them. So we borrowed heavily from the
5 eviction rules, Rule 742a, which is the eviction alternate
6 service rule.
7 We borrowed heavily from that, but it's a
8 little bit different because the problem with landlords,
9 unlike with tenants, is that in tenants, the tenant is in
10 the precinct. In other words, the suit has to be filed in
11 the same precinct that the property is located in, so you
12 have one constable or sheriff or whoever that's serving
13 that's going to be serving that tenant. So they go out
14 and they can't get the tenant to answer the door, they
15 come back, they get a Rule 742a alternate, and they attach
16 it to the door. So that's not really a problem, but with
17 landlords it's a little bit different because there's no
18 guarantee that all of these people that are going to be
19 listed as possible -- as possible for service are going to
20 be in the same precinct. They may be in different
21 precincts. What that means is if you send the citation to
22 the constable in precinct one, who tries to serve
23 somebody, he can't do it, the next address is in precinct
24 two. It has to go to that constable, who tries to serve
25 it, or it may be out of state, depending on where the

1 owner lives.
2 So it's a little more cumbersome for
3 alternate service, so we've modified Rule 742a a little
4 bit, and just to give you the highlight, is that the
5 service addresses that are listed in the complaint -- and
6 that's part two. That's another reason we wanted that
7 information in part two. That's all the places that you
8 can serve the tenant, or serve the landlord, excuse me.
9 So you go out and you make two attempts at service to
10 personally serve them, and if you can't personally serve
11 them, you come back and you get an authorization from the
12 court to make alternate service.
13 The court then goes out and makes one
14 attempt at each location to serve somebody over the age of
15 16, and if they are unsuccessful in that then they can
16 simply slide it under the door, through a mail slot, or
17 attach it to the door at one of those locations. This was
18 the most streamlined procedure we could come up with that
19 would make sure that they were trying to serve everybody,
20 consistent with what we do on evictions, but yet ensure
21 that someone could be served so the suit could go forward.
22 CHAIRMAN BABCOCK: Yeah, Justice Gray.
23 HONORABLE TOM GRAY: Just two comments. If
24 there is a form promulgated, it would have to have the
25 option of some items that are available but not necessary,

1 and this would be one of them because it appears to be
2 optional to list all these addresses and then include the
3 statement that these are all the addresses, that the
4 person knows of no other addresses at which the landlord
5 could be served. So that seems to be an option available
6 to the tenant in the event that they choose to file the
7 petition, and I notice that right in the middle of the
8 second paragraph of 735.5 you use the term "complaint."
9 Is that something different than a petition? It's the
10 seventh line down right in the middle of the page. I
11 think that's probably just one of those instances where a
12 different word was used, but it looks like it --
13 HONORABLE TOM LAWRENCE: I think it's fair
14 to state that I missed that one. For some reason I
15 thought I caught everything, but that should be
16 "petition," you're right.
17 HONORABLE TOM GRAY: Okay.
18 HONORABLE TOM LAWRENCE: The reason that
19 it's -- that it's optional to list these addresses is that
20 it may be that the landlord is the owner and the rent is
21 paid to the owner, and that's the person that would be
22 served, there are no alternative addresses. Or it may be
23 that the landlord has provided the tenant with the name of
24 the landlord's management company in writing, and that's
25 the person that would be served. So you may only have one

1 person. I would think you would very rarely have more
2 than two. You're going to have the owner maybe and
3 whoever collects the rent would probably be the maximum,
4 so normally you're going to have one, you may have two in
5 many cases, but that's usually all you're going to have.
6 CHAIRMAN BABCOCK: Okay. Anybody else
7 on .5? Yeah, Carl.
8 MR. HAMILTON: In the paragraph above the
9 (a) you say that if the justice can authorize service,
10 anyone over 16, but if the sheriff is unsuccessful -- I
11 assume that means in serving someone over 16 -- then he
12 can do the following. Then again, we're going to serve
13 someone over 16.
14 HONORABLE TOM LAWRENCE: Yeah, I think
15 you're right. I think maybe we need to -- in the second
16 paragraph we probably need to cut out part of that
17 language, because it is repetitive, isn't it? Well, or
18 what we need to do probably is cut it out in (a) maybe.
19 MR. HAMILTON: Cut it out in (a), yes.
20 HONORABLE TOM LAWRENCE: I think you're
21 right. That's a good point. We -- the task force met
22 three times, and we had flurries of e-mails, but we were
23 still trying to correct language on the deadline date.
24 And, by the way, we got this in on time and under budget,
25 too.

1 CHAIRMAN BABCOCK: A rarity these days.
2 HONORABLE TOM LAWRENCE: Yeah. There may be
3 a few things like that that we probably overlooked, and
4 that was probably because we changed something and I just
5 didn't catch it, but I think you're right. I think (a)
6 probably needs to be -- we need to take some of that out.
7 Good point.
8 CHAIRMAN BABCOCK: Anything else on .5?
9 Okay, why don't we go to .6?
10 HONORABLE TOM LAWRENCE: All right, .6 is
11 representation by agents, and this is similar to -- I
12 think it's rule 747 and also 24.007 or 009 of the Property
13 Code that allows -- in an eviction case allows a landlord
14 or a tenant to be represented by an agent, and typically
15 it's the landlord having the management company come in,
16 apartment manager come in, but sometimes we get tenants
17 that have someone come in because the tenant has to work
18 and they get their relative to come in and represent them.
19 So this is just really a continuation of that. It's a
20 fair thing to do in these types of cases.
21 Now, the second sentence is added because I
22 have a lot of people that decide that they are -- they are
23 tenant attorneys, and they come in wanting to represent
24 tenants. They're not lawyers, and the tenant is there,
25 but they want to act like their lawyer, which we believe

1 to be unauthorized practice of law, so what we're trying
2 to say here is that "Nothing in this rule shall authorize
3 a person who is not an attorney licensed to practice law
4 in this state to represent a party before the court if the
5 party is present." Now, it would be permissible under the
6 rules if the tenant were not there or the landlord were
7 not there for that person to speak for them and to
8 represent them, but if they're there, we don't think they
9 ought to act like an attorney and represent them in court.
10 So that's the purpose of that sentence.
11 MR. LOW: But what if the person is going to
12 be a witness, the landlord, I mean, they're going to claim
13 "I told you at a party," but this management company, they
14 handle all of it, and they could go down just because the
15 person -- the owner is going to be there, then the
16 management company can't represent him as they could just
17 because he might be a witness, they brought him in as a
18 witness, and he's going to have to do it himself or stay
19 away.
20 HONORABLE TOM LAWRENCE: Well, that sentence
21 is -- well, now, the first sentence of Rule 6 is almost
22 identical to Rule 747 that we have now and also a specific
23 provision in the Texas Property Code. That first sentence
24 is not a change. I mean, that's been the law for a long,
25 long time.

1 MR. LOW: No, I'm not questioning that. I'm
2 just questioning under this rule, would that be -- say
3 Richard, somebody -- he owns some houses and one of
4 them -- and so he's -- he might be called as a witness
5 because they may say that they told him about this defect
6 at a party. He doesn't want to handle it. He doesn't do
7 that, so he's got a management company that handles --
8 they do all of that, and they can do that. Just because
9 Richard's going to be there then the management company
10 can't do it, and Richard would have to do it himself, be
11 his lawyer.
12 HONORABLE TOM LAWRENCE: Well, I think that
13 that's the law now. I think if the party is there then
14 the party is supposed to be -- you know, the party before
15 the court being the responsible party who can call
16 whatever other witnesses they want to call and can call
17 themselves as a witness, but correct me if I'm wrong, but
18 I think that's exactly what the law is now.
19 CHAIRMAN BABCOCK: What if the landlord
20 doesn't -- isn't there at the beginning? He just comes in
21 later --
22 MR. LOW: Yeah.
23 CHAIRMAN BABCOCK: -- as a witness. Is that
24 okay, or does the management company then have to stop and
25 turn it over to the landlord who's there?

1 HONORABLE TOM LAWRENCE: Well, I don't know
2 that I've ever been faced with that, but I think if the
3 landlord got there, that at that point I would insist that
4 the landlord be --
5 CHAIRMAN BABCOCK: Take over.
6 HONORABLE TOM LAWRENCE: -- take up the
7 proceeding, because I believe that's what the law requires
8 now.
9 MR. LOW: So you're suggesting landlords
10 stay away?
11 HONORABLE TOM LAWRENCE: Well, no, not at
12 all.
13 MR. LOW: No, I'm kidding.
14 CHAIRMAN BABCOCK: Only this committee could
15 have thought of that hypothetical. Richard Munzinger, and
16 then Frank.
17 MR. MUNZINGER: I'm just curious if the word
18 "appear" were substituted for the word "representation"
19 would it clear some of that up a little bit? I don't
20 know. And also, you just answered my question about the
21 disjunctive "or be represented." You couldn't have both
22 present. That's what the judge just said, but if you said
23 "appear by," "appear in person or by agent" that may
24 remove the concern that somebody is acting as a lawyer
25 that shouldn't be.

1 HONORABLE STEPHEN YELENOSKY: Is that
2 consistent with the statute, Judge Lawrence?
3 HONORABLE TOM LAWRENCE: Well, I believe
4 that we tracked the statute. The statute says, "Parties
5 may represent themselves or be represented by authorized
6 agent." Parties -- no, we tracked the statute. We
7 tracked the rule and the statute. I mean, this is both in
8 the Property Code and in the Rules of Procedure.
9 CHAIRMAN BABCOCK: Frank Gilstrap.
10 MR. GILSTRAP: I understand that you're
11 adding the second sentence to proposed Rule 737.6 to keep
12 unauthorized people from practicing law for tenants in
13 these proceedings, but it -- you know, you don't have it
14 in Rule 747(a), and it seemed -- even though this suit
15 involves -- contemplates a suit by the tenant against the
16 landlord and eviction contemplates a suit by landlord
17 against tenant, it would seem to me there is no difference
18 in this situation. If it's in one, it ought to be in the
19 other. In fact, I think if you put it in 747(a) and don't
20 put it in -- excuse me, if you put it in this rule, 737.6,
21 and don't put it in 747(a) I think the unauthorized
22 attorney could come in and say, you know, "I'm not
23 excluded," you know. "They excluded me here, but they
24 didn't exclude me in eviction, so I've got a right to be
25 here."

1 HONORABLE TOM LAWRENCE: If that's a motion
2 to amend 747(a), I second it.
3 MR. GILSTRAP: And second, I mean, this
4 doesn't -- none of this prevents an unauthorized attorney
5 as an unlicensed attorney from representing landlords as
6 long as the landlord is not present.
7 HONORABLE TOM LAWRENCE: That's right.
8 MR. GILSTRAP: It permits it, in fact. So
9 someone could set up a practice. "I'm not a lawyer, but
10 I'm good at it, and you're a bunch of apartment owners,
11 and I'm going to represent you and cut you a good deal,
12 and I'm not a lawyer." Okay.
13 HONORABLE TOM LAWRENCE: That's what the
14 Legislature has provided and the Court.
15 MR. GILSTRAP: All right.
16 CHAIRMAN BABCOCK: Anything more on .6? .7.
17 HONORABLE TOM LAWRENCE: All right.
18 "Docketing, appearance, and trial." (a) is "The case
19 shall be docketed and tried as other cases; (b), the
20 appearance date on citation shall constitute the trial
21 date," because that's what we believe the statute says, is
22 that it be handled -- I forget the exact language, but
23 within 6 to 10 days.
24 (c), "Any party shall have the right to
25 trial by jury by making a request to the court within five

1 days after the date the landlord is served with citation
2 by paying a jury fee. If either party demands a jury, the
3 jury shall be empanelled as soon as practicable. If
4 neither party demands a jury, the justice shall try the
5 case.
6 (d), "The justice may continue the trial for
7 good cause shown. Continuances should be limited, and the
8 case should be reset for trial on an expedited basis." We
9 know that the Legislature says you need to handle these
10 within 6 to 10 days, but there are things that are going
11 to come up that are going to dictate a continuance, both
12 from the tenant's side and the landlord's side, and we
13 need to have some mechanism to do that, but we're trying
14 to get across that it should be limited and for good
15 cause.
16 (e), "If the tenant appears at trial and the
17 landlord has been duly served and fails to appear at the
18 trial, justice may proceed to hear evidence. If the
19 tenant establishes that the tenant is entitled to recover,
20 the justice shall render judgment against the landlord in
21 accordance with the evidence." That's the default
22 judgment provision, and then (f), "If the tenant fails to
23 appear for trial the justice on motion of the landlord may
24 dismiss the suit," and that's the DWOP provision.
25 CHAIRMAN BABCOCK: Okay. Comments? Justice

1 Gray.
2 HONORABLE TOM GRAY: Under (c), while I
3 always prefer shorter as opposed to longer, you use the
4 word "the justice shall try the case." I would wonder if
5 "the justice shall decide the case" would not be better in
6 that circumstance, and in (f) I don't know why the justice
7 should have to wait for the landlord to make the motion to
8 dismiss the suit. They ought to be able to do it sua
9 sponte, on their own motion.
10 HONORABLE TOM LAWRENCE: Well, my opinion on
11 that is that the -- is that the judge should not advocate
12 rights for a party by on his own motion dismissing in a
13 situation like this, that the motion needs to come from
14 the party and the judge act on it as opposed to the judge
15 deciding that he'll enforce some rights for a party on his
16 own motion.
17 HONORABLE TOM GRAY: Then don't make it on
18 his own motion. Just "the judge shall dismiss the case."
19 If the petitioner doesn't show up, the tenant doesn't show
20 up, the justice shall dismiss the suit. Then he's not
21 making a motion.
22 HONORABLE TOM LAWRENCE: Well, we just
23 thought it was cleaner that there be a motion. We're
24 going to have a motion on a default judgment.
25 HONORABLE TOM GRAY: You have a pro se

1 landlord. He doesn't know he needs to move to dismiss if
2 the tenant doesn't show up. What happens?
3 HONORABLE TOM LAWRENCE: Well, he gets
4 hints.
5 HONORABLE TOM GRAY: "If you move to
6 dismiss, I will?"
7 CHAIRMAN BABCOCK: "Do I hear a motion to
8 dismiss? I thought so." Ralph had his hand up.
9 MR. DUGGINS: Under (c), the jury request,
10 you've also got similar language in 737.3. I'd like to
11 suggest you delete the language in 737.3, the second
12 paragraph, since you have it here and ask whether or not
13 this request, you ought to have the word "written" in
14 front of "request." I just don't feel strongly about it,
15 I just ask that question.
16 HONORABLE TOM LAWRENCE: We know that there
17 is also a provision in 3, and I guess we thought it would
18 be better to, I guess, provide a lot of notice on this and
19 have it in two places. Yeah, it is duplicative, but we
20 thought it needed to be in 3, and we thought it needed to
21 be here in 7.
22 MR. DUGGINS: But where do you advise the
23 plaintiff that the plaintiff can do it like you advise the
24 defendant in citation?
25 HONORABLE TOM LAWRENCE: Well, right here.

1 I think 3 also tells them that, but I think 7 certainly
2 tells them that. It says, "Any party shall have the right
3 to trial by jury."
4 MR. DUGGINS: I know, but in the citation
5 you're specifically admonishing a defendant that he or she
6 or it pursue a jury trial by doing -- making the request
7 and paying a fee. We don't have a similar admonition to
8 the plaintiff.
9 MR. DOGGETT: Maybe the form could say, "Do
10 you want a jury?"
11 MR. DUGGINS: That's fine, but I think it
12 ought to be both ways if you're going to tell people that.
13 HONORABLE TOM LAWRENCE: Well, I don't know
14 how you -- other than putting it in the rule how would
15 you -- how would you tell the tenant? Because it's the
16 landlord that's getting served the citation that we get
17 that notice.
18 MR. DUGGINS: Put it in the form that you
19 may try the case to a jury, check this box, and pay
20 whatever the fee is.
21 CHAIRMAN BABCOCK: Okay. Yeah, Jeff.
22 MR. BOYD: Yeah, related to that, the
23 language of 737.7(c) as written sounds like if you're
24 going to request a jury you can't do it until after the
25 landlord has been served, and I assume the intent is that

1 the plaintiff could request the jury in the written
2 petition.
3 HONORABLE TOM LAWRENCE: Well --
4 MR. BOYD: It certainly has to be no later
5 than five days after the landlord is served, but as
6 written to say "within five days," you have to make the
7 request within five days, it's unclear. It sounds like
8 they can't do it until service has occurred.
9 HONORABLE TOM LAWRENCE: Well, that's the
10 way Rule 744 is for evictions, and we just parroted that,
11 but you're right. The tenant would have to know when he
12 was served and come in within that five days. We don't
13 mean to preclude a landlord -- or, I mean, a tenant from
14 requesting a jury trial when they file it. We don't mean
15 to preclude that.
16 MR. BOYD: So you might just change the word
17 "within" to "no later than."
18 CHAIRMAN BABCOCK: Right. Right.
19 HONORABLE TOM LAWRENCE: "No later than."
20 Okay.
21 HONORABLE STEPHEN YELENOSKY: Chip?
22 CHAIRMAN BABCOCK: Judge Yelenosky.
23 HONORABLE STEPHEN YELENOSKY: Why do we even
24 need (d), (e), and (f)? I don't think we say those things
25 with respect to any other appearance or failure to appear

1 or continuance, do we? I mean --
2 HONORABLE TOM LAWRENCE: Yeah.
3 HONORABLE STEPHEN YELENOSKY: I mean, I
4 don't know of anything in the Texas Rules of Civil
5 Procedure for district or -- for district courts where it
6 tells you what you do if somebody doesn't appear for
7 trial.
8 HONORABLE TOM LAWRENCE: Well, there is in
9 JP court in the 500 series.
10 HONORABLE STEPHEN YELENOSKY: Oh, there is?
11 HONORABLE TOM LAWRENCE: Yeah. Yeah.
12 That's why we put this in there, because it's currently
13 existing. You need to have some mechanism to explain how
14 these cases are handled. I mean, if you don't put
15 anything, you're just sort of leaving it up to everyone to
16 interpret what they ought to do, so here you're setting
17 forth that if the landlord doesn't -- if the landlord
18 doesn't show up, the tenant can move for default; tenant
19 doesn't show up, the landlord can move for dismissal. I
20 mean, you're setting it all out so everybody understands
21 the process.
22 HONORABLE STEPHEN YELENOSKY: Okay.
23 CHAIRMAN BABCOCK: Elaine, then Harvey.
24 PROFESSOR CARLSON: Yeah, 737.7(f), I like
25 the fact that it's on motion of the landlord, because in a

1 Rule 165a dealing with DWOPs, when it's on the court's on
2 motion, has a lot of procedural protections that aren't
3 incorporated here, and maybe they don't need to be because
4 I guess if the tenant's case gets dismissed it's without
5 prejudice. If it's still not repaired, I guess you have a
6 new cause of action.
7 CHAIRMAN BABCOCK: Right. Right.
8 HONORABLE STEPHEN YELENOSKY: But that's
9 different when somebody doesn't show up for trial. I
10 mean, it's not a dismissal. It's just if they don't show
11 up for trial, how are they ever going to meet their
12 burden. You just render a take-nothing judgment. Why do
13 you need --
14 HONORABLE TOM LAWRENCE: Well, this is
15 consistent with Rule 538, Rule -- oh, let's see --
16 HONORABLE STEPHEN YELENOSKY: I mean, it's
17 not as if you have a DWOP, a motion to dismiss, where the
18 parties are acting outside the context of a setting on the
19 merits. You have a setting on the merits, one side
20 doesn't show. We all sort of know -- well, we, judges,
21 should know what to do in that instance, who has the
22 burden, who's there.
23 HONORABLE TOM LAWRENCE: This is standard
24 practice in justice court under Rule 538, and we tried to
25 keep these consistent with the eviction rules and the

1 justice court rules as much as possible. This spells it
2 out. I don't think it hurts anything by being in there,
3 and it provides some clarity to the litigants and the
4 court as to how they proceed.
5 CHAIRMAN BABCOCK: Harvey.
6 HONORABLE HARVEY BROWN: On subpart (d) I
7 wondered, Judge, why you use the verb "should be reset."
8 "Should be" rather than "must" or "shall" there. That
9 seems to give a little more discretion, and in light of
10 the legislative mandate of 6 to 10 days, I was curious
11 about that.
12 HONORABLE TOM LAWRENCE: Just giving the
13 trial judge some discretion.
14 HONORABLE HARVEY BROWN: Over and above the
15 discretion the expedited basis already gives them?
16 HONORABLE TOM LAWRENCE: Well, I don't know
17 that there is a lot of conscious thought to that
18 particular word. I don't know. I don't have a strong
19 feeling one way or the other about it. I think "should"
20 was there just to provide guidance more than specifics.
21 CHAIRMAN BABCOCK: It's pretty hard to say
22 it's limited, but it "shall be limited." It's either
23 limited or it isn't.
24 HONORABLE TOM LAWRENCE: Yeah, "should be
25 reset on an expedited basis," "shall be reset," what is

1 the real practical difference of that? What does
2 "expedited basis" mean? I mean, it's kind of a nebulous
3 term, so I don't know that the modifier makes much
4 difference with that ultimately.
5 CHAIRMAN BABCOCK: Justice Hecht, did you
6 have something?
7 HONORABLE NATHAN HECHT: Yes. What is the
8 jury practice in these kinds of cases?
9 HONORABLE TOM LAWRENCE: I knew somebody was
10 going to ask me about that. Here's the problem. You
11 can't always get a case to jury trial within 6 to 10 days.
12 It's just not possible. If somebody comes in on the fifth
13 day after service and says they want a jury trial, you're
14 in all likelihood not going to get that jury trial within
15 6 to 10 days after the date of service, because that only
16 gives you, what, 2 to 5 days to get it in. So what
17 happens is that you try to get it as quickly as possible.
18 You try to set it on the next jury docket.
19 Those of us in the urban counties typically
20 get our jurors from the central jury pool. We have to
21 give them our jury dates a month in advance. If I call
22 down to the jury pool and say, "I need a jury out here on
23 next Tuesday," they might not laugh at me, but I'm not
24 going to get it, you know, and --
25 CHAIRMAN BABCOCK: They respectfully

1 decline.
2 HONORABLE TOM LAWRENCE: Yeah, they would
3 respectfully decline, so that's why it's as soon as
4 practicable because it's just not going to happen within 6
5 to 10 days. Now, you might hit it lucky, and that happens
6 from time to time that you've got a jury docket set within
7 that time period and you can add it to it or you can get
8 it quickly after, but that's why we say "as soon as
9 practical" because you can't always do it within 6 to 10
10 days.
11 HONORABLE NATHAN HECHT: So why should there
12 be juries in these cases? It looks like it's just a
13 built-in delay.
14 HONORABLE TOM LAWRENCE: Well, I guess
15 that's kind of a policy matter for the Court as to whether
16 they would want to deny a jury trial on these. We didn't
17 even talk about the possibility of not having one. It was
18 just kind of understood.
19 HONORABLE NATHAN HECHT: Damages can be up
20 to 10,000?
21 HONORABLE TOM LAWRENCE: Yes, capped at
22 10,000.
23 HONORABLE NATHAN HECHT: But I suppose a lot
24 of cases are about broken things and sort of repairs
25 that --

1 HONORABLE TOM LAWRENCE: I would say leaky
2 water pipes, toilets, would be a high percentage of the
3 types of cases you get, but leaky roofs. You know, in
4 Hurricane Ike you had a lot of roofs and things of that
5 type. Maybe power off. Robert probably has a better feel
6 for the types of causes of action, but I would say
7 plumbing is going to be at the top of the list.
8 MR. DOGGETT: Electrical, there's all kinds
9 of damages or issues that weren't repaired that landlords
10 don't want to spend the money on repairs.
11 Air-conditioning, especially in South Texas, is a major
12 problem, but your question is a good one. It wasn't
13 discussed heavily. Evictions, of course, there is that
14 right. There is a de novo appeal from a JP court, of
15 course, to the county court, and so it can be a whole new
16 jury trial. It's a reasonable question.
17 CHAIRMAN BABCOCK: How often are juries
18 demanded?
19 MR. DOGGETT: I would tell you rarely, but I
20 think Judge Lawrence would have a --
21 CHAIRMAN BABCOCK: Judge Lawrence, how often
22 are juries demanded?
23 HONORABLE TOM LAWRENCE: In evictions?
24 CHAIRMAN BABCOCK: No, no, no. In these
25 repair situations.

1 HONORABLE TOM LAWRENCE: Who knows. Never
2 had one. I've never talked to anybody that's ever seen
3 one, a repair case, filed under this particular section.
4 CHAIRMAN BABCOCK: Yeah.
5 HONORABLE TOM LAWRENCE: The only county
6 court at law judge that I was able to get a response back
7 from has been there 10 years and never heard of one.
8 HONORABLE NATHAN HECHT: But how many in
9 eviction cases?
10 HONORABLE TOM LAWRENCE: Oh, gosh. I do
11 probably 2,500 evictions a year, and I probably have
12 eviction jury trials maybe 10, and of those 10 I might
13 have four or five actually go, so very few.
14 HONORABLE NATHAN HECHT: Wendy, what's your
15 view of a jury in these cases?
16 MS. WILSON: Well, your Honor, we really
17 didn't talk about this, and, you know, I mean, again, I'd
18 reiterate what Robert said earlier in that they are
19 allowed in evictions, and we tried to -- the idea was to
20 have these proceedings be similar to those in evictions,
21 but again, because of the expedited nature of them, you
22 know, I think probably the reality is they won't -- there
23 won't be juries requested.
24 HONORABLE TOM LAWRENCE: In a writ of
25 re-entry, which is -- it's similar in that it's expedited

1 and there's a possibility of going to jail for contempt,
2 but there's no money judgment for damages, but it's sort
3 of similar. There's no jury trial in that, and the order
4 of restoration, I don't think there's a jury trial in
5 that. So there are some somewhat similar things the
6 Legislature has done that has not provided for jury
7 trials. The only difference is that you do have -- you
8 will end up with a judgment that --
9 HONORABLE NATHAN HECHT: That you can appeal
10 de novo?
11 HONORABLE TOM LAWRENCE: -- that you can
12 appeal de novo without posting an appeal bond, so there is
13 that protection.
14 CHAIRMAN BABCOCK: Judge Christopher, you
15 had your hand up a minute ago?
16 HONORABLE TRACY CHRISTOPHER: Oh, this was
17 just on the continuances. In the other JP rules, "for
18 good cause shown supported by affidavit of either party,"
19 y'all have dropped that out of this on purpose?
20 HONORABLE TOM LAWRENCE: Yeah, on purpose.
21 We thought that was kind of cumbersome to do that,
22 particularly with this 6- to 10-day requirement, that you
23 require somebody to in a short period of time to come down
24 with an affidavit, and so we relaxed that a little bit.
25 It's up to the court to decide to grant it or not, so

1 there's -- you know, there's a stop there, but we thought
2 the affidavit was just a little cumbersome.
3 CHAIRMAN BABCOCK: Frank.
4 MR. GILSTRAP: I want to go back to the
5 question of the parallelism between this proposal, which
6 is going to be section two of the special proceedings, and
7 forcible entry, which is going to be -- which is section
8 three. It looks to me like this is covering the same
9 material that's covered in Rule 743 through 747 and also
10 748 in the forcible entry rules. What -- can you tell me
11 if there are any differences and are those differences
12 significant, or is it basically going to be more or less
13 the same in both type proceedings?
14 HONORABLE TOM LAWRENCE: Well, I think that,
15 you know, the base for these, for these set of rules, was
16 the eviction rules, the small claims court rules, and the
17 justice court rules. I don't know that we -- except with
18 a few exceptions, we didn't reprint things exactly. We
19 changed things to make it work for these rules, and I
20 think in some cases we improved it.
21 MR. GILSTRAP: I understand. I'm saying I
22 guess, you know, but a lot of these changes then could be
23 also made in the forcible rules.
24 HONORABLE TOM LAWRENCE: If that's a motion,
25 I'll second it.

1 MR. GILSTRAP: I'm just concerned about --
2 CHAIRMAN BABCOCK: You're getting a lot done
3 today.
4 MR. GILSTRAP: I'm just concerned about
5 clever lawyers scrutinizing these things and saying,
6 "A-ha, it's in the rules for landlord repair, but not in
7 the eviction rules, and there's some significance to
8 that."
9 HONORABLE TOM LAWRENCE: Completely
10 different causes of action, different parts of the rule, I
11 wouldn't think that would be much of an argument that
12 would be successful, but, yeah, I guess it could be made.
13 MR. DOGGETT: And it's about ready to be
14 made in a few minutes when we get to the contempt issue.
15 No offense.
16 CHAIRMAN BABCOCK: I knew there was some
17 clever lawyers here. Buddy.
18 MR. LOW: Yeah, you were asked about the
19 continuance, and you dealt specifically with that, but
20 Rule 566 provides default or dismissal and motions for new
21 trial. I know you can't meet within the six-day deadline.
22 Did y'all -- is there anything in there that says that 566
23 doesn't apply to this proceeding?
24 HONORABLE TOM LAWRENCE: No. We get to that
25 later.

1 MR. LOW: Okay. All right.
2 HONORABLE TOM LAWRENCE: That's in later
3 rules where we start talking about appeals and motions for
4 new trial, but we'll deal with that a little bit later.
5 MR. LOW: You had dealt with it up here and
6 Tracy asked about --
7 HONORABLE TOM LAWRENCE: We're on pretrial
8 right now.
9 MR. LOW: Okay.
10 CHAIRMAN BABCOCK: Let's take our morning
11 break. 15 minutes.
12 (Recess from 10:45 a.m. to 11:13 a.m.)
13 CHAIRMAN BABCOCK: Okay. Judge Lawrence,
14 let's get the firing squad back in place and start
15 shooting. .8.
16 HONORABLE TOM LAWRENCE: We were on 16; is
17 that right?
18 CHAIRMAN BABCOCK: Yeah, we were on .16.
19 HONORABLE TOM LAWRENCE: All right. 8,
20 judgment. "A justice may enter a judgment against a
21 landlord for failure to repair or remedy condition at the
22 leased premises. If the total judgment including the
23 order directing the landlord to repair or remedy a
24 condition does not exceed 10,000, excluding interest and
25 costs of court." This 10,000 is an absolute cap.

1 Normally I can render judgment for more than 10,000 if the
2 amount in controversy goes up solely because of the
3 passage of time, but not with this. This is absolutely
4 capped by the statute at 10,000, and this becomes a
5 problem, as we're going to see a little bit later, because
6 you're going to have a landlord saying that, "Yeah, I can
7 repair this for $6,000." Then they may come back five
8 days later and say, "I just got my contractor out there,
9 it's going to take 11,000," and all the sudden you've got
10 a jurisdiction problem. So this 10,000 is an important
11 number because it can never exceed 10,000 exclusive of
12 costs and interest.
13 "The judgment may, (a), order the landlord
14 to take reasonable action to repair or remedy the
15 condition. (b), order the landlord to reduce the tenant's
16 rent." Now, this reduction of rent, keep in mind, what
17 you're saying is -- is that, all right, I got a notice to
18 repair. The landlord got a notice to repair November the
19 1st, and I decide that, yeah, this condition materially
20 affects your health or safety. I'm going to order the
21 rent to be reduced. It relates back to the date of the
22 notice. So ultimately, if you look at the judgment that
23 I've got attached on this other handout, the judgment is
24 going to be that the rent is reduced from 800 a month to
25 600 a month from November 1st, and then that goes on until

1 the condition is remedied or repaired.
2 So there are two ways that could happen.
3 One way that could happen is if the judge enters an order
4 to repair at the same time the order to reduce rent
5 occurs, then the order to reduce rent is going to
6 terminate and revert back to the market rent on the
7 completion date of the order to repair. That's a
8 relatively clean concept and works out well without the
9 necessity of an additional hearing. But if the landlord
10 does -- if the judge does not order the landlord to repair
11 something, for example, just says -- well, it may have
12 already been repaired, and they come in and they say, "I'm
13 not going to order it to be repaired or remedied, but I'm
14 going to reduce the rent and I'm going to grant these
15 other damages."
16 So if the rent is reduced, let's say that
17 there's no order to repair and the rent is reduced
18 conditioned upon this problem with the leasehold, then
19 you've got to have some way to determine when that order
20 to repair goes out of effect and it reverts back to market
21 rent, and that's going to require another hearing. So
22 when you read 8 and then you read 11 later, that's all
23 going to be about the reduction of the rent. It's going
24 to be cumbersome if you don't have an order to repair.
25 I'm hoping that most of these will have orders to repair,

1 and it's going to be clean, and you're not going to have
2 to have another hearing, but there may be some, because
3 there are five separate things you can sue for, the tenant
4 may not ask for the order to repair, the court may not
5 grant the order to repair but may grant the other four,
6 and so we've got to have some mechanism in the rules to
7 account for that.
8 So that gets us to where we are in (b).
9 "Order the landlord to reduce the tenant's rent from the
10 date of the first repair notice in proportion to the
11 reduced rental value resulting from the condition until
12 the condition is repaired or remedied, as long as the
13 order reducing the rent states the amount of the rent to
14 be paid by the tenant, if any, the frequency with which
15 the rent is to be paid, the condition justifying the
16 reduction of the rent, the effective date of the rent
17 reduction, and the termination date of the order reducing
18 rent.
19 "On the date the rent reduction terminates
20 the rent will revert to the rent specified in the lease
21 agreement. If an order to repair or remedy is issued in
22 addition to an order to reduce the tenant's rent then the
23 reduction in rent automatically terminates on the
24 completion date set in the order to repair or remedy,
25 after which the rent returns to the rent amount in the

1 lease.

2 "(2), if the justice did not issue an order

3 to remedy" -- "to repair or remedy in addition to the

4 order to reduce the tenant's rent then the court must hold

5 a hearing to determine when the condition has been

6 repaired or remedied and may modify the rent reduction

7 based on that determination."

8 Then (c), (d), and (e) are just the other

9 aspects of 92.0563, the civil penalty, actual damages, and

10 court costs and attorney's fees. But the hard part, the

11 part in this that's the tricky part, is (b), the reduction

12 of rent.

13 CHAIRMAN BABCOCK: Okay. Any comments?

14 Yeah, Ralph.

15 MR. DUGGINS: Why wouldn't you just take

16 what's in the first paragraph and insert that in (a)?

17 HONORABLE TOM LAWRENCE: Well, (a) deals

18 with the order to repair or remedy. That's separate from

19 the order to reduce rent.

20 MR. DUGGINS: No, I'm talking about the

21 first paragraph says that "the order directing a landlord

22 to repair or remedy does not exceed $10,000." Why

23 wouldn't you take out -- take that language out of that

24 and add it in (a)? "Order the landlord to take reasonable

25 action to repair or remedy the condition, provided that it

1 may not exceed $10,000."
2 HONORABLE TOM LAWRENCE: Because you're
3 talking about the total judgment. It's not just the order
4 to repair.
5 MR. DUGGINS: Oh, okay.
6 HONORABLE TOM LAWRENCE: It's everything
7 can't be more than 10,000.
8 MR. DUGGINS: I think that could probably
9 stand some clarification then. I mean, make that clear
10 that the total judgment may not under any circumstances
11 exceed.
12 HONORABLE TOM LAWRENCE: Well, we say that I
13 think about three times in the rules. I mean, I don't
14 know how else we could do it. We tried to repeat that on
15 a number of different occasions, but I -- I mean, we can
16 try to redo that.
17 CHAIRMAN BABCOCK: Carl.
18 MR. HAMILTON: Do I understand that you can
19 order a rent reduction if there is a repair that needs to
20 be made, but let's say it costs over $10,000, so you can't
21 order it done, but you just order the rent reduced?
22 HONORABLE TOM LAWRENCE: Well, you know,
23 that's a jurisdiction question that's going to come up.
24 You know, I guess the -- like any other jurisdiction issue
25 like that where you've got an amount in controversy

1 problem, I think that the tenant could choose to abandon
2 the order to repair and not sue for that and get within
3 the court's jurisdictional limit, and you could order the
4 rest of that. Because you've got five separate things to
5 sue for, and somebody may correct my analysis here, but I
6 believe when you've got five separate things that you
7 could choose to abandon any part of that and just sue for
8 the other parts to get within the jurisdictional limit of
9 10,000, but if you say, "No, I want it repaired" and the
10 repairs are 8,000 and the value of the reduction of rent
11 is a thousand and then you've got these actual and
12 statutory damages that get you over 10,000, then I'm going
13 to dismiss that for want of jurisdiction at that point if
14 the tenant insists on proceeding with all of that and I
15 believe that the repairs are really going to cost 8,000.
16 I mean, there is an element that the
17 landlord is going to have to prove what those repairs
18 cost.
19 MR. HAMILTON: Why would you not always
20 enter an order requiring repairs? Why leave that open to
21 have a hearing later on?
22 HONORABLE TOM LAWRENCE: Well, that's not my
23 choice. I mean, the tenant may not ask for an order to
24 repair, or there may be -- and don't ask me what
25 circumstance it would be, but there may be some

1 circumstance that I would not order the landlord to repair
2 for whatever reason. I mean, it's one of five different
3 causes of action. It's possible it either won't be pled
4 or won't be granted, and you have to take that into
5 consideration if it's possible.
6 CHAIRMAN BABCOCK: Pam.
7 MS. BARON: Yeah, I think, on amount in
8 controversy, I think the cases are pretty clear that you
9 can drop certain elements of damages to stay within the
10 jurisdiction of the particular court. What's odd to me
11 about this is that normally you would not include an order
12 for somebody to go take an action as included within the
13 amount of the judgment, but it looks like the statute here
14 says the judgment including the order to repair can't
15 exceed $10,000, so it does look like you have to value
16 that, which is an unusual way to calculate an amount in
17 controversy, but is that what you concluded, that the
18 statute --
19 HONORABLE TOM LAWRENCE: Yeah.
20 MS. BARON: -- required that?
21 HONORABLE TOM LAWRENCE: Yeah. And look at
22 the judgment form I dummied up. It's a funny-looking
23 judgment form because you've got part of the judgment that
24 is really -- that you can execute on and part of the
25 judgment that's part of the amount in controversy that you

1 can't levy and execute on.

2 MS. BARON: Right.

3 HONORABLE TOM LAWRENCE: I've never seen a

4 judgment like that, but that's exactly what the statute

5 seems to require. Yeah, it's funny, but --

6 CHAIRMAN BABCOCK: Frank.

7 MR. GILSTRAP: If the landlord comes in and

8 proves that the repairs are going to cost $11,000, does he

9 get the suit dismissed?

10 HONORABLE TOM LAWRENCE: Absolutely. If the

11 tenant wants to keep on with the order to repair, then,

12 yeah, the suit's going to have to be dismissed.

13 HONORABLE NATHAN HECHT: But then he's going

14 to district court, right?

15 HONORABLE TOM LAWRENCE: He can go to county

16 or district court.

17 HONORABLE NATHAN HECHT: Bound by his

18 $11,000.

19 HONORABLE TOM LAWRENCE: Yeah. He doesn't

20 lose his cause of action. He just can't do it in JP

21 court.

22 MR. GILSTRAP: He has to come up with

23 another $92.

24 HONORABLE TOM LAWRENCE: Well, it's a little

25 more than that.

1 MR. JEFFERSON: I mean, is that right, is it
2 -- I mean, the statute just says that a justice court may
3 not award a judgment that exceeds $10,000.
4 HONORABLE TOM LAWRENCE: Yes.
5 MR. JEFFERSON: Okay. So, I mean, if you
6 prove repairs that are greater than $10,000, why wouldn't
7 the judgment just be $10,000?
8 HONORABLE TOM LAWRENCE: Oh, well, because I
9 think the law is, is if the amount in controversy is over
10 my jurisdictional limit I have to dismiss for want of
11 jurisdiction.
12 MR. JEFFERSON: I guess I'm questioning
13 whether this is really a jurisdictional limitation.
14 HONORABLE TOM LAWRENCE: Well, I think it
15 is. I mean, I have a limit -- I have a jurisdictional
16 limit anyway of 10,000, and then this caps it at 10,000 in
17 addition to that, but even outside of that, I'm going to
18 have a -- I mean, there's case law that says that if the
19 amount in controversy is outside of my jurisdictional
20 limit I'm supposed to dismiss it.
21 CHAIRMAN BABCOCK: Lamont's point is that
22 this may not be an amount in controversy.
23 MR. JEFFERSON: I mean, the statute doesn't
24 seem to say that. It says you can't award a judgment more
25 than $10,000, but it doesn't say you can't take the case.

1 HONORABLE TOM LAWRENCE: But the Chapter 27
2 of the Government Code says that I have a limit of 10,000
3 on civil suits in my court, and if the amount in
4 controversy is over that -- there are two different things
5 that mandate a judgment of no more than 10,000. One is
6 this specific statute, and the other is Chapter 27 of the
7 Government Code that also says I can't render a judgment
8 over 10,000, but that at least has some latitude that
9 there's some circumstances I can go over it, but still, if
10 it's -- if the pleading is 10,000 or is more than 10,000
11 and it doesn't meet some of these exceptions then
12 typically I have to dismiss for want of jurisdiction.
13 MR. JEFFERSON: I mean, I hear what you're
14 saying as far as if the Government Code says you can't
15 take a case that has an amount in controversy over
16 $10,000. This seems to say you can't have an amount in
17 controversy in justice court that's over $10,000, and so
18 you could take -- you could take the case, but you just
19 can't award a judgment that's over that number. You know,
20 I think it probably requires some judicial interpretation,
21 but --
22 HONORABLE TOM LAWRENCE: Well, see, I'm not
23 going to know at the time the suit is filed what the
24 amount in controversy is, other than the plea may be for
25 actual damages and the statutory damages, civil penalty of

1 500 plus a month's rent. I may know what those are, but
2 I'm not going to have any idea how much the repair is
3 going to be until the landlord comes in and tells me how
4 much it's going to cost. That's when I'm going to realize
5 I may have a jurisdiction problem. It's probably not
6 going to be when the suit is filed that that comes to my
7 attention. It's going to be after I get proof on the
8 amount to repair.
9 CHAIRMAN BABCOCK: Roger had his hand up.
10 MR. HUGHES: No, I -- just echoing Mr.
11 Jefferson's comment, but it seems to me if you start off
12 saying that you have a jurisdictional statute limiting the
13 amount in controversy to $10,000, if I remember the case
14 law, if the damages grow in the interim you can render a
15 judgment in excess, but it seems to me that what we've
16 done -- what's going on here is the Government Code says
17 you have to start off with no more than 10,000, and then
18 you have a statute that says the most you can award is
19 10,000 at the end, so maybe that's the best of both
20 worlds.
21 CHAIRMAN BABCOCK: Okay. Yeah, Judge
22 Yelenosky.
23 HONORABLE STEPHEN YELENOSKY: Well, the
24 practical matter, I would think the tenant's coming in
25 saying, for instance, "Water is coming through my roof. I

1 don't know where it's coming from, but they won't repair
2 it," so that's the claim. Landlord comes in and says,
3 "Yep, it's a roof problem. It's going to cost us a
4 hundred thousand dollars to fix it." The tenant does not
5 want a judgment for $10,000 worth of repairs on that roof
6 because it's not going to stop the water from coming
7 through. They want an order to fix the roof. So surely
8 the statute intended that if they have a good claim for
9 fixing the roof that they get into a court that can order
10 that, and so if we have the leeway here in interpreting
11 the statute in the rules, it seems to me we want to get
12 them into the court that can order the only relief that
13 really is going to make any difference to them. And so if
14 we're saying, well, the JP court could then order the
15 landlord to do one-tenth of the roof work, that doesn't
16 seem to me to be a real world solution.
17 MR. JEFFERSON: Yeah, but is the answer to
18 that to say you can't be in court at all? I mean, the
19 whole idea is so that, you know, aggrieved parties can
20 easily and efficiently get into court and get a judge to
21 look at the situation, and, you know, this has a very
22 expedited procedure to do that. Once it's in court then
23 you've got the landlord's attention, and there are ways
24 you can get either to the appropriate court or he can
25 order some nonmonetary relief or whatever, whatever is the

1 equitable thing to do under the circumstances, but to say
2 that the court who's there for the people, you know, the
3 pro se folks, that if it's not pled right or if you have
4 that technical problem of it's a remedy that would be more
5 than $10,000 you can't even be in court doesn't seem to me
6 to be the appropriate solution.
7 HONORABLE STEPHEN YELENOSKY: May I respond
8 to that?
9 CHAIRMAN BABCOCK: Yeah, sure.
10 HONORABLE STEPHEN YELENOSKY: Yeah. Well,
11 yeah, I think we have the same objective, and I'm just
12 thinking out loud, but I guess if you got a judgment from
13 that in my scenario from the JP court that said, "I can't
14 order you to fix the roof because it's going to cost a
15 hundred thousand dollars, and this precludes me from doing
16 that, but I can do what then, order 10,000 in rent
17 credit?" And if the JP court does that, can the tenant
18 still then go file in county court to get the actual
19 injunctive order to fix the roof? Can they do both?
20 Because if they can't do both then we certainly don't want
21 to give them something that doesn't solve the problem.
22 CHAIRMAN BABCOCK: We're in law school now,
23 right? Okay.
24 HONORABLE STEPHEN YELENOSKY: Well, Judge
25 Lawrence would know the answer to that. What happens if

1 you get a judgment from the JP court that says, "I give
2 you 10,000 worth of rent credit for the leaky roof, but I
3 cannot order them to fix the roof"? Can they then go to
4 county court to get that order?
5 HONORABLE TOM LAWRENCE: If I'm Wendy Wilson
6 I'm going to argue that's collateral estoppel or res
7 judicata, and no. So I don't know the answer to that
8 question. I can tell you that neither the statute nor the
9 bill address that.
10 PROFESSOR HOFFMAN: How could it be res
11 judicata if the court can't render a verdict above a
12 certain number?
13 HONORABLE TOM LAWRENCE: Well, I don't know.
14 I'm speculating it could be one of those two because you
15 have a cause of action that you're bringing in the JP
16 court for part of it, but you're going to go somewhere
17 else for the other part? Does that present a problem? I
18 mean, shouldn't you do it all at one time in one court?
19 CHAIRMAN BABCOCK: The better res judicata
20 argument would be if the costs of the repairs are 11,000
21 and you say, "Look, I can only give you 10,000 under this
22 statute, but I can render a judgment up to 10,000, statute
23 says I can, and so I'll give you 10, but you're going to
24 be leaving a thousand on the table." And the election is
25 made, "Yeah, I want the 10 now. I don't want to have to

1 go to county court and get 11 later."

2 HONORABLE TOM LAWRENCE: They just abandoned

3 part of their claim in essence, yeah.

4 CHAIRMAN BABCOCK: Yeah. Right. And if

5 they don't -- but they can't have it both ways. Anyway.

6 Roger.

7 MR. HUGHES: Well, I'm not sure of the

8 answers, but I pose the question. The JP courts are

9 usually not courts of record, and I thought res judicata,

10 collateral estoppel, only applied if you had a judgment

11 from a court of record, but I still think that, getting

12 back to the original problem, that being aside, you know,

13 I understand the desire of a sympathetic justice of the

14 peace -- justice wanting to do what he can and it not

15 becoming a trap for unwary and somehow foreclosing them

16 from going to the court. I think, you know, I'm unsure --

17 both courts would be very chagrinned to find out that the

18 justice court having done something for the aggrieved

19 tenant, the tenant loses the lion's share of his remedy.

20 So unless we put in some provision to either

21 transfer part of the case to the county court, I think the

22 only -- maybe the only safe thing to do is either build in

23 some kind of safeguard that this does not prejudice their

24 right to seek the remaining relief in county court, or

25 simply tell the judge you're going to have to dismiss the

1 whole thing so they can get complete relief from some
2 court that doesn't have these problems.
3 HONORABLE TOM LAWRENCE: I don't know the
4 answer to that. The task force didn't address this,
5 because we were strictly concerned with the rules in JP
6 court, not what might happen in county or district, so we
7 didn't even talk about this aspect.
8 CHAIRMAN BABCOCK: Any other comments
9 about .8 other than the perhaps esoteric jurisdictional
10 issue?
11 MS. BARON: I object to jurisdiction being
12 called esoteric.
13 CHAIRMAN BABCOCK: Jurisdiction, of course,
14 is fundamental --
15 MS. BARON: Yes, thank you.
16 CHAIRMAN BABCOCK: -- but the discussion
17 could be esoteric. Okay. Anything else on .8? Okay.
18 .9.
19 HONORABLE TOM LAWRENCE: Counterclaims.
20 These things have to be tried within 6 to 10 days. The
21 task force feels that counterclaims should not be
22 permitted. "Counterclaims and the joinder of suits
23 against third parties are not permitted in suits under
24 these rules. Compulsory counterclaims may be brought in a
25 separate cause of action. Any potential causes of action,

1 including compulsory counterclaim, that are not brought
2 because of this rule shall not be deemed to be waived.
3 Any landlord or tenant who prevails in a suit brought
4 under these rules may recover the party's costs of court
5 and reasonable attorney's fees as allowed by law."
6 Now, taking the last sentence first, that
7 tracks 92.005 of the Property Code which says that the
8 prevailing party in a suit under this section is entitled
9 to attorney's fees and costs. Now, the first part of that
10 is kind of similar to the eviction rules. The eviction
11 rules -- and there's a lot of case law on that -- talk
12 about the only part -- the only focus of the eviction
13 rules is for possession, rent, court costs, and attorney's
14 fees, and then the case law talks about any other cause of
15 action that may -- that the landlord may have or that the
16 tenant may have is a counterclaim or not waived and can be
17 brought as a separate action. So we just kind of parroted
18 what was in the eviction rules in the interest of trying
19 to get this done in 6 to 10 days as the Legislature wants.
20 CHAIRMAN BABCOCK: Okay. Yeah, Harvey.
21 HONORABLE HARVEY BROWN: The issue on
22 attorney's fees seems to me like it's in the wrong place.
23 I mean, why only put that in the counterclaims section?
24 Why not have it as its own separate section because it
25 really applies more to the plaintiff's claims than it

1 applies to the -- well, it applies to both, not just
2 counterclaims.
3 HONORABLE TOM LAWRENCE: Yeah. Elaine just
4 said move it up to the judgment. I guess we felt --
5 because when we started talking about counterclaims we
6 talked about counterclaims for attorney's fees and it
7 seemed to be a logical place to put it because of that,
8 but I don't think we would object to putting it somewhere
9 else.
10 CHAIRMAN BABCOCK: It does seem -- since
11 it's going both ways, not just for the landlord defendant,
12 that maybe it ought to go up in the part --
13 HONORABLE TOM LAWRENCE: We can do it up in
14 8, in judgment, if that's what y'all want to do.
15 CHAIRMAN BABCOCK: Nina, did you have
16 something?
17 MS. CORTELL: I was just going to say we
18 could also play with the title.
19 CHAIRMAN BABCOCK: That's another way to do
20 it. Okay. What else on .9? Any other comments on .9?
21 Okay. This looks like this is going to be fun, .10.
22 HONORABLE JAN PATTERSON: Judge Lawrence?
23 CHAIRMAN BABCOCK: Oh, I'm sorry. Justice
24 Patterson.
25 HONORABLE JAN PATTERSON: In 8 we reference

1 attorney's fees, in 9 we reference attorney's fees as
2 allowed by law, and I wonder whether "as allowed by law"
3 only adds confusion to that measurement.
4 HONORABLE TOM LAWRENCE: Well, we actually
5 were trying to narrow it down to 92.005. Maybe it would
6 be better to say "92.005" --
7 HONORABLE JAN PATTERSON: Yes.
8 HONORABLE TOM LAWRENCE: -- and the task
9 force actually talked about that, and I don't remember
10 why, but rejected that in favor of "as allowed by law,"
11 but that wasn't a big issue. It could be changed.
12 MS. BARON: It's probably because 92.005
13 might get renumbered and then where are you at that point?
14 HONORABLE TOM LAWRENCE: That may have been
15 it. I don't remember. That would be wise.
16 CHAIRMAN BABCOCK: Okay. Richard Munzinger,
17 and then Frank. He beat you by a hair, Frank.
18 MR. MUNZINGER: The sentence says "any
19 potential causes of action," second sentence, "including a
20 compulsory counterclaim that are not brought because of
21 this rule shall not be deemed to be waived," and I just
22 ask those who know more about res judicata and claim
23 preclusion if the word "waived" is correct as distinct
24 from saying "precluded."
25 CHAIRMAN BABCOCK: Or barred.

1 MR. MUNZINGER: Sir? Or barred.
2 CHAIRMAN BABCOCK: Or barred.
3 MR. MUNZINGER: Yeah, because waiver is a
4 specific concept, and I'm not sure that that is
5 sufficiently broad.
6 CHAIRMAN BABCOCK: Yeah, waiver is very
7 different than like other things like res judicata.
8 MR. MUNZINGER: It's esoteric, too.
9 CHAIRMAN BABCOCK: Could be esoteric.
10 Frank.
11 MR. ORSINGER: Not since you mentioned it,
12 putting it in the record.
13 MR. GILSTRAP: Judge Lawrence, is this --
14 there's nothing limiting this just to residential tenants,
15 is there?
16 HONORABLE TOM LAWRENCE: Yes.
17 MR. GILSTRAP: It is? Okay. All right.
18 HONORABLE TOM LAWRENCE: Yeah. This section
19 only applies to residential tenants.
20 CHAIRMAN BABCOCK: Okay. Orsinger, did you
21 have something?
22 MR. ORSINGER: No, I was just saying that
23 once it's on the record in here it's no longer esoteric.
24 CHAIRMAN BABCOCK: Lamont.
25 MR. JEFFERSON: Back on the attorney fee

1 thing for a second, the statute doesn't seem to require
2 that the prevailing -- or that any party -- well, the
3 statute says that the judgment may award fees. Is that
4 right? I mean, it's not a -- I don't know exactly what
5 that means, if that means it's a prevailing party
6 requirement or reasonable and equitable, whatever the
7 standard is.
8 HONORABLE TOM LAWRENCE: Well, the way I'm
9 reading it, it says, "A party who prevails in a suit
10 brought under this subchapter may recover the party's
11 costs of court and reasonable attorney's fees in relation
12 to work reasonably expended."
13 MR. JEFFERSON: So that "may" -- are we
14 reading the "may" as an automatic winner gets their fees?
15 HONORABLE TOM LAWRENCE: Well, I think it
16 always has to be proven up.
17 MR. JEFFERSON: Well, I know, but --
18 HONORABLE STEPHEN YELENOSKY: But does the
19 judge have discretion?
20 HONORABLE TOM LAWRENCE: Well, I think he
21 does under that. Wendy, what do you -- have you dealt
22 with that?
23 MS. WILSON: I have not, but I would think
24 that it is at the discretion of the court, but --
25 HONORABLE TOM LAWRENCE: I thought the

1 court -- well, maybe I'm mistaken. I thought the court
2 always had discretion as to the attorney's fees.
3 MR. JEFFERSON: The amount, sure. As to the
4 amount I think that's right, and maybe that's what the
5 "may" applies to, but my question was what -- does the
6 "may" in the statute give the court the discretion to not
7 award attorney's fees?
8 HONORABLE TOM LAWRENCE: Well, I would
9 assume so, but I don't know the answer to that.
10 HONORABLE TRACY CHRISTOPHER: And how does
11 that dovetail into the Supreme Court line of cases that
12 say you don't prevail unless you get money or some sort of
13 declaratory relief?
14 HONORABLE TOM LAWRENCE: To be honest --
15 HONORABLE TRACY CHRISTOPHER: I mean, to put
16 in "any landlord or tenant who prevails" strikes me as
17 problematic because that presumes that a landlord could
18 prevail, and I don't see how a landlord can prevail here,
19 because the landlord will never get money or declaratory
20 relief because there's no counterclaim. So are you
21 arguing that if the landlord wins the suit they get
22 attorney's fees? I mean that's --
23 MR. JEFFERSON: That's my question.
24 CHAIRMAN BABCOCK: Loser pay.
25 HONORABLE TRACY CHRISTOPHER: I don't think

1 that's what that statute means. I don't think it means to
2 change prevailing party law.
3 HONORABLE TOM LAWRENCE: Well, we did not --
4 I don't think we considered the Supreme Court cases. We
5 looked at the statute the Legislature adopted, and we
6 based this on the legislative statute.
7 MR. MUNZINGER: The statute itself says that
8 it's a tenant judicial remedy of attorney's fees in
9 Section 92.0563(a)(5), court costs and attorney's fees, so
10 it's a remedy given to the tenant.
11 HONORABLE TOM LAWRENCE: No, 92.005 is the
12 section that we're talking about.
13 PROFESSOR HOFFMAN: Tracy, are you
14 suggesting that -- I'm trying to follow what you're
15 saying, that maybe the way to read 92.005(a) is that only
16 tenants can be prevailing parties, because they're the
17 only ones seeking relief?
18 HONORABLE TRACY CHRISTOPHER: Yes. I mean,
19 that's what I'm suggesting.
20 HONORABLE TOM LAWRENCE: I don't think
21 that's the case in landlord-tenant law. I think that it's
22 typical that if a landlord -- if a tenant brings a suit
23 and the landlord hires an attorney and the landlord wins,
24 I think typically the landlord gets attorney's fees.
25 MS. WILSON: That's correct.

1 HONORABLE TOM LAWRENCE: Correct me if I'm
2 wrong, Wendy.
3 MS. WILSON: That's my understanding.
4 That's correct, and the way that provision has been
5 interpreted.
6 HONORABLE TOM LAWRENCE: Based on 92.005.
7 CHAIRMAN BABCOCK: So this is the English
8 rule, the loser pays.
9 HONORABLE TRACY CHRISTOPHER: Loser pays.
10 CHAIRMAN BABCOCK: Yeah. Remember when we
11 had the offer of settlement rule, which some people
12 thought was shifting attorney's fees to the loser? There
13 was an uproar of monumental proportions in this committee
14 about that, but I agree with you. I think that's probably
15 what this says, but Tracy's right, if you look at Supreme
16 Court jurisprudence on prevailing.
17 HONORABLE TOM LAWRENCE: I know. Wendy.
18 MS. WILSON: And I think, too, that one of
19 the reasons that -- if I'm recalling, Judge Lawrence, that
20 we put this last sentence in the counterclaim rule was
21 because we wanted to make sure that this was not
22 considered -- or if it was considered a counterclaim, that
23 it didn't preclude in these cases a landlord who
24 prevailed; and, Judge Christopher, I think, you know, who
25 gets a -- the tenant gets a take-nothing judgment, that

1 that's prevailing, would be able to recover attorney's
2 fees under 92.005, and that it didn't mean that you had to
3 bring a separate counterclaim. I think that was the line
4 of the discussion that we had.
5 CHAIRMAN BABCOCK: Yeah, that would make
6 sense.
7 MR. JEFFERSON: You thought a landlord would
8 automatically get fees if they prevailed?
9 MS. WILSON: Well, automatically, that they
10 would be able to do it without having asserted a separate
11 counterclaim for fees, but it would be based on 92.005.
12 HONORABLE TRACY CHRISTOPHER: Well --
13 CHAIRMAN BABCOCK: And there's never been
14 any controversy about 92.005(a) meaning that whoever wins
15 the lawsuit gets attorney's fees? Even in the absence of
16 a counterclaim.
17 MS. WILSON: Not to my knowledge, and I
18 would have to -- I'm not aware of that.
19 CHAIRMAN BABCOCK: Okay. Buddy.
20 MR. LOW: But, Chip, my question is that,
21 landlord or tenant, they can recover reasonable costs.
22 They act as their own attorney, they can't get reasonable
23 attorney's fees for --
24 CHAIRMAN BABCOCK: Oh, that's right.
25 MR. LOW: I mean, you know, they say, "I'm

1 acting as my own attorney, I want a reasonable fee." Do
2 you have to have incurred it or have an attorney, because
3 this could be read that I'm my own attorney, I want a
4 reasonable fee?
5 HONORABLE TOM LAWRENCE: I don't think that
6 one's going to fly, Buddy.
7 MR. LOW: Well, okay. If it won't fly, we
8 don't need to shoot it down.
9 CHAIRMAN BABCOCK: We don't need to get on
10 the runway if it won't fly. Judge Christopher.
11 HONORABLE TRACY CHRISTOPHER: May I suggest
12 just a -- instead of saying "any landlord or tenant who
13 prevails" we just say "any party who prevails" leaving the
14 ambiguity that is already there, there, as to whether the
15 landlord could prevail?
16 CHAIRMAN BABCOCK: Makes sense. Pam.
17 MS. BARON: Judge Christopher, I think in
18 the Texas Supreme Court case that dealt with the
19 prevailing party issue, they only considered it from the
20 perspective of the party that was seeking affirmative
21 relief as the plaintiff and that the defendant in that
22 case did not bring forward the issue about whether they
23 would be entitled as a prevailing party to attorney's fees
24 if the plaintiff failed to obtain any relief at all, so I
25 think that's still an open question. Is that correct,

1 Judge Hecht?
2 HONORABLE NATHAN HECHT: Yes.
3 MS. BARON: Thank you.
4 CHAIRMAN BABCOCK: Yeah, Carl.
5 HONORABLE TRACY CHRISTOPHER: Under the
6 statute or a contract?
7 MR. HAMILTON: Can our rule --
8 MS. BARON: Under a contract.
9 HONORABLE TRACY CHRISTOPHER: Under a
10 contract, yeah, I agree with you under a contract.
11 THE REPORTER: Wait.
12 (Multiple simultaneous speakers)
13 HONORABLE TRACY CHRISTOPHER: But it's clear
14 under our statute that you've got to get money or a
15 judgment of relief to prevail.
16 CHAIRMAN BABCOCK: I suppose we could.
17 Whether we should is another matter. Buddy.
18 MR. HAMILTON: Well, the Legislature didn't
19 do it.
20 MR. LOW: There's a line of cases where you
21 get one dollar in these cases and then that's not
22 prevailing, so if somebody recovers one dollar, and --
23 CHAIRMAN BABCOCK: Yeah. Hey, Dee Dee, were
24 you able to get Carl's comment?
25 THE REPORTER: No, I didn't, actually.

1 CHAIRMAN BABCOCK: Hey, Carl, you're going
2 to have to repeat it.
3 MR. HAMILTON: The question was can't we
4 just define "prevail" in the rule? The Legislature didn't
5 define it, so --
6 CHAIRMAN BABCOCK: And the question is -- I
7 said we could, but the question is should we, and I'm not
8 sure that the Senate Bill 1448 asked us to promulgate
9 rules that might or might not encompass 92.005. You could
10 argue that it doesn't.
11 HONORABLE TOM LAWRENCE: The task force did
12 not even talk about the issue of prevail because you've
13 got a statute that says that, and prevail is kind of a
14 tricky issue that I think the individual courts are going
15 to have to deal with because you've got five separate
16 things you can sue for, so can the -- does the landlord
17 prevail only if he gets a plaintiff take-nothing, or does
18 the landlord prevail if he wins on four of those but not
19 the fifth? I don't know. I think that's up to the
20 discretion of the court maybe, unless there is some case
21 law on this, but we didn't attempt to define what the
22 Legislature did not.
23 CHAIRMAN BABCOCK: Yeah. And I would say,
24 Carl, that there's a substantial policy issue embodied in
25 that statute, and I'm not sure by rule you should try to

1 solve that policy debate. It seems more substantive to
2 me. Buddy.
3 MR. LOW: No, there is a lot of case law
4 under the civil rights, you know, the prevailing party,
5 and there is a lot of case law on who prevails, but to
6 define it, I don't know you can do that.
7 CHAIRMAN BABCOCK: Okay. What else?
8 Anything else on .9? All right. Let's go to .10.
9 HONORABLE TOM LAWRENCE: All right. This
10 will be fun.
11 CHAIRMAN BABCOCK: Particularly since we
12 have two options stretching over five pages.
13 HONORABLE TOM LAWRENCE: All right. Here's
14 the problem: Contempt of court, what is the penalty if
15 you order a landlord to repair something and the landlord
16 doesn't repair something? 92.0563, which is the statute
17 on which all of this is based, does not have any
18 discussion as to what the penalty is. It's silent as to
19 that. All it says is that the court can order the
20 landlord to repair something with no discussion as to what
21 happens if he doesn't repair it. In the original bill,
22 for what this is worth, Senate Bill 1448, the original
23 bill which actually amended a section of the local
24 Government Code, not the Property Code that we're dealing
25 with today, they put in there that the court could issue

1 an injunction against the landlord to order him to repair
2 something, which, of course, has all the powers and rights
3 under that to punish, but then they had a committee
4 substitute; and the committee substitute, which is the
5 bill that was passed, didn't make any determination about
6 the penalty and didn't change the underlying section, so
7 you can say that the statute itself is silent and the bill
8 is silent.
9 Now, looking at some similar -- the argument
10 for holding a landlord in contempt of court would be
11 21.001 of the Government Code and 21.002 of the Government
12 Code, which says basically -- and it's in the materials --
13 it says a court has inherent power to enforce its orders,
14 and then it talks about contempt of court in 21.002. So
15 the argument is that it's an order of the court and you
16 can -- you can enforce that through contempt. It's an
17 inherent power of the court.
18 The issue and why it's not quite as clear
19 maybe is that the Legislature has passed similar statutes
20 to this. One is what's called a writ of re-entry, where
21 the court orders a landlord to readmit a tenant that's
22 been illegally locked out, and that's an order of the
23 court, and the Legislature dictated that if the landlord
24 doesn't let him back in, then the court can put the
25 tenant -- the landlord in jail until he lets him back in.

1 Not three days, not a hundred dollars, but in jail until
2 he lets him back in. In the writ of restoration of
3 utility services, which goes into effect January 1st,
4 there's a similar statute, that if the court orders the
5 landlord to restore utility services to the tenant and he
6 doesn't do it then the landlord can hold -- the court can
7 hold that landlord in contempt.
8 So you've got two similar provisions where
9 the Legislature has specifically said contempt if you
10 don't comply, but the Legislature didn't speak to this.
11 So what do you do in the rule? If you -- I think that the
12 Court could put something in the rule. The Court has a
13 number of places in the Rules of Procedure, all of which
14 are in here where the Court has said that you can hold
15 someone in contempt if they don't comply with this or obey
16 that. So if the Court chose to do it then I think the
17 Court could put something in this rule that you can hold a
18 landlord in contempt under 21.002, three days and/or a
19 hundred dollars, or you could decide that the Legislature
20 did not intend for JPs to hold somebody in contempt
21 because it was in the original bill, was left out of this.
22 It's in similar statutes, but not in this, and 21.001,
23 inherent power of the court, doesn't apply; therefore, you
24 shouldn't do it, and maybe you put something in the
25 comment that says you can't hold somebody in contempt.

1 We can write it round or we can write it
2 flat. I'm only asking that we put something in there one
3 way or the other because -- let me finish. Because JPs
4 are taught to be careful with contempt. We're taught in
5 the training schools and the desk book to use it
6 sparingly, don't do it unless it's clear that you can.
7 Some JPs are going to look at this statute and the bill
8 and they're going to say, "Well, there's no contempt in
9 here. I'm not holding a landlord in contempt." And if
10 you don't hold a landlord in contempt who fails to repair
11 something then there's no real remedy for the landlord not
12 doing it. I mean, you've got other remedies, the
13 reduction of rent and other things, but as far as the
14 order to repair, there's no power to compel the landlord
15 to do it.
16 So if you don't put something in the rule
17 one way or the other, either you can hold them in contempt
18 or not hold them in contempt, I believe that there is
19 going to be confusion in JP world. I think you're going
20 to have some JPs that say "inherent power of the court"
21 and hold them in contempt, some that are going to be more
22 cautious and say, "It's not in the rule, it's not in the
23 statute, I'm reluctant to do that, and I'm not going to
24 want to hold them in contempt." So that is the issue.
25 Now, Rule 10 is written in two ways. Option

1 one has a part (c) where you hold somebody in contempt,
2 and option two does not have a part (c), so that's the
3 difference between the two, and that's the -- some of
4 the -- the task force was split on this. Some felt it
5 ought to -- that it was obvious that contempt is
6 appropriate here, and it should be in the rule. Some felt
7 that contempt may be appropriate, but since the statute
8 doesn't say anything about it and the bill -- and the
9 underlying -- neither the bill nor the statute say
10 anything about it then the rule shouldn't say anything
11 about it. So that in essence is the debate.
12 CHAIRMAN BABCOCK: Why did the statute not
13 say anything about contempt, because it's an inherent
14 power of the court?
15 HONORABLE TOM LAWRENCE: Well, I don't know.
16 I went back and listened to the tapes of the committee
17 hearings. I read the legislative history. There was no
18 discussion of that. All I know is that the original bill
19 had injunction and the substitute had nothing about it,
20 different sections, but Wendy was involved in that and
21 Robert. Maybe y'all have some -- but I don't know what
22 the legislative intent was, but it's not clear, some would
23 argue.
24 CHAIRMAN BABCOCK: Well, is contempt an
25 inherent power, or does it always have to be spelled out?

1 I don't know.
2 MS. WILSON: Well, Government Code 21.001?
3 MS. PETERSON: 2. 1 and 2. 2 specifically.
4 MS. WILSON: 2, gives justice courts the
5 ability to impose contempt up to three days in jail or a
6 hundred-dollar fine.
7 HONORABLE TOM LAWRENCE: Well, let me read
8 -- I'm sorry.
9 HONORABLE STEPHEN YELENOSKY: Well, it also
10 says that they can impose coercive contempt. Coercive
11 contempt is not so limited.
12 HONORABLE TOM LAWRENCE: 21 --
13 MS. WILSON: I guess the point is the
14 statute provides for it.
15 HONORABLE TOM LAWRENCE: 21.001 and 21.002
16 aren't JP court. It says "a court." I mean, this is just
17 the generic "a court." It's not specific to JP court.
18 MR. GILSTRAP: Yeah, but 02 has a provision
19 involving limiting the justice court power.
20 HONORABLE TOM LAWRENCE: The range of
21 punishment, that's correct.
22 MR. GILSTRAP: So obviously it's inherent in
23 that the justice court can impose contempt.
24 CHAIRMAN BABCOCK: Yeah, and 21.001 is
25 styled "Inherent power of the courts." Justice Yelenosky.

1 HONORABLE STEPHEN YELENOSKY: You're going
2 to promote me. Judge.
3 CHAIRMAN BABCOCK: What?
4 HONORABLE STEPHEN YELENOSKY: I think you
5 said "justice."
6 CHAIRMAN BABCOCK: Yeah, well, I promoted
7 you. You're doing good today.
8 HONORABLE STEPHEN YELENOSKY: Or justice of
9 the peace.
10 CHAIRMAN BABCOCK: Yeah, Justice Hecht said
11 demoted, so --
12 HONORABLE STEPHEN YELENOSKY: Yeah, I think
13 it would -- I think it was Lincoln who said, "Law without
14 enforcement is just good advice," and so that's all this
15 would be, and I mean, the question of whether it's
16 inherent power, I guess if you were talking about a
17 district court where you've got a constitutional basis you
18 might say it's inherent constitutionally, maybe not so
19 with JP courts, but this statute, whether you call it
20 inherent or not, there's statutory power of contempt for a
21 court under 21.002, and it's clear that a court includes
22 the justice court not only because of what's in there, but
23 if you look at the structure of the statute it's in the
24 general provisions, which is then followed by appellate
25 courts, district courts, JP courts, municipal courts.

1 And the only limitation with respect to --
2 or the only reference to justice court is to set the limit
3 for punitive contempt, criminal contempt, as it sets for
4 district court and then down below it says "except as
5 provided in subsection (h)," which puts an outer limit I
6 guess even on coercive contempt. "A court's" -- "a
7 court's power to confine or compel the contemptor to obey
8 a court order is not otherwise restricted."
9 I think your point, Judge Lawrence, about
10 being careful with contempt is a very good one, but it's a
11 big difference between -- there's a big difference between
12 saying a court should not hold somebody in contempt
13 without considering all the circumstances in trying
14 perhaps a lesser coercion or maybe shouldn't confine until
15 considering lesser coercion. That is completely different
16 from saying the court doesn't have the power to do it,
17 because, again, if the court doesn't have the power then
18 it's just good advice.
19 CHAIRMAN BABCOCK: Yeah, Robert.
20 MR. DOGGETT: In terms of the legislation,
21 there was two different bills that were pending before the
22 Legislature. They ended up running with the horse that
23 made the least number of changes. In other words, there
24 was a horse that had quite a lot of new law, if you will,
25 and used the word "injunction," and it was a change to the

1 local Government Code, as I recall. And the change that
2 ultimately passed, the Legislature made the change in the
3 Property Code where all the rules were already in play and
4 there was already an indication that the county and
5 district court had this authority, and there was an
6 indication that a justice court does not have this
7 authority, and so ultimately what was done was a strike,
8 as you will see in your packet, a strike through that
9 language on the justice court.
10 So although the words "injunction" was never
11 used in the actual bill itself, nor is it ever stated in
12 the Property Code where all this is originating from, I
13 don't think there's ever been any doubt about what a court
14 has or has not, and so what this bill ended up doing was
15 raise the justice court jurisdiction, if you will, or
16 abilities up to the level of a county and district court
17 with regard to these particular matters and these
18 particular matters alone. And, frankly, the lawyers
19 for -- or the advocates for the landlords and tenants I
20 think looked at this and had no dispute about whether or
21 not a justice court has the right to hold somebody in
22 contempt. It's found in the Government Code.
23 The question for us is, frankly, do you want
24 to have a road map for a justice to have so when they know
25 what to do when they're thinking about holding someone in

1 contempt, or do you want to keep it out of the rule and
2 leave it up to the individual justices to devise their own
3 method, and we as an advocate for the tenants thought it
4 would be really preferable so the justice courts know what
5 they're supposed to do and how they're supposed to do it,
6 there's a road map, they know what to do, and we think
7 that would be very helpful for the justices, so that's
8 where we came out on it.
9 CHAIRMAN BABCOCK: Wendy.
10 MS. WILSON: Yes, I just wanted to say our
11 -- my position is, our position is, that, you know, the
12 contempt is certainly provided for in Chapter 21 of the
13 Government Code to enforce various types of orders,
14 including an order for repair. The question is whether it
15 should be included in the Rule of Procedure, and it's my
16 position that it shouldn't be, because it's not included
17 and referenced in all the other Rules of Procedure where
18 contempt is provided for for other failure to follow other
19 types of orders in justice court.
20 CHAIRMAN BABCOCK: Yeah, Carl.
21 MR. HAMILTON: I have a problem with a
22 contempt for that. I mean, if I'm a landlord and I have a
23 building and I don't want to repair it, why should there
24 be a court that can make me repair my property or put me
25 in jail if I don't?

1 MR. GILSTRAP: Because you leased it to a
2 tenant.
3 MR. HAMILTON: Well, then they can cancel
4 the lease or give him his money back or --
5 HONORABLE STEPHEN YELENOSKY: We already
6 crossed that bridge. The Legislature said you could order
7 it. The only question is whether you can enforce your
8 order by contempt.
9 MR. HAMILTON: That's what I'm saying. You
10 can enforce it by other ways, cancel the contract or
11 something else. I just have a problem with somebody being
12 put in jail because they don't want to make a repair to
13 their property.
14 HONORABLE STEPHEN YELENOSKY: Well, then you
15 wouldn't support the law that allows the court to order
16 them to repair it. I just -- it makes no sense to me to
17 stay a court can order something but cannot then compel
18 that to happen.
19 CHAIRMAN BABCOCK: Elaine.
20 PROFESSOR CARLSON: Judge Lawrence, would
21 contempt be off the table, assuming it is otherwise
22 available, once the landlord appeals de novo? Am I
23 reading that statute --
24 HONORABLE TOM LAWRENCE: It would be off the
25 table in JP court.

1 PROFESSOR CARLSON: JP court.
2 HONORABLE TOM LAWRENCE: Right.
3 PROFESSOR CARLSON: So if a landlord appeals
4 de novo to the county court, the statute says it
5 automatically stays the effect of the judgment.
6 HONORABLE TOM LAWRENCE: Yeah, so long as he
7 timely appeals.
8 PROFESSOR CARLSON: Right.
9 HONORABLE TOM LAWRENCE: But if he doesn't
10 timely appeal then he would be out of luck.
11 PROFESSOR CARLSON: So the question is
12 whether the justice court would have contempt power once
13 there's a final judgment that's not appealable.
14 HONORABLE TOM LAWRENCE: Well, or contempt
15 power period would be a question that some on the task
16 force would raise, because we've got some things built
17 into appeals to extend the time limits in some
18 circumstances, but, yeah, there would be a point at which
19 the remedy to appeal was exhausted, and it might be that
20 the completion date of the repair is after that time to
21 appeal and then the issue would be do you hold them in
22 contempt or not, and the landlord wouldn't be able to
23 appeal possibly at that point if the date of completion
24 was far enough out.
25 CHAIRMAN BABCOCK: You could appeal the

1 contempt.

2 HONORABLE STEPHEN YELENOSKY: Habeas.

3 MR. WATSON: You can always appeal a

4 contempt order.

5 CHAIRMAN BABCOCK: That's what I'm saying.

6 Skip.

7 MR. WATSON: Tom, other than you, is there a

8 problem with the justice courts not knowing that they can

9 enforce the judgments or not knowing how? What happens

10 when somebody comes in and says, "Here's your order, they

11 haven't done it, I need you to do something"?

12 HONORABLE TOM LAWRENCE: Most of contempt in

13 JP court relates to truancy cases. That's where contempt

14 is used more than anything else, is in the enforcement of

15 truancy cases on parents, and it's done frequently. We

16 also use contempt on writs of repair -- or writs of

17 re-entry rather. We're probably going to be using it on

18 writs of restoration of utility services coming up in

19 about five more weeks, but that's mostly --

20 MR. WATSON: But the question is do they

21 know how to do it or not?

22 HONORABLE TOM LAWRENCE: Yeah. Yeah, we

23 have -- there is training on that. There are forms in the

24 JP desk book. If you talk to the general counsel of the

25 JP -- of the training center, they'll tell you that they

1 get calls all the time from judges asking about that, but
2 so, I mean, it is generally known how to do that. The
3 education is there. They're exposed to it. Now, you
4 know, whether every individual JP does it right every
5 time, I don't know.
6 MR. WATSON: Well, that's not the question,
7 is if they know that they have the duty to enforce their
8 judgments and they know how to do it, I'm not sure why
9 we're putting it in a rule to say in this particular
10 instance you should do it.
11 HONORABLE TOM LAWRENCE: Well, in my
12 opinion, there's going to be controversy about this,
13 because the other statutes that are similar to this, the
14 writ of re-entry and the writ of restoration of utility
15 services, that provide -- that are similar to the order to
16 repair specifically provide for contempt, and this does
17 not. It's not in the bill, and it's not in the statute.
18 I'm concerned that JPs are going to look at that and say,
19 "Well, we don't think the Legislature intended to give us
20 contempt powers for this because it's not here."
21 Now, if you think that that's not a problem
22 then I guess you can just not address it, but I believe
23 it's going to be a problem, if there's not something in
24 the rule one way or the other.
25 CHAIRMAN BABCOCK: Fair enough. Richard

1 Orsinger.

2 MR. ORSINGER: Judge Lawrence, is there a

3 general statute about what the contempt powers of the

4 justice courts are?

5 HONORABLE TOM LAWRENCE: No. Well, 21.001

6 and 21.002.

7 MR. ORSINGER: Well, the district courts,

8 for example, there's a statute that limits you to a

9 500-dollar fine and six months in jail maximum per

10 violation.

11 HONORABLE TOM LAWRENCE: Isn't that 21.002?

12 MR. ORSINGER: Does that apply to justice

13 courts as well?

14 HONORABLE TOM LAWRENCE: No. It's three

15 days in jail and a hundred dollars.

16 MR. ORSINGER: That's in another statute?

17 HONORABLE TOM LAWRENCE: No, it's the same

18 statute, except that the writ of re-entry does not have

19 any limitations. It's contempt, jail until you fix it.

20 So there are some other contempt provisions other than

21 21.002 that the Legislature have provided for that are

22 different than 001 and 002.

23 MR. ORSINGER: Is there a time limitation or

24 a fine limit in those other statutes?

25 HONORABLE TOM LAWRENCE: No.

1 MR. ORSINGER: Okay. So, and another
2 question --
3 HONORABLE TOM LAWRENCE: There's no fine.
4 You just go to jail till you do it.
5 MR. ORSINGER: Okay, so it's coercive.
6 HONORABLE TOM LAWRENCE: Yes.
7 MR. ORSINGER: And for -- first of all, has
8 anybody ever been held in contempt for something? In the
9 whole history of the state of Texas has a justice court
10 put somebody in jail for something?
11 (Judge Lawrence raises hand)
12 MR. ORSINGER: Okay. Now, do they
13 generally --
14 CHAIRMAN BABCOCK: Let the record reflect
15 Judge Lawrence has raised his hand.
16 MR. ORSINGER: Do they generally get out of
17 jail by appealing, or do they get out of jail by doing a
18 habeas corpus, or do they get out of jail by complying
19 with the order?
20 HONORABLE TOM LAWRENCE: Complying with the
21 order.
22 MR. ORSINGER: Okay, thanks.
23 CHAIRMAN BABCOCK: Get of out of jail, but
24 it's not free. Justice Gray.
25 HONORABLE TOM GRAY: I'm assuming that we're

1 going to come back to (a) and (b) because I've got some
2 problems in understanding how we're going to serve this
3 order and who we're going to serve it on.
4 CHAIRMAN BABCOCK: Yeah. Justice Gray, I
5 was going to suggest in a minute that we take a vote,
6 since we haven't voted all morning on anything, on
7 contempt or not --
8 HONORABLE TOM GRAY: Okay.
9 CHAIRMAN BABCOCK: -- contempt.
10 HONORABLE TOM GRAY: With regard to the
11 contempt, we've mentioned -- and Judge Yelenosky mentioned
12 it I think first -- the concept of coercive contempt
13 versus punitive contempt, and what is in this statute is
14 punitive contempt powers; whereas, what Judge Lawrence has
15 referred to in the other statutes, as best I understand,
16 is in the nature of coercive contempt. The distinction
17 being without regard to whether or not the contempt is
18 ongoing under subsection (c)(4) as proposed, the justice
19 would still be able to impose it; whereas, the coercive
20 contempt is to put the person in jail or make the person
21 pay money until they purge themselves of the contempt.
22 To remedy the failure of the landlord to
23 comply with the order, which seems to be the objective
24 here, coercive contempt is much more effective than a
25 hundred dollars fine or three days in jail, because you

1 can stay there essentially indefinitely under coercive
2 contempt, or the fine is so much per day until they purge
3 themselves of the contempt. So this would seem to me to,
4 one, be different than the statutes -- the right of
5 re-entry and the other one that Justice Lawrence had
6 referred to, and I would tend more towards the use of
7 coercive contempt and making it clear that they can use
8 that in this rule like the other statutes rather than what
9 is punitive contempt.
10 Because I got into this issue with regard to
11 the chief's counsel on court reporters not giving us
12 records timely and what we could do, and I know that at
13 some point you trigger the whole range of due process
14 rights of right to counsel and stuff if you are going to
15 potentially incarcerate in a punitive fashion the court
16 reporter for failure to deliver the record. In this
17 instance are we going to trigger that range of due process
18 protections by the possibility that the landlord could go
19 to jail for three days and lose his liberties as opposed
20 to coercive contempt where that's not necessarily a
21 problem.
22 CHAIRMAN BABCOCK: Is your reading of
23 21.002(c) that it is criminal or coercive or both?
24 HONORABLE STEPHEN YELENOSKY: You have to
25 read (e) as well.

1 HONORABLE TOM GRAY: Can I get back to you
2 on that? I'll take it under advisement.
3 CHAIRMAN BABCOCK: Okay. Justice Gaultney,
4 and then Richard Orsinger.
5 HONORABLE DAVID GAULTNEY: I think it's
6 criminal. It appears to track the 21.002 criminal
7 provision, and it -- one argument could be made that since
8 it only provides for criminal that the statute doesn't --
9 or rule doesn't intend coercive. I think -- I think
10 the -- I think there is a question about whether under
11 some circumstances you could be imprisoned for a debt, but
12 that it would seem to me to be a separate issue, and I
13 think it might be better off just leaving the Government
14 Code like it is. In other words, if the justice court has
15 the authority under the Government Code to either
16 coercively imprison or under appropriate circumstances
17 criminally sanction, the Government Code is already in
18 place, already gives that authority.
19 CHAIRMAN BABCOCK: Is your read that
20 21.002(c) is the extent of a JP's ability to find somebody
21 in contempt criminally, but that (e) gives them broader
22 rights for coercive contempt?
23 HONORABLE DAVID GAULTNEY: I think that's
24 correct. That's the -- (e) says that despite anything
25 else you can still use civil contempt.

1 CHAIRMAN BABCOCK: Okay. So under this
2 reading, if a judge wanted to -- if a JP wanted to assess
3 a criminal contempt, it would be limited to no more than
4 three days in jail and a hundred bucks, but if he says
5 "fix that" -- "fix that leaky toilet" and the landlord
6 says, "I ain't going to do it" then under (h)'-- (h) --
7 HONORABLE DAVID GAULTNEY: (e).
8 HONORABLE STEPHEN YELENOSKY: (e). (e).
9 CHAIRMAN BABCOCK: (e).
10 HONORABLE DAVID GAULTNEY: 21.002(e), until
11 such time as you can fix it or there's a limitation,
12 actually, of no --
13 CHAIRMAN BABCOCK: Yeah, (h) limits (e).
14 HONORABLE STEPHEN YELENOSKY: Right. It's a
15 limit on coercive.
16 HONORABLE DAVID GAULTNEY: Right. It's 18
17 months.
18 CHAIRMAN BABCOCK: So that would be -- it
19 would be (h)(2) is what I was looking for. So that would
20 be coercive contempt of 18 months.
21 HONORABLE DAVID GAULTNEY: I mean, that's
22 the way I read the Government Code 21.002 as far as the
23 current power is concerned. I think if you write in just
24 criminal contempt then one argument could be made that
25 that's the exclusive -- that's the exclusive contempt

1 power.

2 Now, I think there is a question -- one of

3 the comments earlier is they question whether you should

4 be allowed to throw someone in jail on this type of order.

5 Well, I think that starts to talk about imprisonment for

6 debt, which, you know, you may have some constitutional

7 restrictions on.

8 CHAIRMAN BABCOCK: Right.

9 HONORABLE DAVID GAULTNEY: I'm not sure we

10 can answer that.

11 CHAIRMAN BABCOCK: Here we can't. But,

12 Judge Lawrence, just so I can get straight in my mind, is

13 your reading of 21.002 the same as Justice Gaultney's,

14 that for -- that (c) limits your power of criminal

15 contempt to three days or a hundred bucks, and/or a

16 hundred bucks, but that under (e) you can toss somebody in

17 jail for up to 18 months for failure to obey an order?

18 HONORABLE TOM LAWRENCE: No, that's not the

19 way that JPs typically understand contempt. We understand

20 contempt to be a maximum of three days or a hundred

21 dollars. Except for those other specific statutes.

22 That's the way we interpret it.

23 HONORABLE STEPHEN YELENOSKY: If that's true

24 then a district court is limited by subsection (b), which

25 states our criminal contempt limits, and we know that's

1 not true. I mean, 21.002, other than the Constitution, is
2 the same place the district court gets its coercive civil
3 contempt powers, and they are absolutely parallel on
4 coercive contempt between the JP court and the district
5 court. It's only with respect to punitive contempt that
6 they differ, and so the only question seems to me to be
7 what we say in this rule, and the argument for saying it
8 in this rule is the same argument you gave me earlier when
9 I asked why do we have to say in a rule that when a party
10 doesn't show up and they have the burden you can dismiss
11 the case, and your answer was -- and I think your answer
12 is here because JPs need a road map, and some of them
13 aren't lawyers.
14 CHAIRMAN BABCOCK: Richard Munzinger and
15 then Orsinger. Richard the First and Richard the Second.
16 MR. MUNZINGER: If I understood the judge
17 correctly, the same Legislature that enacted this statute
18 regarding safety and health repairs enacted a statute
19 relating to the provision of utilities, and that statute
20 regarding the provision of utilities specifically includes
21 the power of contempt.
22 HONORABLE TOM LAWRENCE: And also the writ
23 of re-entry, the same thing, yes.
24 MR. MUNZINGER: So here we have the same
25 Legislature adopting two statutes giving JPs the power of

1 contempt, but in a third statute not giving JPs the power
2 of contempt, and God forbid that the Legislature not do
3 something unintentional. That's contrary -- that's
4 contrary to all of our law, so now we're sitting here and
5 we're asking ourselves the legal question did the
6 Legislature intend to give JPs the power of contempt to
7 enforce their statute. I don't know. I don't think
8 anybody knows until that is litigated, and the
9 interpretation of the rule by the committee, if adopted by
10 the Court, arguably becomes an advisory opinion of the
11 Court because the Court didn't have a dispute of parties
12 in front of it when it did so. Now, they may have that
13 power to do so under the rules. I've never briefed the
14 issue, but it's not quite so simple if two statutes in the
15 same Legislature give a power, a third statute doesn't,
16 what's the legal effect of that.
17 CHAIRMAN BABCOCK: Well, and there's a third
18 issue, too, and that is that this rule is drafted --
19 apparently the task force believed that the JPs were
20 restricted to only contempt under subsection (c), which is
21 at odds with what Justice Gaultney thinks or Judge
22 Yelenosky.
23 MR. MUNZINGER: And I think Judge Yelenosky
24 is correct. I mean, how could you take such a position
25 when the statute doesn't distinguish between subsection

1 (c) and (e) and (h)?
2 CHAIRMAN BABCOCK: Well, it's a mess.
3 Orsinger.
4 MR. ORSINGER: Well --
5 CHAIRMAN BABCOCK: Now it will get clear.
6 MR. ORSINGER: Yeah. You know, I think that
7 if there is inherent authority for a justice court to put
8 somebody in jail for -- on a coercive basis, it would have
9 to be under 21.001(a), which talks about all courts having
10 the power to enforce their lawful orders, but -- and I
11 haven't done a recent study of this, but in the world that
12 I travel in, almost every time that somebody is held in
13 contempt for an action outside the courtroom that's not
14 disruption of the proceedings or disrespectful directly to
15 the court, it's based on a rule or a statute. I don't
16 know that that's always true, but that's certainly been
17 the history in family law litigation, which is where 99
18 percent of contempts go on, and I'm a little troubled that
19 there's not a statute that explicitly gives justice courts
20 the power of coercive contempt.
21 And you look down here at (e), and it says,
22 "This section does not affect the court's power to confine
23 to obey a court order," but then it doesn't grant that
24 power either. It just means that this statutory
25 provision, .002, doesn't impair it. So I'm still looking

1 around for where the grant of authority is.
2 CHAIRMAN BABCOCK: How about 21.002(a)?
3 MR. ORSINGER: Well, punish for contempt.
4 You see, a direct contempt is a contempt that occurs in
5 the court's presence, which I think is part of the
6 inherent power. An indirect contempt that occurs outside
7 the courtroom that the judge is not judicially a witness
8 of, I'm not sure whether this contempt is talking about
9 the inherent power to enforce the court proceedings or
10 whether you're talking about an allegation that some
11 statute or rule was violated outside of court.
12 CHAIRMAN BABCOCK: Buddy's got the answer.
13 MR. LOW: Judge -- no, I don't have the
14 answer. I have more questions. Did the committee
15 consider contempt -- you say okay, "I'm ordering you to
16 repair. If you don't repair within two days or so, you're
17 in contempt, and for contempt your rent is going to be
18 reduced to $2 a month."
19 HONORABLE TOM LAWRENCE: No, that's not --
20 you can't do that under the statute. The reduction of
21 rent is separate from the order to repair. You can do
22 either or both, but you have to have a separate order to
23 repair and a separate order reducing rent, if that's what
24 you're asking.
25 MR. LOW: Okay. Well, that's what I'm

1 asking.

2 CHAIRMAN BABCOCK: Justice Gray. Then

3 Frank.

4 HONORABLE TOM GRAY: With regard to the

5 advisory opinion or the taking the issue under advice

6 while ago, I now agree with Justice Gaultney on the

7 interpretation of the 21.002, but I disagree with Justice

8 Gaultney on whether or not we should or should not include

9 something in the rule regarding it, and this is in answer

10 to Richard the First's comment. In the Legislature what's

11 different about this statute is the Legislature assigned

12 the Supreme Court the responsibility to make the rules.

13 In the other two statutes where they included contempt

14 powers they did not assign that responsibility, and that's

15 what makes this one different than those and why we should

16 include it.

17 CHAIRMAN BABCOCK: Okay. Frank and then

18 Judge Yelenosky and then Richard the First.

19 MR. GILSTRAP: When I read, you know,

20 section 21.001 and 002, if that's correct, if that's the

21 right numbers, you know, I come away from that and say JP

22 has the inherent power and then -- but then when I read

23 the statutes involving the justice court, it bothers me a

24 little bit that the Legislature expressly gave them powers

25 in certain situations, but then when I go on and read the

1 Rules of Civil Procedure and find they're just laced with
2 provisions that the Court has imposed allowing other
3 courts to hold people in contempt, I mean, I just don't
4 think there is any kind of inference we can draw from the
5 structure.
6 I think what happened was that a lot of
7 these contempt provisions were in the old statutes and
8 were just passed piecemeal and then put in the rules, and
9 I wind up being real comfortable that we can put a
10 provision in the rule allowing the JP courts to enforce it
11 by contempt, and we probably need to because of what Judge
12 Yelenosky said. It's a joke, if you don't have that.
13 HONORABLE STEPHEN YELENOSKY: Here, here, I
14 agree with that. I mean, it just seems odd to me that we
15 would be debating whether a court could enforce the order
16 that the statute says it can issue. If all a JP court can
17 do is say, "Fix the toilet or I'm going to start reducing
18 the rent," then the statute would say you can order them
19 to fix the toilet, and if he doesn't do so, reduce the
20 rent. What the statute says is the JP court may issue an
21 order to repair. It doesn't say you can fine him. It
22 isn't an order to repair unless it can be enforced, and
23 all this concern about, well, we don't want to be putting
24 people in jail, that's always a concern with contempt, and
25 you can say on one extreme you're ordering somebody to

1 jail because they don't have the money to fix a roof
2 that's going to cost them a hundred thousand dollars.
3 There's a defense to contempt based on inability. We hear
4 that all the time in child support. Defense may be
5 appropriate, but if you're saying they don't have the
6 authority to enforce by contempt, including coercive
7 contempt and putting in jail, you're also saying when they
8 tell them to fix the blockage in the sewer and the
9 landlord says "no," all you can do is reduce the rent.
10 You can't put that person in jail for simply being
11 obstinate, and to me that just is not consistent with the
12 statutory authority to make the order.
13 CHAIRMAN BABCOCK: Richard Munzinger and
14 then Gene and then Roger.
15 MR. MUNZINGER: Here is a hypothetical,
16 which I think comes within the intent of the Legislature.
17 A tenant has a condition that threatens health or safety,
18 goes to the justice court, and the justice court says,
19 "Fix it." During the period of time that the health and
20 safety has existed the tenant has the right, if the judge
21 says so, to pay reduced rent and that power to pay -- or
22 right to pay reduced rent exists until the condition is
23 resolved, and the judge may include that in his judgment.
24 So far am I correct?
25 HONORABLE TOM LAWRENCE: Yes, sir.

1 MR. MUNZINGER: He may also issue these
2 penalties and what have you. Now, then there's an order
3 that says, "Fix this on or before June the 10th because
4 that's when I've calculated your rent reduction." So far
5 am I still correct?
6 HONORABLE TOM LAWRENCE: Well, the order to
7 repair would have a completion date. The order to reduce
8 rent is contingent upon the condition being repaired.
9 MR. MUNZINGER: On the condition. If I
10 don't do -- meet that completion date as a landlord and my
11 tenant remains in the same property, my tenant has a new
12 cause of action on the day after the completion date.
13 Now, I'm a landlord, and I'm Carl Hamilton's friend, and I
14 think to myself, "My God, I'm going to spend $10,000 on a
15 roof for a piece of property that makes me when I net,
16 net, net everything out $200 a month. The heck with this.
17 Move out and go to a different place. I'm going to shut
18 the dadgum thing down."
19 Here we are, we're giving a court the power
20 to make a fellow do something to his property, and in all
21 this circumstance the Legislature enacted two statutes
22 specifying the power of contempt, but didn't in this one.
23 I've got a problem with it.
24 CHAIRMAN BABCOCK: Gene and then --
25 MR. STORIE: I think I have a similar

1 problem because both the statute and the proposed judgment
2 that Judge Lawrence gave us talk about "reasonable action
3 to repair or remedy the condition," and when we're holding
4 people in contempt we're supposed to tell them, I think,
5 exactly what they've got to do to comply with the order.
6 If you're going to turn on the electricity, by golly, turn
7 on the electricity, and we know what that means, but if
8 you get into a structural problem and you think it's going
9 to cost a certain amount or take a certain amount of time,
10 and your repair guy says, "Oh, no, baby, this is way worse
11 than you thought," what are you going to do then? I mean,
12 and alternatively how can you set somebody up for
13 contempt --
14 HONORABLE STEPHEN YELENOSKY: But that's
15 always an issue of contempt, whether the order was
16 specific enough to be enforced by contempt. That is not
17 an argument against the authority to enforce by contempt.
18 It's an argument that the order needs to be specific and
19 may not be enforceable.
20 CHAIRMAN BABCOCK: Roger, and then Justice
21 Hecht.
22 MR. STORIE: If I may, just for a second, I
23 mean, I think the question is does the statute give you
24 that kind of authority to make that kind of order, because
25 it doesn't say fix the toilet presumably. It says, you

1 know, look at the toilet and see if you can fix it for
2 under $10,000 or for some reasonable amount.
3 CHAIRMAN BABCOCK: Roger.
4 MR. HUGHES: Well, I hate to say it, I
5 flipped ahead, and I looked at the appeal section, and if
6 I read the appeal section right, in order to appeal you
7 don't put up a bond at all under this section. You just
8 file the notice of appeal, and the notice of appeal is a
9 stay of any repair order, and I guess I'm kind of
10 wondering when are we going to have a landlord who is so
11 upset with the order to fix the toilet or rebuild the roof
12 that he will rather go to jail than plop down a piece of
13 paper and stay the order to repair?
14 I mean, I tend to agree on the question of
15 whether there is any specific contempt authority under the
16 new statute at all, so I tend to lean in that way, but I
17 guess the next thing of it is if we're going to say that
18 all you have to do is flop down a notice of appeal, you
19 get de novo review in the county court at law and all of
20 the repair orders are stayed. I'm wondering when contempt
21 is going to come up.
22 HONORABLE TOM LAWRENCE: Well, it won't come
23 up in the justice court if you appeal. It's going to be
24 up to the county court then to enforce it.
25 HONORABLE TOM GRAY: It's going to come up

1 when the landlord misses his notice of appeal deadline.
2 CHAIRMAN BABCOCK: Yeah, that's when it's
3 going to come up. Justice Hecht.
4 HONORABLE NATHAN HECHT: Well, I had that
5 question, and also, just to get a read from the task
6 force, how likely is it to come up when the other penalty
7 is you don't get any money until you make the repair?
8 HONORABLE TOM LAWRENCE: Well, that's the
9 alternative in this, is that you can just not issue an
10 order to repair and reduce the rent down so much that it
11 becomes painful, and the landlord either fixes it or the
12 tenant is living there virtually rent free.
13 HONORABLE NATHAN HECHT: And is there an
14 idea that that's not a strong enough incentive to obtain
15 the just result and, therefore, you need contempt?
16 HONORABLE TOM LAWRENCE: Well, I think it is
17 a strong incentive. Now, whether or not that's -- we
18 didn't look at it as an either/or because we were charged
19 with trying to write the rules for all of it --
20 HONORABLE NATHAN HECHT: No, I'm just trying
21 to get a feel for the practicality of it.
22 HONORABLE TOM LAWRENCE: But I think I
23 commented one time in the task force meeting that if you
24 don't hold somebody in contempt, if that's not an option,
25 then the real option here is reducing the rent, and the

1 rent is reduced down to whatever level it's going to be
2 reduced consistent with the condition, and at some point
3 the landlord is going to fix it or let the lease run out
4 and terminate the lease and move the tenant out when he
5 can do so under the law or under his agreement, and the
6 tenant decides that, well, we'll suffer this condition for
7 a reduction in the rent of X number of dollars until our
8 lease runs out, and the tenant may be happy with that.
9 HONORABLE NATHAN HECHT: Just I'm, again,
10 trying to look at the policy here. Wouldn't it be better
11 from the tenant's perspective to have a reduction in rent
12 rather than having the recalcitrant landlord in jail? And
13 the sheriff generally do not like these kinds of people in
14 his jail, because he likes to save room for rapists and
15 murderers, but would there -- is it your experience from
16 truancy and other situations that this would be likely to
17 happen or not so likely, or what's your anticipation?
18 HONORABLE TOM LAWRENCE: Well, I think you
19 always have the possibility of getting a hard-headed
20 landlord that just refuses to do it and says, "Hold me in
21 contempt." It's easier from the tenant to have a
22 reduction in rent. If it's an order to repair and the
23 landlord doesn't do it, the tenant has got to file another
24 motion with the court, get a hearing, and prove the
25 landlord didn't fix it right or fix it at all. On an

1 order to reduce rent the burden is on the landlord to come
2 into court and to prove to the court it's been fixed so
3 the rent can go back up.
4 MR. DOGGETT: Your Honor, just to respond to
5 that from the tenant perspective, keep in mind that some
6 landlords feel like, hey, yeah, let them live there for
7 free without the blank, without the toilet working,
8 without the -- so judges very well may just say, "Look, we
9 can -- I've already done that. Now you're going to go to
10 jail." I used to bring these cases on behalf of the city.
11 The original version of the statute was a city could bring
12 these cases against landlords, and it had injunction in
13 there, but there was never any question that the district
14 court was going to hold them in jail and warned them many
15 times, you know, "Bring your toothbrush to the next
16 hearing," and I brought a lot of those cases, and not one
17 ever actually did go to jail after many times of asking,
18 but, you know, the judge looked over their glasses, looked
19 over their glasses, "Bring your toothbrush." No one ever
20 went to jail eventually.
21 But I will tell you judges in my experience
22 did like having that tool available to get their
23 attention, because sometimes landlords don't have any
24 problem. They paid for the property. Losing their rent
25 is not a big deal. You'll be gone soon anyway.

1 CHAIRMAN BABCOCK: Judge Christopher.
2 HONORABLE TRACY CHRISTOPHER: Well, I was
3 going to echo on that. We've all seen -- this is just
4 anecdotal evidence, I'll have to admit. We've all seen
5 the stories on the news about the landlords who just won't
6 fix things, and if you don't have the ability to put them
7 in jail because they just won't fix things then the
8 tenants are living in a horrible condition, and, remember,
9 we're talking about health and safety issues here. We're
10 not talking about not health and safety issues. So, you
11 know, and we're all well enough off that if we're in an
12 apartment complex and the air-conditioning isn't working,
13 we leave. Okay. We break the lease. We pack up and move
14 someplace else. Well, a lot of these people, they don't
15 have the money for a new security deposit. It's been put
16 with this one landlord. Yeah, they can move out, maybe,
17 if they have the money to move. That costs money. They
18 don't have cars, you know, to pack up their stuff, move
19 someplace else, presuming they can find someplace else
20 that's, you know two, three hundred, you know, 500 a
21 month, whatever it is, the minimal amount of rent that
22 they're paying.
23 This is a health and safety issue. I mean,
24 JPs did not have the power -- it's my understanding you
25 don't have injunctive power, so they were never used to

1 thinking to themselves "I have the power to hold somebody"
2 -- you know, to put them in jail until -- in coercive
3 contempt until they comply with my order. Well, now the
4 Legislature has given them essentially injunctive power,
5 ordering the landlord to make these repairs. We have to
6 give them the ability to put the landlord in jail, and if
7 the landlord doesn't like it, appeal to county court where
8 the county court has that ability.
9 CHAIRMAN BABCOCK: Okay. Richard Munzinger,
10 and then Judge Lawrence.
11 MR. MUNZINGER: That's a policy argument,
12 and it's the correct argument if the decision is a policy
13 decision. The problem is courts are creatures of the
14 Constitution and to an extent the Legislature. Why didn't
15 the Legislature give the power of contempt in this statute
16 when in two other statutes it did so? There must be a
17 reason. They're not stupid. Judicially speaking.
18 MR. DOGGETT: Richard, you're kind of
19 misstating the facts, is the problem. That's not exactly
20 correct. What you're saying is not actually true.
21 CHAIRMAN BABCOCK: What's wrong with what he
22 said?
23 MR. DOGGETT: The Legislature didn't look at
24 this statute and then give it to them in two others.
25 That's just -- what happened was, as Frank was talking

1 about earlier, you're trying to make this argument that
2 it's not over here, so therefore, this -- they didn't
3 intend for it to be over here. That's a clever, good
4 lawyer argument. What happened was the writ of re-entry
5 has been in place for a very, very long time. I think it
6 predated the Property Code. I'm not sure which version,
7 but the writ of re-entry has been there a long, long time,
8 and it was a free-standing passage of that right. In
9 other words, when you've been locked out, a JP was given
10 the authority to order somebody to get them back in, and
11 the Legislature put something in there special. It was a
12 free-standing statute.
13 Now, the right to repair, it's a much larger
14 statute. It's subchapter (b) of the Property Code.
15 There's lots and lots of sections in there, and there was
16 one section in there that says a justice of the peace
17 doesn't have the ability to order repair. So that
18 particular provision was struck, so to suggest that sort
19 of the Legislature some many years ago had this writ of
20 re-entry, it's been there for a very long time, and then
21 here just last session decided, hey, let's get rid of that
22 line, those don't mix. It wasn't a comparison made.
23 These were free-standing things. In other words, the bill
24 you see before you is a removing of language. It's not a
25 new act that the -- giving the JPs this new power. It was

1 a deletion of a line that's been there for a long, long
2 time.
3 MR. MUNZINGER: But it was an expression of
4 legislative intent on the question under discussion, the
5 power of a justice of the peace.
6 MR. DOGGETT: That clearly was not before
7 the Legislature. The power of contempt was never
8 discussed.
9 MR. MUNZINGER: So it was not in this last
10 Legislature?
11 MR. DOGGETT: Absolutely never discussed,
12 and, frankly, as we all know, legislative intent is pretty
13 hard to get your hand around. I will tell you that --
14 CHAIRMAN BABCOCK: Some would say.
15 MR. DOGGETT: If there's ever any
16 legislative intent, I will tell you all the testimony was
17 concerned about giving justices of the peace the power to
18 hold someone or the power -- injunctive power. Much
19 testimony was whether or not we should give the justice of
20 the peace this new power, and the Legislature said, yes,
21 ultimately yes. So if there was ever any discussion, if
22 you listen to any of the tapes, or watch them, actually,
23 you can see them online, the only discussion that was ever
24 made about this law that passed was "We're concerned about
25 giving justice of the peace this new authority," and the

1 answer to that question was "Let's do it." I mean, bottom
2 line that's the intent. If you're going to take off
3 anything else, that's the only intent that's out there,
4 that they wanted to give them the new power.
5 CHAIRMAN BABCOCK: Robert, what I think is
6 animating Richard's comments, and I'm sure they're shared
7 with others, is that we have as a committee -- and I know
8 the Court as well has tried to be very careful about not
9 intruding on the Legislature's role, and if there is a
10 policy matter that is within the ambit of the Legislature,
11 we try very carefully not to cross the line and by rule,
12 you know, make a policy. So I think that's what is
13 animating the concern, but I wonder, Richard Munzinger,
14 about the comment that was made earlier, which was here
15 the Legislature did expressly delegate to the Court the --
16 not only the power, but the request to make rules by a
17 very -- by a very tight deadline, and even if your
18 argument has validity, maybe that would be some expression
19 of the Legislature that the Court within some parameters
20 has some leeway to deal with that issue. I don't know.
21 MR. MUNZINGER: My only response would be
22 that the Legislature said here is a discrete subject, make
23 rules concerning the discrete subject. The discrete
24 subject does not include the power of contempt. The
25 committee's proposal does include the power of contempt.

1 That's my point.
2 CHAIRMAN BABCOCK: Carl.
3 MR. HAMILTON: I think there's a big
4 difference in re-entry and turning on electricity. I
5 assume that those orders don't go out until the bill has
6 been paid or the tenant's paid the rent and the landlord's
7 got to let him back in. So it doesn't cost the landlord
8 anything to turn on the power or unlock the door, but in
9 this case we're ordering the landlord to dig into his
10 pocket and come up with $10,000 or whatever to fix the
11 roof, which he may or may not even have. So, you know, to
12 argue that they can defend that on a contempt charge, I
13 mean, why put the landlord through all of that grief of
14 being charged with contempt and having to hire a lawyer
15 and all of that. I just think it's improper to -- it's
16 kind of like a debt. It's kind of like putting somebody
17 in jail because they can't pay their debt.
18 CHAIRMAN BABCOCK: Debtors prison, it's been
19 done. Judge Christopher.
20 HONORABLE TRACY CHRISTOPHER: The current
21 statute --
22 CHAIRMAN BABCOCK: Not in this country.
23 HONORABLE TRACY CHRISTOPHER: -- allows for
24 this lawsuit in county and district court. No one
25 disputes that county and district court would have

1 coercive injunctive power. The Legislature says now you
2 can bring this case in JP court. Why is it different?
3 HONORABLE STEPHEN YELENOSKY: And you can
4 bring it up to this limit.
5 CHAIRMAN BABCOCK: Lamont.
6 MR. JEFFERSON: The original bill, if I'm
7 reading this right on page seven, where the original bill
8 did have a -- an option for injunction included the
9 sentence, "The justice court may only require the owner to
10 repair or remedy the condition." I'm not sure if that --
11 I mean, it seems like there was at least some discussion
12 about the limits of the ability of the court to command a
13 response from the landlord. So, I mean, I don't know
14 where -- I'm not sure where to go with that. It's not in
15 the bill that was passed, which suggests to me that maybe
16 the court has more power than only requiring the owner to
17 repair or remedy the condition.
18 CHAIRMAN BABCOCK: Well, I feel like voting.
19 So everybody that is in favor of Option No. 1, which
20 includes language regarding contempt, raise your hand.
21 All those opposed, raise your hand. The
22 Option No. 1 passes by a vote of 16 to 12, the Chair not
23 voting, and let's have lunch.
24 MR. MUNZINGER: Chip, before you close, take
25 a look at that title, "Landlord's order." It's really a

1 court order, order requiring landlord to repair. The
2 title ought to be better.
3 CHAIRMAN BABCOCK: Yeah, I agree with that.
4 We haven't voted on the whole rule. We're going to go
5 over the language after lunch.
6 (Recess from 12:42 p.m. to 1:37 p.m.)
7 CHAIRMAN BABCOCK: So, Judge, I think the --
8 we have voted in favor of option one that has the contempt
9 feature in it, and now we'll take comments on .10, option
10 one, from the crowd. And, by the way, everybody has
11 commented to me over the break how well you're taking the
12 abuse that is being heaped upon you by our members. So
13 comments on .10, option one.
14 HONORABLE TOM LAWRENCE: All right, (a),
15 we're on page 23, form and content of the order. "The
16 order must be directed to the landlord and state the names
17 of the parties to the proceeding, address of the leased
18 premises where the conditions are to be repaired or
19 remedied, in reasonable detail the actions the landlord
20 must take to repair or remedy the conditions, and the date
21 by which the landlord must repair or remedy the
22 conditions."
23 CHAIRMAN BABCOCK: Okay. Any comments?
24 HONORABLE TOM LAWRENCE: (b).
25 CHAIRMAN BABCOCK: You want to go through

1 them all and then --

2 HONORABLE TOM LAWRENCE: Whatever you want

3 to do.

4 HONORABLE TOM GRAY: It's kind of a gnat,

5 but in (a)(2) why would you say "leased premises," because

6 a lot of folks think of it as rented premises. Can we

7 just say "premises"?

8 HONORABLE TOM LAWRENCE: We're using the

9 language that they use in the Property Code. We're trying

10 to make all the terminology consistent with the Property

11 Code.

12 HONORABLE TOM GRAY: Okay.

13 HONORABLE TOM LAWRENCE: It just makes it

14 easier for everybody to understand, we think.

15 CHAIRMAN BABCOCK: Okay. Any other comments

16 on (a)? Yeah, Harvey.

17 HONORABLE HARVEY BROWN: Should it state the

18 dollar amount that has to be spent on repairs or "not to

19 exceed" or --

20 HONORABLE TOM LAWRENCE: Well, that's in

21 the -- that's in the judgment. Well, let me see where --

22 well, you're going to -- you're going to state that it's

23 not going to go over $10,000. Let's see, I can't remember

24 if we put that in Rule 8.

25 MS. WILSON: Yes.

1 HONORABLE TRACY CHRISTOPHER: Is this going
2 to be a separate order or part of the judgment?
3 HONORABLE TOM LAWRENCE: It could be either
4 way. I mean, it could be done either way. There was --
5 you know, we didn't talk about that on the task force as
6 to whether or not a court is going to have a separate
7 order in addition to the judgment or just put all of it in
8 the judgment. What I have drafted sort of puts all of it
9 in the judgment, but it could be done differently.
10 Harvey, to answer your question, we could
11 put that in there.
12 HONORABLE HARVEY BROWN: I mean, it just
13 seems that there might be some judges who aren't
14 experienced, since this is fairly new, and that might be
15 kind of helpful.
16 CHAIRMAN BABCOCK: Yeah. And don't you
17 think, Judge, going back to the comment that was made
18 before lunch that we ought to strike in the title
19 "Landlord's"? It should just be "order." It's not the
20 landlord's order. It's an order to the landlord, but it's
21 not his order.
22 HONORABLE TOM LAWRENCE: Oh, you mean the
23 title of .10.
24 CHAIRMAN BABCOCK: Yes.
25 HONORABLE TOM LAWRENCE: Yeah, we can do

1 that.

2 CHAIRMAN BABCOCK: Just make it "order."

3 HONORABLE TOM LAWRENCE: Yeah.

4 CHAIRMAN BABCOCK: Okay.

5 HONORABLE TOM LAWRENCE: Okay. (b),

6 issuance, service, and return of order. "The justice

7 shall prepare and issue the order. The order may be

8 served on the landlord in open court or by any means

9 provided under Rule 21a at an address listed in the

10 petition, the addressed listed on any answer, or such

11 other address the landlord furnishes to the court in

12 writing. Unless the justice serves the landlord in open

13 court or by other means provided in Rule 21a, the person

14 serving the order on the landlord shall file a certificate

15 of service of the order."

16 I anticipate that most of these the judge is

17 going to write out the order and hand it to the landlord

18 in open court, but you're also going to have defaults

19 where the landlord didn't appear, so you have to have some

20 mechanism to deliver it to the landlord then, so this is

21 what that's all about, how the landlord gets the actual

22 order.

23 CHAIRMAN BABCOCK: Okay.

24 HONORABLE TOM GRAY: But if the landlord is

25 represented by an agent, it won't be adequate to serve the

1 order on the landlord's agent for service of process or
2 representative if that representative is not the landlord.
3 HONORABLE TOM LAWRENCE: Well, I think maybe
4 you could argue that under Rule 6 it would be. If the
5 agent is representing the landlord then I think you could
6 give the order to the agent, who is essentially standing
7 in the shoes representing the landlord there, but that is
8 a question. But I think that's what the task force
9 intended, that under the representation rule that since
10 the person is there representing the landlord, that that
11 would be sufficient to give the order to him or her.
12 CHAIRMAN BABCOCK: Elaine.
13 PROFESSOR CARLSON: What is meant in the
14 last sentence, "the person serving the order"? Who is
15 that?
16 HONORABLE TOM LAWRENCE: Well, it may be
17 that this might be given to a sheriff or constable
18 conceivably. I would anticipate that often the clerk of
19 the court is probably just going to mail it out, but it
20 could be done another way. We didn't want to preclude
21 other possibilities.
22 HONORABLE TOM GRAY: Since you've got
23 "landlord" defined in the Property Code and that's what
24 you've been dealing with, I would suggest that you expand
25 (b) to be the landlord or his agent, because under 92.002,

1 2 -- 01, too, it expressly excludes the agent of the
2 landlord unless it's the manager, agent, purports to be
3 the owner, lessor, or sublessor, and I'm just concerned
4 that the handing of it to the property manager is not
5 going to be deemed ultimately adequate if you have to
6 serve the landlord, given that the landlord is the defined
7 term.
8 HONORABLE TOM LAWRENCE: But we're saying
9 that a representative may represent the landlord or the
10 tenant for that matter in court, and we allow evictions to
11 occur where the tenant doesn't show up but a
12 representative of the tenant shows up, and they're not
13 even given an order in open court. It's just a judgment
14 that they've -- where the eviction occurs later, so I
15 think it's consistent with that.
16 HONORABLE TOM GRAY: I'm just pointing out a
17 potential land mine.
18 HONORABLE TOM LAWRENCE: Well, if you have
19 to actually give it to the landlord then that's not going
20 to occur on that day. That's something you're going to
21 have to mail later under Rule 21a, and if the -- if you're
22 trying to expedite the process, which is what the
23 Legislature seems to infer by this, it would be faster.
24 The landlord has authorized this person to represent them,
25 I would think that would be suitable or adequate to --

1 HONORABLE TOM GRAY: And don't get me wrong.
2 I'm not going to argue with you that that's suitable or
3 adequate. I would just expand the language of who the
4 order can be served on so that it is clear --
5 HONORABLE TOM LAWRENCE: Oh, I see, okay.
6 HONORABLE TOM GRAY: -- that you are
7 including the landlord or his agent who appeared in court.
8 HONORABLE TOM LAWRENCE: Okay. That's fine.
9 CHAIRMAN BABCOCK: Yeah, you would just put
10 in the second sentence, "The order may be served on the
11 landlord or his agent."
12 HONORABLE TOM LAWRENCE: Yeah.
13 CHAIRMAN BABCOCK: And then in the last
14 sentence "Unless the justice serves the landlord or his
15 agent in open court."
16 HONORABLE TOM LAWRENCE: Okay. I agree.
17 CHAIRMAN BABCOCK: Judge Christopher.
18 HONORABLE TRACY CHRISTOPHER: I don't think
19 we should have a separate order from the judgment because
20 then that will confuse the appellate timetable and, you
21 know, which order you're appealing. I just think that it
22 needs to be in the judgment, and so I just think we need
23 to rewrite it, because you've got it here as part of the
24 judgment, but then you have it as a separate order or it
25 could be a separate order. I don't see the advantage of

1 that separate order.

2 CHAIRMAN BABCOCK: What if you just changed

3 (a) to say "form and content of the judgment"?

4 HONORABLE TRACY CHRISTOPHER: Well, we

5 already have -- .8 is already judgment.

6 HONORABLE TOM LAWRENCE: Well, this section

7 doesn't deal with the entire judgment. It just deals with

8 the order to repair only.

9 CHAIRMAN BABCOCK: Okay. Yeah, that's

10 right.

11 HONORABLE TRACY CHRISTOPHER: But, see, I

12 don't think you should have -- I mean, why would we want a

13 separate order? I mean, we've got this expedited

14 procedure. Everything should be in one judgment that then

15 is appealable within a certain period of time. And so,

16 you know, to the extent you need to put this information

17 about what needs to be in the order to repair then it

18 should be put into the judgment, in my opinion. And then

19 put No. 10, just "landlord's failure to comply with the

20 judgment that includes an order to repair" and then move

21 on from there. I mean, you have to serve a judgment on

22 them, too, don't you?

23 HONORABLE TOM LAWRENCE: Well, we would --

24 they would get the judgment in the same way they get any

25 judgment.

1 HONORABLE TRACY CHRISTOPHER: Right.
2 HONORABLE TOM LAWRENCE: They would be
3 mailed a copy of it.
4 HONORABLE TRACY CHRISTOPHER: Or if they're
5 in court, you hand it to them.
6 HONORABLE TOM LAWRENCE: Yeah.
7 HONORABLE TRACY CHRISTOPHER: Same thing.
8 CHAIRMAN BABCOCK: Yeah, Richard.
9 MR. MUNZINGER: The order to repair is part
10 of the final judgment. It's not a preliminary or interim
11 order; is that correct?
12 HONORABLE TOM LAWRENCE: It's part of the
13 final judgment, that's correct, but you may not -- the
14 judgment may not -- you may not find that an order of
15 repair is granted. It may not be granted or pled for, so
16 you could have a judgment without an order to repair, but
17 if you have an order to repair, yes, that's part of the
18 final judgment disposing of all the issues.
19 MR. MUNZINGER: It would have to be part of
20 the final judgment.
21 HONORABLE TOM LAWRENCE: (Nods head.) Now,
22 whether it's a separate form or included in the final
23 judgment, the task force didn't have any position on that.
24 Whatever the Court or the committee prefers. I drafted
25 the -- the draft judgment I drafted with it in there

1 because it think it makes more sense to have everything in
2 one piece of paper personally, but we didn't contemplate
3 having the rule address that, but we can.
4 CHAIRMAN BABCOCK: Okay. Carl.
5 MR. HAMILTON: I don't understand. How do
6 you get an order to repair if that's not part of the
7 judgment?
8 HONORABLE TOM LAWRENCE: Well, I'm saying it
9 is part of the judgment, but you could have a judgment
10 without an order to repair.
11 MR. HAMILTON: Then it isn't part of the
12 judgment.
13 CHAIRMAN BABCOCK: Could you have an order
14 to repair without a judgment?
15 HONORABLE TOM LAWRENCE: No.
16 MR. MUNZINGER: It may be a semantic
17 problem. "Judgment requiring a repair." I think that's
18 part of the problem. The use of the word "order" as
19 distinct from the word "judgment," which includes an order
20 to repair, is what may be causing the problem under
21 discussion here. People are reading the order -- I mean,
22 the rule as if there are two separate documents or two
23 separate orders, when, in fact, a judgment requiring
24 repair must be a final judgment, otherwise, I've got no
25 right to appeal. I can't appeal to the county court from

1 an interim order, I guess, unless I do it by mandamus or
2 contempt or something else, and I don't think that's what
3 the Legislature envisions, and I don't think that's what
4 the group envisioned when they voted to say that we could
5 have justices of the peace hold people in contempt. It's
6 a definitional problem.
7 CHAIRMAN BABCOCK: Okay. Yeah, Elaine.
8 PROFESSOR CARLSON: So if you wanted to
9 exercise as a JP jurisdiction over the repair, would you
10 order the repair in so many days and maintain authority
11 over the case?
12 HONORABLE TOM LAWRENCE: Yes.
13 PROFESSOR CARLSON: Or is this set up that
14 you order the repair and then you sign the final judgment,
15 and you've got a short period of time in which the party
16 will appeal? If they want.
17 HONORABLE TOM LAWRENCE: Well, you're
18 jumping ahead again, aren't you, because that gets to the
19 question of how long the courts are going to have plenary
20 jurisdiction over this order to reduce rent and order to
21 repair, and we're proposing that we follow -- what was it,
22 Elaine, TRAP rule -- you're the one that gave it to me.
23 Help me remember. The TRAP rule that says that you have
24 some continuing jurisdiction over certain issues after the
25 plenary jurisdiction. So what we're going to propose is

1 that the JP court will retain plenary jurisdiction over
2 the order to repair and the order reducing rent after the
3 normal plenary jurisdiction of the court would have
4 expired, just in order to keep control over this, because
5 otherwise you would have to do everything within the
6 court's plenary jurisdiction or you lose it, and you can't
7 do anything about it, which, you know, doesn't seem to be
8 the best way to handle this. We want to get this
9 adjudicated and done, so but we're going to talk about
10 that in a rule a little bit later.
11 PROFESSOR CARLSON: So it could be a
12 judgment and then you have this enforcement ability down
13 the road over your --
14 HONORABLE TOM LAWRENCE: Yes, over the order
15 to repair and the order reducing rent.
16 CHAIRMAN BABCOCK: Richard Munzinger.
17 MR. MUNZINGER: Well, it seems to me what I
18 just heard is that a property owner can go -- can be
19 called into justice court. The justice of the peace hears
20 of the problem affecting health and safety, tells the
21 property owner, "Fix it." It's not a final judgment. The
22 property owner says, "That's unreasonable."
23 "Fix it." And I can't appeal because it's
24 not a final judgment, so I can't appeal to the county
25 court. The justice court has maintained jurisdiction of

1 this issue and can now tell me that I go to jail if I
2 don't fix it while the case is pending before the justice
3 court.
4 HONORABLE TOM LAWRENCE: No. No, not at
5 all. There is an appeal.
6 PROFESSOR CARLSON: And the appeal stays the
7 judgment.
8 MR. MUNZINGER: Pardon me?
9 PROFESSOR CARLSON: There is an appeal for
10 the landlord, and it stays the judgment.
11 MR. MUNZINGER: But that's not a judgment.
12 It's an interim order. There is no judgment.
13 CHAIRMAN BABCOCK: Richard is saying it's
14 interlocutory.
15 MR. MUNZINGER: Sure. It's an interlocutory
16 order. I've got jurisdiction of the case. "Yes, Judge,
17 and I want you to lower the rent, and I want you to enter
18 the civil penalty, and I want you to do this, that, and so
19 forth." And the judge says, "Fine. We're going to sit
20 here until this is done. You've got six days to fix the
21 roof."
22 HONORABLE TOM LAWRENCE: There is a final
23 judgment, and there is a time to appeal, but it is
24 contemplated that the repairs may take longer. The
25 repairs may take 30 days for whatever reason, or the -- or

1 the order reducing rent may last for 30 days because the
2 condition is not going to be repaired. The landlord is
3 going to know what is ordered on the day of the trial.
4 The judge is going to say, "Fix this, and the rent is
5 reduced this much," and if you don't like it then you
6 appeal on that day. If you don't appeal, then it's -- we
7 presume the landlord says, "Okay, I think that's fair, I'm
8 not going to appeal," and then the court is going to
9 retain jurisdiction over the issue of repair and the
10 reduction of the rent until that's disposed of.
11 MR. MUNZINGER: And the problem that I am
12 bothered with is that the rule uses the word "order," not
13 "final judgment," and Elaine just asked the question of
14 whether the court would have continuing jurisdiction; and
15 your answer is, yes, to enforce the judgment during its --
16 the plenary power would be extended to enforce the
17 judgment, but the rule contemplates the entry of an order,
18 as distinct from a final judgment which orders repair, and
19 the rules should not be that ambiguous if you're going to
20 put people in jail for violating it.
21 HONORABLE TOM LAWRENCE: Well, the term
22 "order" comes from the statute because the statute gives
23 us the jurisdiction to order a repair, so that's why the
24 term "order" is --
25 MR. MUNZINGER: And I agree with you. I

1 looked at the statute, and the statute does, in fact, use
2 "order" and then two sections later uses the word
3 "judgment." And that's bothersome.
4 CHAIRMAN BABCOCK: Hugh Rice Kelly.
5 MR. KELLY: I think it's somewhat analogous
6 to what you're talking about, but in administrative law
7 cases, especially decades ago, one way to test an order
8 was to refuse to comply, be found in contempt, and then
9 you would -- you would seek a writ of habeas corpus, and
10 they appealed Railroad Commission cases that way. So the
11 JP ordered you to jail, you get a writ of habeas corpus,
12 post a 200-dollar bond, and you're gone.
13 MR. MUNZINGER: And I understand that, but
14 is that what the Legislature intended, and is that what
15 the rule that the Supreme Court of Texas wants to adopt in
16 this circumstance?
17 MR. KELLY: I'm just offering that as a
18 piece of history, Richard, not suggesting it.
19 MR. MUNZINGER: No, I understand. I
20 understand.
21 CHAIRMAN BABCOCK: Judge Yelenosky, then
22 Skip.
23 HONORABLE STEPHEN YELENOSKY: Well, why
24 shouldn't it -- Judge Lawrence, why shouldn't it just be
25 judgment? A court always -- as we're discussing down here

1 -- always has power to enforce the order beyond its
2 plenary jurisdiction, doesn't it? I mean, so you issue
3 the judgment --
4 HONORABLE TOM LAWRENCE: Well, I'm not sure
5 about that.
6 HONORABLE TRACY CHRISTOPHER: It's like a
7 permanent injunction.
8 HONORABLE STEPHEN YELENOSKY: Yeah.
9 HONORABLE TRACY CHRISTOPHER: You have the
10 ability if they're no longer complying with the permanent
11 injunction years after the case is over with to take that
12 matter up.
13 HONORABLE STEPHEN YELENOSKY: So you don't
14 have to retain any jurisdiction explicitly over
15 enforcement. I mean, the way it would happen in district
16 court is you'd do a temporary injunction, which of course
17 you can appeal. There is an interlocutory appeal to that,
18 so we don't want to create something that would be
19 unappealable, and here it seems like it ought to be a
20 judgment. You don't lose the power to enforce it.
21 HONORABLE TOM LAWRENCE: I don't think the
22 task force cares if we call it an order or a judgment. We
23 tried to use terminology consistent with the underlying
24 statute, but the task force believes that there is a
25 potential jurisdiction problem with the court taking

1 action after the plenary jurisdiction.
2 HONORABLE STEPHEN YELENOSKY: Well, let's
3 resolve that. I mean, is that a concern? What do people
4 think?
5 HONORABLE TOM LAWRENCE: Well, it was to the
6 task force, which is why we drafted the rules a little bit
7 later to give us continuing jurisdiction over these two
8 areas.
9 HONORABLE STEPHEN YELENOSKY: Well, it's a
10 concern, but if we can discuss it and people don't think
11 that it's a realistic concern then there's no real reason
12 not to make it a judgment, and it becomes appealable, and
13 Richard Munzinger's concern goes away.
14 CHAIRMAN BABCOCK: Skip.
15 MR. WATSON: I think we're assuming, and I
16 think correctly so, that the Legislature is just loosely
17 using terms, judgment, order. We get over to section 13,
18 and it's the decision that's appealable. I think that
19 rather than being bound to the statutory wording, we just
20 need to start saying "judgment," and if we're talking
21 about a particular order within the judgment, we say so.
22 I would just suggest changing it to "the judgment
23 containing the order."
24 CHAIRMAN BABCOCK: Justice Gaultney.
25 HONORABLE DAVID GAULTNEY: I was just going

1 to say the same comment, but I think Judge Christopher had
2 the solution, and that is to -- assuming it is the
3 judgment that's going to be entered, is simply if you've
4 got the context problem in terms of the order, just move
5 it to 737.8(a) where you refer to the order to repair and
6 just describe it at -- in the judgment rule what that
7 order should look like.
8 CHAIRMAN BABCOCK: Okay. Any other comments
9 about this? Okay. Why don't we get to subsection (c),
10 which is the fun part?
11 HONORABLE TOM LAWRENCE: All right.
12 "Landlord's failure to comply with the order. If the
13 landlord fails to comply with the order, the failure is
14 grounds for contempt of court against the landlord under
15 Section 21.002 of the Government Code. If the landlord
16 fails to comply with an order, the tenant may file in the
17 justice court where the case is pending an affidavit
18 stating that the order has been disobeyed and describing
19 the acts or omissions constituting the disobeyance. On
20 receipt of the affidavit, the justice shall issue a show
21 cause order directing the landlord to appear on a
22 designated date and time and show cause why the landlord
23 should not be adjudged in contempt of court. The order to
24 show cause should be delivered to the sheriff or constable
25 in the county and must be personally served on the

1 landlord no later than three days prior to the hearing on
2 order to show cause.
3 "If the justice finds after considering the
4 evidence at the hearing that the landlord violated an
5 order, the justice may assess a fine of not more than a
6 hundred dollars or confinement in the county jail for not
7 more than three days or both such fine and confinement in
8 jail. If the landlord violates an order before receiving
9 the show cause order, but has complied with the order
10 after receiving the show cause order, the justice may
11 still find the landlord in contempt and assess punishment
12 as provided for in this rule."
13 A lot of that comes from the writ of
14 re-entry statute, which we've been working with for a
15 number of years.
16 CHAIRMAN BABCOCK: Okay. Comments about
17 this? Judge Yelenosky.
18 HONORABLE STEPHEN YELENOSKY: Yeah, it
19 references the Government Code provision, but then it only
20 incorporates the criminal punitive contempt and not the
21 coercive contempt. So I would prefer we either just
22 reference the Government Code and be silent, or if we're
23 going to reference the punitive contempt, we also
24 reference the coercive contempt.
25 HONORABLE TOM LAWRENCE: Well, I think most

1 JPs feel that the JP has the power for three days and/or a
2 hundred dollars and no more.
3 HONORABLE STEPHEN YELENOSKY: But we
4 disagree.
5 HONORABLE TOM LAWRENCE: Well, then I guess
6 that's up to the Court then, isn't it, to resolve that.
7 HONORABLE STEPHEN YELENOSKY: Yeah, but, I
8 mean, I think the vote -- wasn't the vote on coercive
9 contempt existing?
10 HONORABLE TOM LAWRENCE: Well, I think the
11 vote was whether you can hold them in contempt or not.
12 CHAIRMAN BABCOCK: Yeah, I don't think we
13 voted on whether coercive versus criminal, but maybe
14 Munzinger thinks differently.
15 MR. MUNZINGER: No, Judge Yelenosky is, in
16 my opinion, correct in his interpretation of Section
17 21.002. The coercive powers afforded a justice of the
18 peace in the ordinary reading of that statute are twofold,
19 one, hundred-dollar fine, three days in jail; two, go to
20 jail and don't pass go until you obey me. You've got both
21 of them. If Judge Yelenosky's interpretation of the
22 statute is correct, the Supreme Court is now amending --
23 is denying that power to a justice of the peace by not
24 referencing subsection (h) in its rule relating to this
25 problem, and obviously the Court has the authority to do

1 that, I suppose, but do they want to.

2 CHAIRMAN BABCOCK: Why don't we -- as a

3 possible alternative to this language, why wouldn't you

4 just say that the justice may hold the landlord in

5 contempt according to law or according to Section 21.002

6 without making a judgment about whether Judge Lawrence and

7 all the other JPs are right or whether Yelenosky and

8 Munzinger are right?

9 HONORABLE STEPHEN YELENOSKY: Because they

10 need guidance, I guess. Well, that's what we're told. I

11 mean, I'm not being facetious.

12 CHAIRMAN BABCOCK: I know.

13 MR. MUNZINGER: Chip, when you do come to a

14 vote I do think we should vote on the question of whether

15 or not the rules should use the word "judgment" and

16 "order" to make it clear that the -- if that's what the

17 committee wants, that the -- an order of contempt may only

18 be included and enforced in a final judgment and not in a

19 temporary judgment. I think that's a very important issue

20 for the freedom of property owners, and then the second

21 issue is what -- this issue we're discussing, whether

22 subsection (h) is part of their -- of the justice's

23 coercive powers, but I think there are two votes that are

24 necessary.

25 PROFESSOR HOFFMAN: I think you mean

1 subsection (e).

2 MR. MUNZINGER: Sir?

3 PROFESSOR HOFFMAN: I think you mean

4 subsection (e).

5 CHAIRMAN BABCOCK: Subsection (e) as limited

6 by subsection (h).

7 MR. MUNZINGER: Yeah, (e) refers to (h). I

8 apologize. It is (e) and (h).

9 CHAIRMAN BABCOCK: Judge Christopher.

10 HONORABLE TRACY CHRISTOPHER: I agree. I

11 think we need to move 737.10(a), 737.8(a). Then we need

12 to move issuance, service, and return --

13 CHAIRMAN BABCOCK: Hey, Judge Christopher, I

14 don't think we got that last part. What are you proposing

15 again?

16 HONORABLE TRACY CHRISTOPHER: Move 737.10(a)

17 to .8(a).

18 CHAIRMAN BABCOCK: Okay.

19 HONORABLE TRACY CHRISTOPHER: Move

20 737.10(b), call it "Issuance, service, and return of

21 judgment," not "order," and move it also under the

22 judgment section of 737.8.

23 CHAIRMAN BABCOCK: Okay.

24 HONORABLE TRACY CHRISTOPHER: Turn 737.10

25 into just "contempt." Put subsection (c) as "Landlord's

1 failure to comply with the judgment," and make that the
2 beginning of the provision. Then the (d), modification,
3 needs to be combined somehow with 737.11. So it would be
4 a motion to modify the judgment, which would include
5 either the reduction in rent or the repair order, and
6 combine those two somehow.
7 CHAIRMAN BABCOCK: Okay.
8 MR. DOGGETT: Chip?
9 CHAIRMAN BABCOCK: Yes.
10 MR. DOGGETT: You've got to be careful. The
11 reason why "order" was used and not just because of the
12 Property Code, but somebody doesn't comply with the
13 judgment, the judgment may say, "You shall pay the tenant
14 $500." So I don't want a landlord to be guilty or
15 possibly guilty of contempt for not paying some money.
16 HONORABLE TOM GRAY: Why not?
17 MR. DOGGETT: Well --
18 HONORABLE TRACY CHRISTOPHER: That portion
19 of the judgment requiring him to repair. I mean, I
20 understand -- I agree with you, you can't hold him in
21 contempt for not paying.
22 MR. DOGGETT: Because I'm not prepared as a
23 tenant advocate even to hold a landlord in contempt for
24 not paying money.
25 HONORABLE TOM LAWRENCE: We tried to keep 10

1 and 11 separate because 10 we wanted to relate only to the
2 order to repair and 11 only to the order to reduce rent.
3 HONORABLE TRACY CHRISTOPHER: Yes, but you
4 include in 11 more about order to repair and remedy.
5 So --
6 HONORABLE TOM LAWRENCE: Well, only to the
7 extent that it would govern when the order to reduce rent
8 is terminated.
9 HONORABLE TRACY CHRISTOPHER: But, again,
10 you have to modify the judgment. Everything needs to be
11 in a judgment to begin with, and everything needs to be --
12 the judgment needs to be modified, I think. You know,
13 miscellaneous orders floating out there is a problem.
14 CHAIRMAN BABCOCK: Judge Lawrence, you don't
15 see it as a problem?
16 HONORABLE TOM LAWRENCE: Well, she raised a
17 lot of different points there. I think that we need to
18 keep 10 only for the orders to repair and 11 only for the
19 orders to reduce rent. I don't think we should mix and
20 match those.
21 CHAIRMAN BABCOCK: Okay. But what about her
22 other -- Judge Christopher's other organizational, like
23 (a) and (b)?
24 HONORABLE TOM LAWRENCE: Well, moving (a) to
25 8, Rule 8 on judgment, is that what you said?

1 CHAIRMAN BABCOCK: Right.
2 HONORABLE TOM LAWRENCE: Well, I think that
3 could work, I think. We just have to be careful that we
4 restrict it only to the order to repair, but I think that
5 could be done.
6 CHAIRMAN BABCOCK: Okay.
7 HONORABLE TOM LAWRENCE: We can do that.
8 CHAIRMAN BABCOCK: And what about the issue
9 of (c), subpart (4), where you have restricted it to that
10 one part of the statute and ignored the other part, (e) as
11 modified by (h)?
12 HONORABLE TOM LAWRENCE: Well, I wish I
13 could give you the cite for why I believe that, but that's
14 what is taught in the JP schools, I believe, and I believe
15 that there is some case law on that, but I'm not positive,
16 but that's always been the understanding of the limits of
17 our contempt.
18 CHAIRMAN BABCOCK: Justice Jennings knows
19 the answer.
20 HONORABLE TERRY JENNINGS: No, but I did
21 want to point out under 92.0563, you know, they -- you
22 know, I guess everybody has recognized they do use the
23 word "order" in regard to (a)(1) and (a)(2), and they do
24 use the word "judgment" in regard to (3) and (4).
25 HONORABLE TOM LAWRENCE: Yeah.

1 HONORABLE TERRY JENNINGS: Is it possible
2 under the statutory scheme for an order to be entered and
3 for the landlord to comply with that order before you get
4 to a point where you would want to enter a judgment for
5 the additional penalties?
6 CHAIRMAN BABCOCK: Yeah, that's what Richard
7 was asking a minute ago.
8 HONORABLE TERRY JENNINGS: Well, and it just
9 seems to me that you might want to give the landlord a
10 chance to comply with the order, minimize what they're
11 going to end up having to pay out in a judgment to
12 minimize the tenant's damages, and I mean, there's got to
13 be a reason why the Legislature used "order" in (1) and
14 (2) and "judgment" in (3) and (4). I don't think they
15 just mixed the terms up.
16 HONORABLE TOM LAWRENCE: Well --
17 HONORABLE TERRY JENNINGS: Maybe they did,
18 but within the same subsection?
19 HONORABLE TOM LAWRENCE: It would be nice if
20 you could address the issue of the repair and have that
21 all finished before you render the rest of the judgment
22 because you don't know what the actual damages are going
23 to be, for example, if somebody has moved out, and they're
24 still going to be out until it's fixed, but that's not
25 what the bill says. The bill says you try this 6 to 10

1 days.

2 HONORABLE TERRY JENNINGS: The whole thing.

3 The whole thing?

4 HONORABLE TOM LAWRENCE: It would have been

5 nice if we had that luxury, but that's not what the

6 Legislature gave us, and we're trying to make these rules

7 fit in what the statute and the bill says.

8 CHAIRMAN BABCOCK: Judge Lawrence, isn't

9 that an argument for Judge Christopher's proposal that you

10 just have a judgment, you don't have an -- I mean, if it's

11 all a 6- to 10-day thing.

12 HONORABLE TOM LAWRENCE: I don't care if we

13 have everything in one judgment. I think that's fine.

14 That's the way I drafted the sample judgment I have.

15 That's the way I would personally want to do it, but the

16 task force didn't really address that, but I don't think

17 there's any objection to that.

18 CHAIRMAN BABCOCK: Okay. Elaine.

19 PROFESSOR CARLSON: Once the final judgment

20 is signed, and assuming there is no timely appeal, you

21 have enforcement powers, contempt and otherwise, right,

22 just by virtue of --

23 HONORABLE TOM LAWRENCE: For -- if everyone

24 buys this continuing jurisdiction concept then, yes, we

25 would have enforcement powers over the order to repair and

1 order to reduce rent. If you don't buy that then arguably
2 we would lose jurisdiction at some point, and if the
3 repair wasn't done then, you know, we're done with it. I
4 don't know what happens.
5 PROFESSOR CARLSON: Well, wait a minute.
6 Let me --
7 HONORABLE TOM LAWRENCE: If I'm answering
8 your question.
9 PROFESSOR CARLSON: Let me restate it
10 because it was not a very well-stated question. Is there
11 a need to change the judgment after it's final because
12 with the expiration of plenary power you have the ability,
13 the obligation to enforce the judgment if there's no
14 appeal. Judgment hasn't been stayed. Are you envisioning
15 this continuing jurisdiction where you're changing the
16 underlying judgment?
17 HONORABLE TOM LAWRENCE: No.
18 PROFESSOR CARLSON: Adding to it?
19 HONORABLE TOM LAWRENCE: No, the only thing
20 that would be changed would be the completion date and
21 maybe the scope of the order to repair and changing the
22 termination of the order reducing the rent.
23 PROFESSOR CARLSON: And that would have to
24 be done by a motion to modify within a very short period
25 of time after the judgment is signed?

1 HONORABLE TOM LAWRENCE: Well, the motion to
2 modify the order to repair would have to be filed within
3 five days --
4 PROFESSOR CARLSON: Okay.
5 HONORABLE TOM LAWRENCE: -- after the
6 judgment is signed. The order to reduce the rent, that
7 would be taken up at such point as the condition was
8 remedied or repaired.
9 PROFESSOR CARLSON: Uh-huh.
10 HONORABLE TOM LAWRENCE: You know, this -- I
11 know it seems illogical, but this 6 to 10 days is a real
12 problem. That's why we're having to do this, to comply
13 with that 6 to 10 days, and also, the issue of us losing
14 jurisdiction over the case. I guess if we kept
15 jurisdiction over everything until everything is finished
16 and there would be no final judgment until the end, I
17 guess that would solve it, but that didn't -- the task
18 force didn't even really consider that, if I recall.
19 CHAIRMAN BABCOCK: Judge Christopher.
20 HONORABLE TRACY CHRISTOPHER: If the idea is
21 you have your final judgment, the judgment says, you know,
22 "Repair the toilet by X date, and during that time period
23 rent is reduced." Okay. So if the landlord finishes the
24 repair earlier then he wants the rent bumped back up.
25 Well, I don't think we should have to have a motion to

1 modify. I think we could include that kind of language in
2 the judgment. If the repair is finished earlier, the rent
3 goes back up. You wouldn't have to modify it.
4 HONORABLE TOM LAWRENCE: And how would one
5 determine that it was done early?
6 HONORABLE TRACY CHRISTOPHER: Well, that's
7 -- you know, you always have your ancillary dispute about
8 that if people disagree, but I don't think you would have
9 to go back in and actually move to modify the judgment. I
10 think that's unnecessarily complicated. The more tricky
11 thing is you say, okay, repair by the end of the month,
12 rent is reduced for that month, but it takes him two
13 months to do the repairs, and then what do you do at that
14 point? And the question should be is it a new cause of
15 action for the reduction in rent for that month, or do you
16 somehow keep jurisdiction over the case during that extra
17 month time period? If it's just a month, we're good.
18 Okay. Got 30 days, but -- right? You have 30 days for
19 your judgments?
20 HONORABLE TOM LAWRENCE: No, 10.
21 HONORABLE TRACY CHRISTOPHER: 10 days for
22 your judgment. Oh, okay.
23 CHAIRMAN BABCOCK: All those hungry
24 contractors out there are ready to work on 10 days notice.
25 HONORABLE TOM LAWRENCE: That's the problem.

1 HONORABLE TRACY CHRISTOPHER: But you have
2 continuing jurisdiction over an order, so like if we're
3 correct, you do. If it's an injunction, if you're ordered
4 to do something, normally my plenary power is 30 days, but
5 -- if no one has appealed, but I can still hold someone in
6 contempt if they haven't followed the order, what I have
7 told them to do in my judgment.
8 HONORABLE TOM LAWRENCE: But you
9 recognize --
10 HONORABLE TRACY CHRISTOPHER: And I couldn't
11 modify the rent at that point.
12 HONORABLE TOM LAWRENCE: But you recognize
13 this is not an injunction. This is just a simple
14 judgment.
15 HONORABLE TRACY CHRISTOPHER: It's the same
16 thing.
17 HONORABLE STEPHEN YELENOSKY: It's the same
18 thing.
19 PROFESSOR CARLSON: A quasi-injunction, I
20 think you said.
21 CHAIRMAN BABCOCK: Justice Jennings.
22 HONORABLE TRACY CHRISTOPHER: You order
23 somebody to do something that's an affirmative injunction.
24 HONORABLE TERRY JENNINGS: I just had a
25 question. On the six days, are you getting that from the

1 act, line (d)?

2 HONORABLE TOM LAWRENCE: Well, whatever 1448

3 -- that's what it says.

4 HONORABLE TERRY JENNINGS: Well, it says,

5 "If a suit is filed in a justice court requesting relief

6 under subsection (a), the justice court shall conduct a

7 hearing on the request not earlier than the 6th day." Is

8 that what you're talking about?

9 HONORABLE TOM LAWRENCE: Yes.

10 HONORABLE TERRY JENNINGS: It doesn't say

11 you have to enter a judgment or anything like that. It

12 just says you have to have a hearing, and it occurs to me

13 that, well, you can have a hearing and then the judge can

14 enter an order for repair, but I don't see anything in

15 here that says, well, the court has to enter a judgment at

16 that time.

17 HONORABLE TOM LAWRENCE: Well, it was the

18 opinion of --

19 HONORABLE TRACY CHRISTOPHER: Then we have

20 this interlocutory order that you can't appeal that you

21 ought to be able to appeal that is a problem.

22 MR. WATSON: Or he could take it under

23 advisement.

24 HONORABLE TOM LAWRENCE: It was the opinion

25 of the task force that you need to try to dispose of this

1 within the 6 to 10 days, and that's what the rule -- what
2 it's based on, and that was a unanimous opinion of the
3 tack force. Now, it's certainly possible to craft some
4 type of rules that would allow us to not do anything
5 finally until after it's repaired.
6 HONORABLE TERRY JENNINGS: Because, yeah,
7 I'm wondering if that's the legislative intent, because if
8 you read the sentence it clearly says you have to conduct
9 a hearing. Well, you could have your hearing, then the
10 court could enter a repair order. There could be some
11 time involved there to allow the landlord some time to
12 make the repairs and minimize their damages to the tenant,
13 and then after the repairs are made you could have a
14 subsequent hearing, an evidentiary hearing on the damages,
15 and then enter a judgment. So I'm wondering if you could
16 read this and come to the conclusion that the Legislature
17 meant this to be an order with its subsequent -- with its
18 separate remedy of contempt, and then after that's been
19 taken care of then go on and figure out the damages and
20 then enter a separate judgment.
21 CHAIRMAN BABCOCK: Sorry about that.
22 MR. DOGGETT: May I respond?
23 CHAIRMAN BABCOCK: Yeah, go ahead.
24 MR. DOGGETT: Remember, this is supposed to
25 be essentially modeled originally on the eviction rules, a

1 little bit anyway. In other words the 6 to 10 days was no
2 accident. That's the current time line for getting into
3 court if you want to evict somebody. The eviction process
4 is supposed to be a short, quick way to get rid of a
5 tenant that shouldn't be there. The rules there are
6 similar. Your tenant's not paying you, for example, so
7 you're entitled to join a request for rent inside that
8 eviction case and enter a judgment quickly. One hearing.
9 Judge Lawrence has 2,500 of them. This is supposed to be
10 something simple and easy to do and not have multiple
11 hearings requiring the parties and the judges and the
12 courts to have to continue to review something like this.
13 HONORABLE TERRY JENNINGS: I could
14 understand it being simple, but I don't think it's
15 analogous, because, well, what if you have pipes bursting
16 and it's going to take the landlord three weeks to, you
17 know, get somebody in there to fix it?
18 MR. DOGGETT: Well, and the idea is, though
19 -- it is somewhat analogous. How long is a tenant going
20 to be there after the eviction occurs? The judge orders
21 them out, but they may appeal, who knows.
22 HONORABLE TERRY JENNINGS: But there may be
23 repairs that take three weeks or months to -- for the
24 landlord, and to penalize the landlord for something
25 beyond their control, I mean, I can see the analogy, yes,

1 you want to move quickly, but maybe they recognized when
2 they drafted this legislation that it's not quite the same
3 situation and that maybe there's some flexibility here as
4 far as you enter the order, give them a reasonable time to
5 make the repairs, and then if they don't then hold them in
6 contempt. Because it doesn't seem to be completely
7 analogous.
8 MR. DOGGETT: I would just say that we were
9 confident that the justices of the peace are used to
10 dealing with this scenario between these litigants and how
11 much rent is owed, et cetera. The tenant may be there
12 longer or shorter and may not owe the rent necessarily
13 given future events. Similarly here, we don't know what
14 the future will hold. The court is trying to figure out
15 what has happened and enter a reasonable order to address
16 the problem and give the parties an opportunity to come
17 back to court if necessary to modify the order.
18 These are difficult problems, by the way.
19 This was discussed at length, but I want to try to at
20 least defend what we discussed and how we came about sort
21 of our decision on the matter, and that is that we have a
22 procedure to allow an amendment in case of a problem, but
23 if there is no problem then we reduce all the parties'
24 time in court and the court's time as well. That's sort
25 of how we -- we juggled the interests, you understand.

1 It's not a perfect solution, but it's how we got there. I
2 think that's fair to say, Judge.
3 HONORABLE TOM LAWRENCE: Exactly.
4 CHAIRMAN BABCOCK: Okay. Any other comments
5 on that? Let me go back to (c)(4). It seems to me
6 somebody has got to figure out whether or not the -- what
7 apparently they're teaching the JPs and what the JPs
8 believe, which is the extent of their contempt power is
9 three days or a hundred dollars or both, contrary to what
10 Judge Yelenosky and Justice Gaultney think is the reading
11 of the statute, which, frankly, is how I read it, that you
12 have more expansive authority. So somebody is going to
13 have to look at that.
14 HONORABLE NATHAN HECHT: That would be me.
15 CHAIRMAN BABCOCK: That would be Justice
16 Hecht. So just like any first year associate at my firm,
17 look into that and get back to me. So Justice Hecht has
18 got that one covered, and so let's talk about (d) real
19 quickly, and then just so everybody knows, Judge Herman is
20 here to talk about our agenda Item 4, and I don't want to
21 keep him, and there's been some representatives of DPS
22 here patiently waiting for longer than that, so when we
23 finish this subsection (d) of .10 we'll take a little
24 break from this exercise and go to Judge Evans and the
25 NICS disability de novo issue, so let's finish up this as

1 quickly as we can and then we'll go from there.
2 HONORABLE TOM LAWRENCE: Okay. (d) is the
3 modification of the order to repair or remedy. "Either
4 party may move the justice to modify the order to repair
5 or remedy by filing a written motion requesting a hearing
6 with the court within five days from the date the justice
7 signs the judgment. " It's anticipated that you're having
8 this hearing on short notice. The landlord may come in.
9 The landlord may not have had time to get a contractor in
10 to really look at it to figure out what is going to be
11 required. The order may be entered to repair something
12 and the contractor gets out there and tells the landlord,
13 "No, this is a big deal. This is going to take a lot more
14 time" or "it's going to take a lot more money," so there
15 needs to be some mechanism for the landlord to be able to
16 come back into court to change the -- change the date of
17 the completion or some other aspect of the order.
18 "If the justice does not grant the motion
19 requesting hearing within 10 days from the date the
20 justice signs the judgment then the motion is overruled by
21 operation of law." And this is just the motion for a
22 hearing or to modify the order to repair.
23 "If the justice grants the motion requesting
24 a hearing, the justice must set the hearing no later than
25 10 days from the date the justice grants the request for a

1 hearing, unless the parties agree to an extension. If the
2 justice does not grant a party's written motion for a
3 hearing, that party may appeal the judgment within 15 days
4 from the date the justice signs the judgment. A motion
5 for hearing that was not in writing does not extend the
6 time in which a party may appeal. A motion for a hearing
7 under this rule that is not filed within five days from
8 the date the justice signs the judgment is not timely
9 filed and does not extend the time for a party to appeal.
10 "The motion requesting hearing must show
11 good cause for modification and why hearing is justified.
12 The justice may modify the order to repair or remedy by
13 changing the date by which the repairs or remediation must
14 be completed, changing the actions the landlord must take
15 to repair or remedy the condition at the leased premises,
16 and changing any other conditions the court may find
17 appropriate within the scope of the order. If an order is
18 modified, corrected, or reformed in any respect, any party
19 may appeal within 10 days from the date the justice signs
20 the amended order. The appeal must be filed in accordance
21 with Rule 737.13."
22 CHAIRMAN BABCOCK: Okay. Any comments about
23 that? Yeah, Justice Gray.
24 HONORABLE TOM GRAY: I'm sure you know
25 exactly why in each instance the word "judgment" or

1 "order" was used, but in going through that and listening
2 to you read it and looking at the times that it uses the
3 term "motion" or "order" -- I'm sorry, "judgment" or
4 "order," that is very hard for me to get my mind around,
5 and I can't imagine that pro se litigants are going to be
6 able to draw that kind of distinction. That's why I go
7 back to Justice Christopher or Judge Christopher's
8 argument about getting these together. That's very
9 difficult for me if they're not in the same document and
10 with reference to the same at least piece of paper.
11 CHAIRMAN BABCOCK: Carl.
12 MR. HAMILTON: I've already discussed this
13 with Judge Lawrence, but there's a problem with the timing
14 there. Theoretically one could ask for a hearing and the
15 judge grants it on the 9th day and sets the hearing for 10
16 days later, which would be 19 days out, which would be
17 past the time for appeal, if he denies the motion. The
18 other -- so that has to be fixed, but the other question
19 that I had was why would the judge deny a hearing on
20 somebody's motion to modify?
21 HONORABLE TOM LAWRENCE: Well, if he felt
22 there was no cause -- good cause shown for a hearing, if
23 it was just a delaying tactic, if the issue might not have
24 been with the order but was something else that was more
25 properly appealable. Those are three examples that come

1 to mind. If they're asking you to do something that
2 doesn't even apply to the order to repair.
3 CHAIRMAN BABCOCK: And, Carl, on your first
4 point, does (d)(6) fix that?
5 MR. HAMILTON: No.
6 HONORABLE TOM LAWRENCE: No, I think Carl's
7 right. He's pointing out -- and I don't know, I guess we
8 overlooked this or something, but if someone files a
9 motion to reconsider -- or, I'm sorry, to modify the
10 order --
11 CHAIRMAN BABCOCK: Right.
12 HONORABLE TOM LAWRENCE: -- and the court
13 grants the motion for the hearing but ultimately decides
14 not to modify the order, then the time to appeal would be
15 passed. So we need to allow a time to appeal after that,
16 so I think he's right, but we can fix that.
17 CHAIRMAN BABCOCK: Okay. Good. Any other
18 comments? All right. Well, that will take us through
19 737.10, and let's take a little break from these rules now
20 and go to the NICS, disability de novo rules, and Judge
21 Evans has been working on this, and I think has been
22 talking to Judge Herman and to DPS, and there is a fair
23 amount of funding -- Federal funding at issue for our
24 state regarding this rule. So, Judge Evans, tell us about
25 it.

1 HONORABLE DAVID EVANS: All right. Judge
2 Lawrence, thank you for wearing them down. Maybe I'll get
3 a pass on this, I don't know. Judge Peeples has told me I
4 shouldn't speak longer than five minutes and promised to
5 put a red light out. Judge Peeples and Justice Gaultney
6 and I were appointed to a subcommittee to work on this
7 problem, and I'll just outline what I'm going to do. I'm
8 going to lay out the background as to how we got here and
9 then point you toward the rule, but before I do I want to
10 introduce Judge Guy Herman, our presiding judge in
11 statutory probate courts; Mike Lesko with the DPS, and,
12 Mike, why don't you tell them your position?
13 MR. LESKO: I'm the Deputy Assistant
14 Director for the Law Enforcement Support Services at DPS.
15 I have all the crime records stuff, criminal history,
16 AFIS, sex offender registration, UCR, interfaces with the
17 Federal systems.
18 HONORABLE DAVID EVANS: And he is
19 accompanied by Louis Beaty, who is an attorney with the
20 department. And this concerns the National Instant
21 Criminal Background Check System known as the Brady Act
22 and an amendment to that act in 2007 known as the
23 Improvement Act of 2007, and the Improvement Act followed
24 the Virginia Tech shootings and seeks to increase the
25 information available on background checks by allowing

1 people who are selling firearms to determine whether or
2 not someone is prohibited from buying a firearm because of
3 a prior mental health adjudication or commitment, and it's
4 designed to keep the firearms out of the hands of those
5 persons prohibited by state or Federal law from receiving
6 or buying a firearm or having one transferred to them, and
7 a person who is under one of these commitments is
8 considered to be a person who has a firearm disability.
9 Now, when they passed this law they required
10 the states to come into conformity with it, and, of
11 course, they tied -- they have a carrot to it, and a
12 stick. If you don't come into conformity with it you are
13 not eligible for grant money, and so it's very important
14 to the department and to the state that we be eligible for
15 that grant money, and it is significant money, and Mike is
16 available to answer questions on that. So the Improvement
17 Act required some changes by all states, and one of
18 those -- and that was laid out in a memo that Carl
19 Reynolds presented to us at the last meeting, and it's
20 posted on the website as a 9-23 entry if you want to go
21 back and look at that memo so you can understand how we
22 arrived at this point.
23 House Bill 3822 was introduced during the
24 last session. It became section 574.088 in the Mental
25 Health Code and was designed to meet the requirements of

1 the Improvement Act, and it was thought that it did a real
2 good job of it. They had coordinated with the ATF, and
3 they felt like that they had provided for due process, and
4 I put together a very short memo with an attachment to it,
5 and 574 of the Mental Health Code is attached to there,
6 and you can see what the Legislature passed in order to
7 meet the requirements of the Improvement Act.
8 Working with the ATF, it was felt that it
9 was unnecessary in Texas for us to have a de novo trial
10 proceeding, one of the items outlined in the congressional
11 act, because we were sending the petitioners, people who
12 are trying to eliminate this firearm disability, back to
13 the committing court where they get full due process,
14 right to trial by jury, full appellate right. After the
15 bill was passed and after the session was over, then
16 everyone started applying to ATF, and they began to
17 receive forms from the ATF which indicated a greater
18 emphasis on de novo trial review than had been perceived
19 by those persons who are going to have to implement it.
20 So the Court was approached in what Carl called a
21 rule-making exercise, and it certainly has been a little
22 bit of an exercise, to come up with a rule to bridge this
23 gap so that the state might be entitled to funds or apply
24 for funds.
25 So first we thought we met the requirements.

1 Then we began to question whether we had met the
2 requirements, and now I will throw one small matter in.
3 We've got a little history out there. Nevada has made an
4 application. They don't have what we consider to be de
5 novo -- what we would consider to be de novo review, and
6 they were approved. So we're going to proceed on parallel
7 tracks. The department will go ahead -- is considering
8 and is likely to make an application without a rule. It
9 may take six months to have that approved, but the
10 department and the OCA would still like for us to proceed
11 as we can to come up with a de novo review.
12 The committee met three times by telephone
13 and had several e-mail exchanges in the process. We
14 considered several options for a de novo review, review by
15 the appellate courts. We discussed that. Review by
16 masters, even transferring the cases to Austin, and
17 finally we settled on the one that -- one of the other
18 options that we discussed, and that was the assignment of
19 a judge for de novo review.
20 It's pretty hard to do this within the
21 confines of the rule-making power of the Court, and that's
22 my five minutes, Judge Peeples, so I think I'm right there
23 on time. And at this point, in the interest of time, what
24 I'm going to do is turn over to the proposed rule, but --
25 and I'm going to ask for comments, anything you want to

1 throw into it at this point. Judge Herman, is there
2 anything you'd like to add as a resource witness at this
3 point?
4 HONORABLE GUY HERMAN: No, other than, you
5 know, we've followed what we thought the ATF wanted us to
6 do in the legislative process. They took two different
7 statutes and put them together in this next Improvement
8 Act, and what we didn't realize was they were also
9 expecting an administrative hearing of some form, and it
10 can be as little as a petition being filed with the court
11 and the court denying it in administrative capacity and
12 then a trial de novo. We did not realize that. We
13 thought the trial de novo, that you would come back to
14 either the criminal court or a probate court and ask to
15 have a rehabilitation hearing, that would be sufficient
16 for them.
17 We then find out that it isn't, and we start
18 hearing from them -- and it's hard to pin them down --
19 that they sort of expected our appellate courts to have a
20 trial de novo, and we said, "That's not going to happen,"
21 and they said, "Well, you're going to have to come up with
22 something," and then we find out a little bit later that
23 maybe Nevada is going to do it similarly to what we had
24 envisioned, and they approved it, yet we've been told that
25 we have to have this administrative process. And then I

1 contacted Mr. Reynolds and said, "This is a problem,"
2 because Carl had world worked on this the whole way
3 through, and we both had misunderstood what the Feds were
4 asking or we had never been informed what they were
5 asking, so we're trying to come up with a process of an
6 administrative hearing and then some appeal from that to a
7 trial court for trial de novo.
8 HONORABLE DAVID EVANS: What we have come up
9 with as a committee I think I can outline. I think the
10 rule as -- may be read and will give you just as much
11 information. A committing court means the court which
12 originally entered the order that led to the firearm
13 disability. In many -- most of our procedures that's
14 going to be a court exercising probate jurisdiction, and
15 what we envision is a bench trial when the petitioner
16 comes in for relief. If the relief is granted -- and the
17 parties to the proceeding will be the state and the
18 petitioner, because the state would have been involved in
19 the commitment, and following the bench trial a petition
20 for de novo review would be filed, and at the point that a
21 petition for de novo review would be filed the presiding
22 judge of the statutory probate courts would appoint --
23 assign a judge to hear the matter de novo if the original
24 committing court was a court exercising probate
25 jurisdiction, and we track the language in the Government

1 Code, and in all other situations it would be the
2 presiding judge of the administrative region.
3 So the right to jury trial will come at the
4 de novo trial. Both parties have a right to appeal it,
5 and then the final judgment, from a standpoint of
6 appellate review, if the initial proceeding bench trial is
7 not appealed, that's the final judgment. On the other
8 hand, if it is appealed by de novo review then the final
9 judgment in the de novo proceeding will be the appealable
10 order to the appellate courts. And I open it up for
11 questions, comments, corrections, grammatical or
12 otherwise.
13 CHAIRMAN BABCOCK: You say you want to make
14 this Rule 737, huh?
15 HONORABLE DAVID EVANS: That was one we
16 picked.
17 CHAIRMAN BABCOCK: .17, de novo reviews for
18 guns if they don't fix the leaky faucet. Any other --
19 yeah, Frank.
20 MR. GILSTRAP: Well, I guess we all have a
21 problem with the idea that by rule we could come in and
22 create a tribunal that would review the order of a
23 statutory court? I mean, I think that's what we're
24 talking about here. I mean, for example, could the
25 Supreme Court of Texas say, well, in all medical

1 malpractice cases we're going to create a -- we're going
2 to have these submitted for de novo review to a judge,
3 another judge, and in a separate proceeding.
4 I guess -- I don't know, but that seems to
5 me like it might have problems. What if you, however,
6 instead of saying that, you said, well, in this type of
7 case we're going to keep it in the trial court, but we're
8 going to have another judge come in and be appointed to
9 review the trial court's ruling in that same proceeding.
10 Would that maybe -- would that maybe remove some of the
11 problems that this procedure would seem to have?
12 HONORABLE DAVID EVANS: How the cause number
13 might work, Frank, is unknown to me at this matter, which
14 is a clerk function, but there will be -- when a judge is
15 assigned to a case, it doesn't create a new case.
16 MR. GILSTRAP: It does not?
17 HONORABLE DAVID EVANS: It does not create a
18 new case. Now, it could, because we're going to keep the
19 original judge for all other matters, and there's, of
20 course, a concept in probate law that's pretty common, and
21 that's a final appealable order, and you know, you don't
22 end up with this end all judgment in probate matters all
23 the time. You have to determine whether it's a final
24 appealable order, and we decided not to recuse the trial
25 judge, remove the judge from whatever else is in the

1 court, but only have the petition for relief and the
2 petition for de novo relief, have a judge assigned to it,
3 so we're not -- we are assigning a judge to it so --
4 MR. GILSTRAP: You're envisioning it as the
5 same proceeding.
6 HONORABLE DAVID EVANS: All of us in this
7 group have tried to figure out how to stay within the
8 confines of the Court's rule-making authority. We're not
9 positive we've done it, and I couldn't argue that we have.
10 CHAIRMAN BABCOCK: Yeah.
11 HONORABLE DAVID EVANS: But we have assigned
12 a judge to the case as opposed to sending it to another
13 court.
14 CHAIRMAN BABCOCK: Yeah, Roger.
15 MR. HUGHES: Well, I'm not sure whether
16 these are wordsmithing or maybe substitute, but I would
17 suggest first that subsection (h) state that the
18 affirmative findings have to make those findings that the
19 clear and convincing evidence shows that.
20 HONORABLE DAVID EVANS: Okay.
21 MR. HUGHES: It's best to have that in the
22 judgment, I believe, in question. Second, section (e)
23 says, "The initial proceeding will be a nonjury trial,"
24 and then you provide for de novo review by an assigned
25 judge, and you don't really say that that judge's review

1 will be a bench trial as well.
2 HONORABLE DAVID EVANS: It would be a right
3 to trial by jury there.
4 MR. HUGHES: It would be?
5 HONORABLE DAVID EVANS: Yes. That's what we
6 were trying to infer. Didn't do a good job of it.
7 MR. HUGHES: Well, I guess I'm not sure
8 whether it should be a jury trial at all, and I guess
9 that's my first question.
10 HONORABLE DAVID EVANS: I don't think we can
11 deprive a right to trial by jury.
12 MR. HUGHES: Well, but we're talking about a
13 removing of a disability imposed by a Federal law. I kind
14 of think we're talking about a proceeding that didn't
15 exist in common law to begin with, but that's to be
16 discussed. Well, then the next question is whether the de
17 novo review is under clear and convincing standard or
18 whether it's just wide open, and who has the burden of
19 proof in that proceeding? I mean, if it's de novo, you're
20 back to square zero, and I don't know, you know, who has
21 the burden of proof. Is it -- are we to conduct it like
22 the earlier ones? It seems to me if it's de novo then
23 basically once again the petitioner should have the burden
24 of proof to show by clear and convincing evidence. That's
25 just my suggestion.

1 CHAIRMAN BABCOCK: Okay. Any other
2 comments? Yeah, Richard.
3 MR. MUNZINGER: Well, I hate to speak out of
4 character, but I have a real problem with the Supreme
5 Court of Texas creating a right of de novo review because
6 the Legislature stepped on a banana and missed the boat.
7 CHAIRMAN BABCOCK: Are you mixing your
8 metaphors?
9 MR. MUNZINGER: Well --
10 MR. ORSINGER: It was a banana boat.
11 MR. MUNZINGER: Any time you've got a tough
12 problem, just close your eyes to what the law is and let
13 the Court act. I'm going to be a person, let's pretend,
14 who is harmed by this, and I've been denied my weapon, and
15 I come now to the de novo appeal, and I make the argument
16 that the Supreme Court of Texas does not have the right to
17 create a right of de novo appeal because the right of de
18 novo appeal was not included in the statute. You know, my
19 goodness gracious, is the Court a court of law? Is it
20 restricted by the Constitution and by the Legislature, or
21 is it an agency to be used when there is a problem that
22 came about because the Legislature failed in its task?
23 And I -- to me it is a very, very dangerous
24 precedent for the Court to say because we have a problem
25 that may cost us a great deal of money in Federal grants

1 we will create a right out of whole cloth. I can't
2 imagine such a thing. You've got a Constitution, you've
3 got laws, or you don't, and if hard cases make bad laws
4 then to hell with it. It doesn't make sense to me. I
5 understand the problem. It's a problem of government, but
6 it is -- it's a real bad precedent to say, well, we'll
7 just create a right of appeal here whole cloth because
8 we'll lose some Federal money, the heck with that.
9 CHAIRMAN BABCOCK: So whatever Frank had is
10 catching, huh?
11 MR. MUNZINGER: You know, Frank's a good
12 guy.
13 CHAIRMAN BABCOCK: Orsinger, you had a
14 comment, so walk back to you're seat and make it.
15 MR. ORSINGER: Yeah. I would say an
16 argument could be made that de novo appeal is really just
17 the appellate standard of review of what the previous
18 trial court did. I mean, maybe that's a weak argument.
19 The other thing is who is the adversary that's going to
20 raise the argument that Richard just said? I mean, is the
21 county attorney is in there opposing these things, or who
22 is the opposing lawyer?
23 HONORABLE DAVID EVANS: We looked at it, and
24 you'll notice in (b) we stated that the attorney
25 representing the state in the proceeding -- commitment

1 proceeding was a party who had to be served, and that
2 would either be a district or county attorney, depending
3 on the locale that this occurred in.
4 MR. ORSINGER: And you're envisioning that
5 they will come and oppose, just like to be the loyal
6 opposition, they'll come in and oppose this and try to
7 make them prove their case and carry the fact-finder?
8 HONORABLE DAVID EVANS: I can't say --
9 MR. ORSINGER: I mean, I think there's a
10 significant chance there isn't going to be anybody on the
11 other side. I don't know if that's a realistic assumption
12 or not.
13 HONORABLE DAVID EVANS: The other issue is
14 the standard of review of de novo appeal occurred to me,
15 Richard, but the Federal law requires that additional
16 evidence may be presented, and that was the hang-up we got
17 into, a right to additional evidence.
18 MR. ORSINGER: That's a very weak argument.
19 HONORABLE DAVID EVANS: I would like to have
20 done it the way you said.
21 MR. ORSINGER: Is this really going to be an
22 adversary proceeding at all or ever or most of the time or
23 just some of the time? Because it may be that there's
24 nobody on the other side.
25 MR. GILSTRAP: You could see a controversial

1 case. You could see a controversial case where a guy
2 could have committed some crime.
3 HONORABLE DAVID EVANS: I think our
4 witnesses may be able to help us on that.
5 CHAIRMAN BABCOCK: Judge Herman.
6 HONORABLE GUY HERMAN: I think a prosecutor
7 would be remiss not to look at any application for
8 rehabilitation. They're the ones that prosecuted the
9 person. They're the ones that found that this person was
10 likely to cause serious harm to self or others. They're
11 very aware of what happens with guns and people with
12 mental illnesses. Of course, it happens with people
13 without mental illnesses, but I think many prosecutors are
14 certainly going to peruse the application, and I would
15 think in most cases would just make sure that the required
16 proof was put before the court before the court made its
17 own decision.
18 MR. ORSINGER: Okay.
19 CHAIRMAN BABCOCK: Okay. Carl.
20 MR. HAMILTON: What does (a) mean when it
21 says "a person is furloughed from a court-ordered mental
22 health sentence"?
23 HONORABLE DAVID EVANS: It means that I had
24 a lack of imagination and only tracked the Legislature.
25 That's their language, and so I just went with that.

1 That's what we -- that sentence right there is the way in
2 which 574.088 of the Mental Health Code identifies the
3 persons who may petition, and so I --
4 CHAIRMAN BABCOCK: Justice Gray.
5 HONORABLE DAVID EVANS: Maybe Judge Herman
6 could tell you what furlough means on that.
7 HONORABLE GUY HERMAN: In a civil
8 commitment, which can be done by a probate court or by a
9 criminal court when a person comes back from a state
10 hospital or an outpatient facility on a -- they've been
11 sent there on an incompetency to stand trial. They have
12 been not -- they've been found by the hospital that they
13 are still incompetent, will never regain capacity or
14 competency, and they're shipped back, and there's a
15 finding that they also have a mental illness, and so the
16 criminal court if the charges aren't dropped, or the civil
17 court, the probate court, if the charges are dropped, will
18 conduct a hearing to see if they are committed. Once
19 you're committed it's either for 90 days or for one year.
20 During that 90-day period or during the one-year period
21 you could be furloughed; that is, let out before the 90
22 days. Or you could be discharged before the 90 days. As
23 a matter of law at 90 days or one year you're going to be
24 discharged, wouldn't be considered a furlough at that
25 point, unless they bring new proceedings to keep you there

1 longer, and that's the use of the word "furlough."
2 CHAIRMAN BABCOCK: I think Justice Gray had
3 his hand up first, then Judge Christopher, and then
4 whoever is hiding behind Jeff.
5 HONORABLE DAVID PEEPLES: Roger.
6 HONORABLE TOM GRAY: With regard to de novo
7 review, to me that seems to be a misnomer. I know it's a
8 common term, but what you're really talking about is a de
9 novo determination, a new determination, which seems to be
10 inconsistent with what is in (m) when an -- what Judge
11 Evans was referring to that the reviewing judge or the
12 judge that's going to make the new determination has to
13 consider it. It appears to give the assigned judge
14 discretion to receive additional evidence, when it was my
15 understanding under the Federal statute that the new judge
16 or the assigned judge has to receive additional evidence
17 if tendered, and the ability to give deference to the
18 decision of the committing court also seems inconsistent
19 with a new determination, not -- I agree that if it's a
20 review, a true review, that's okay, but typically de novo,
21 as I understood it to mean, is that that is a decision
22 anew. That is a new determination based upon either the
23 record or, in this case under the Federal statute,
24 additional evidence that may be received.
25 And so essentially what I thought we were

1 talking about was essentially a motion for rehearing, and
2 you get a new judge and you start all over, and you can
3 start with the record that's there, but anything that's
4 properly admitted has to be admitted and has to be
5 considered and that there is no deference. So I would
6 have thought (m) would have to be reworked to eliminate
7 the discretion. It will be "receive evidence as in any
8 other case," and no deference would be given to the
9 decision of the committing court.
10 HONORABLE DAVID EVANS: Justice Gray, I
11 would agree with you. That's my understanding de novo,
12 but when -- it's in Carl's memo. When you look at the
13 requirements of the Improvement Act, the language is "the
14 reviewing court may but is not required to give deference
15 to the decision of lawful authority that denied the
16 application," so that's where we parroted that language,
17 and then it states reviewing court also has the right to
18 review, receive additional evidence. Now, as far as --
19 that's why we tracked it.
20 HONORABLE TOM GRAY: Okay.
21 HONORABLE DAVID EVANS: But as a vote, if
22 the committee said, no, wide open, can consider all new
23 evidence and do a real de novo trial, I don't think our
24 committee members necessarily have any problem -- well,
25 I'd want to discuss it with them. I agree with you on the

1 definition of what I consider to be de novo, but we just
2 tracked that Federal law.
3 CHAIRMAN BABCOCK: Judge Christopher.
4 HONORABLE TRACY CHRISTOPHER: Could I ask
5 where "clear and convincing evidence" came from?
6 HONORABLE DAVID EVANS: Same thing.
7 HONORABLE TRACY CHRISTOPHER: The statute,
8 Federal statute.
9 HONORABLE DAVID EVANS: Federal statute.
10 HONORABLE TRACY CHRISTOPHER: And then --
11 HONORABLE STEPHEN YELENOSKY: Do we have
12 that?
13 HONORABLE DAVID EVANS: It was in Carl's
14 memo and it was in 9-23. I believe -- well, I'll ask
15 Justice Gaultney. Did we pull "clear and convincing
16 evidence" from there, or is that another standard?
17 HONORABLE GUY HERMAN: I believe it comes
18 from the Probate Code -- I mean, the Mental Health Code
19 which uses -- the proceedings under the Mental Health Code
20 are by clear and convincing evidence.
21 HONORABLE DAVID EVANS: I'll need to find
22 that out, Tracy.
23 HONORABLE TRACY CHRISTOPHER: And my second
24 question, on the de novo review, is that designed to
25 protect the state or to protect the person trying to get

1 relief from the disability?

2 HONORABLE DAVID EVANS: It's a one size fits

3 all Federal statute where they believe it was going to be

4 an administrative proceeding.

5 HONORABLE TRACY CHRISTOPHER: But I thought

6 you said that -- what you quoted to me talked about

7 someone where the relief had been denied. That would only

8 be the person, not the state.

9 HONORABLE DAVID EVANS: That's true.

10 HONORABLE TRACY CHRISTOPHER: So it seems to

11 me that Richard's idea that, you know, people are going to

12 be unhappy that we've included this new provision would be

13 unhappy if we gave the state the right of de novo appeal,

14 but probably wouldn't be unhappy if it's the disabled

15 person whose petition was denied who gets the de novo

16 appeal. Although I certainly understand your point about

17 how we're stepping outside the bounds of our power, but I

18 mean, you know, in terms of who's going to complain, if

19 I'm the person under a disability and I get a second bite

20 at the apple --

21 HONORABLE DAVID EVANS: Right.

22 HONORABLE TRACY CHRISTOPHER: -- as long as

23 the state doesn't get the second bite.

24 HONORABLE DAVID EVANS: The state may

25 have -- I think that that solution was only framed because

1 we didn't want to have two jury trials, and we wanted to
2 have one hearing without a jury trial, and so the state
3 wouldn't have had a jury trial right on the first bite,
4 and so we granted the state a right of de novo review in
5 the event that it was granted, and so, you know, if the
6 first trial is a jury trial and the state is -- loses then
7 that would give some symmetry to it.
8 CHAIRMAN BABCOCK: Roger, did you have a
9 comment?
10 MR. HUGHES: Yeah.
11 HONORABLE DAVID EVANS: That was the thought
12 process behind it.
13 MR. HUGHES: Basically they actually were
14 questions. The first one was, talking about losing
15 Federal money, the Federal monies for what?
16 HONORABLE DAVID EVANS: Mike, can you help
17 us on that?
18 MR. HUGHES: What would be -- what would the
19 Federal funds be used for that we might lose?
20 MR. LESKO: Essentially the NICS Improvement
21 Act is looking to improve reporting for dispositions to
22 the courts to enrich the database that that's using
23 currently to not deny people access to a weapon.
24 MR. HUGHES: Okay. And the statute --
25 HONORABLE GUY HERMAN: Hold on a second, if

1 I may interrupt.
2 MR. HUGHES: Go ahead.
3 HONORABLE GUY HERMAN: There's also the
4 component that they're going to take money from the
5 criminal justice division of the Governor's office if
6 we're not in compliance with the reporting requirements
7 and having this procedure in there as a part of that by --
8 and that's over a six-year period. They'll check you
9 every two years.
10 MR. HUGHES: The next thing they talk about
11 is relief from a firearms disability. Is that disability
12 imposed by state law, Federal law, or both?
13 HONORABLE GUY HERMAN: Federal law. And it
14 is there right now. The problem is we don't in Texas
15 other than in felonies and in family violence and --
16 that's it. We don't report people that are committed to
17 the state hospitals. We don't report that information up
18 to the DPS, which then gets up to the NICS computer. We
19 don't do guardianship to the DPS and up to the NICS
20 computer. So anybody that's ever been committed to a
21 state hospital can purchase guns. There's been articles.
22 There's a person down in Harris County who recently had
23 been in a hospital, bought a gun, shot somebody with that.
24 Police officers shot throughout the country. We've had
25 people -- we get reports. There's no way to check without

1 having this information.
2 MR. LESKO: Currently in the NICS index from
3 Texas --
4 HONORABLE DAVID EVANS: Mike, the court
5 reporter, it may help her if you could stand.
6 MR. LESKO: Just as a frame of reference,
7 from Texas there are only seven individuals in the NICS
8 denied person's file for mental health reasons.
9 MR. HUGHES: Well, all I can say is, you
10 know, I've seen a lot of commitments from people who have
11 severe drug/alcohol substance abuse dependency problems,
12 and they may be able to clean themselves up enough to get
13 out of immediate commitment, but I'm not sure I would want
14 their firearms disabilities relieved just because they
15 managed to get out of a treatment facility into an
16 outpatient program, and the same thing goes for a lot of
17 people who are convicted for drug and alcohol offenses or
18 offenses related to drug and alcohol. They may not need
19 to be in inpatient treatment, but I'm not sure I trust
20 them with a weapon, I would want weapons in their hands;
21 and the other thing here, I mean, I'm still not in favor
22 of de novo review being a jury trial. Maybe that's
23 mandated by the statute, I don't know, but I still think a
24 full blown evidentiary hearing in front of an assigned
25 judge who is probably going to be a judge from outside

1 that county, that satisfies my notions of due process.
2 HONORABLE DAVID EVANS: I don't believe the
3 statute does require -- I don't believe the Improvement
4 Act requires a jury trial. We only assumed that state law
5 required a jury trial.
6 CHAIRMAN BABCOCK: Justice Patterson, you
7 want to --
8 HONORABLE JAN PATTERSON: Well, I have some
9 thoughts on that, but initially on (m), since you are
10 going to be receiving additional evidence, I think what
11 you want is to be able to consider the original evidence
12 and decision by the committing court, and so instead of
13 giving deference, I think it's sufficient that you "may
14 consider the original decision and evidence considered by
15 the committing court," and that's consistent with de novo
16 review.
17 CHAIRMAN BABCOCK: Okay. Justice Gray.
18 HONORABLE TOM GRAY: If the rehearing court
19 has to make the same findings to grant relief as the
20 original court and we've specified in there the findings
21 that are required in subsection (h), do we need to specify
22 that in connection with the judgment of the assigned judge
23 in subsection (n)? They've got -- I assume they've got to
24 make the same findings to grant relief in the de novo
25 court.

1 HONORABLE DAVID EVANS: We tried to do that
2 with the modifying award proceeding in (g) by saying, "In
3 determining whether to grant relief in any proceeding
4 under this rule, the finder of fact must hear evidence
5 about," and then "any judgment granting relief in any
6 proceeding" tried to encompass both the initial trial,
7 Justice Gray, and the de novo review.
8 HONORABLE TOM GRAY: That was a subtlety
9 that I missed, but if you think it's covered there.
10 HONORABLE DAVID EVANS: No, I'm -- as you
11 notice, I didn't say a word all morning because the last
12 time I talked I got this assignment.
13 CHAIRMAN BABCOCK: That will teach you.
14 Lonny.
15 PROFESSOR HOFFMAN: What was the answer to
16 Richard's concern that this is ultra -- sorry, that this
17 is outside the bounds of what the rules can do?
18 HONORABLE STEPHEN YELENOSKY: Silence was
19 the answer.
20 HONORABLE DAVID PEEPLES: Can someone make
21 the argument again why it is outside? This is -- you go
22 back to the original judge who imposed the disability and
23 in effect get another shot at it.
24 CHAIRMAN BABCOCK: Get a new trial in
25 effect.

1 HONORABLE DAVID PEEPLES: Yeah. And then
2 there's a right to de novo review of that before a second
3 judge. Tell me why that's ultra vires.
4 PROFESSOR HOFFMAN: What Richard wants to
5 know is where is the source of legislative authority that
6 gives the -- that creates that right. So, I mean, take
7 the example from what we've been talking about before,
8 although I haven't been able to find it, I assume there is
9 some statutory provision by which county and district
10 courts have de novo review of JP court decisions. I don't
11 know where that is, but I assume it exists somewhere, and
12 so the rules when they talk about in 749 and 750 they talk
13 about de novo review, that it's derived from the statutory
14 authority. Richard says but where's the statutory basis
15 on which we're allowing a de novo review here. The
16 statute actually specifically only says that a person who
17 has been furloughed can go to the commitment court and ask
18 them to remove the disability, and then Richard says --
19 Richard the Second says, well, maybe we could treat this
20 as some sort of an appeal from that, but that does feel
21 like a remarkable stretch.
22 MR. MUNZINGER: Well, the Texas Legislature
23 did not create a right of appeal from the first judgment
24 of the committing court of the original court and did not
25 create a right to a de novo appeal, and so where does the

1 Supreme Court of Texas get the authority to create the
2 right of a de novo appeal and, moreover, as this is
3 drafted, set the substantive legal standards to be
4 considered, and especially that one criticized giving
5 deference, which denies the concept of a de novo appeal,
6 but the bottom line is the Court is a creature of the
7 Constitution. It doesn't make law. It doesn't create the
8 right of de novo appeal, and the origins of this proposal
9 to us come about because the Legislature -- and it was
10 stated specifically. The Legislature didn't do its job,
11 so we're going to lose money from the United States of
12 America, and it's a lot of money. Maybe we can get the
13 Supreme Court of Texas to cure the money problem.
14 Does the Supreme Court of Texas want to be
15 in the position and does this committee want to say, "We
16 advise you, Supreme Court of Texas, to be in the position
17 the next time that someone argues to you or you are asked
18 from the bench, are we a court that creates law or
19 interprets law?"
20 "Well, you created law in rules 574.998,
21 your Honor. What's the difference between doing that?
22 That was just for money. This is for reputation. After
23 all a man's sacred honor is much more important than his
24 property." What are you going to do? What are you going
25 to say, and how are you going to look people in the face

1 and say, "We are a Court bound by a Constitution?"
2 CHAIRMAN BABCOCK: It's not about money,
3 it's about guns. Judge Patterson.
4 HONORABLE JAN PATTERSON: Well, Guy, correct
5 me if I'm wrong, but I assume that when someone is
6 convicted of one of these offenses there is a -- an
7 automatic disability in Federal law or it's included
8 within the judgment so that -- but by Federal statute
9 there is a disability, so-called disability, a restriction
10 imposed, and that this is simply a mechanism by which
11 someone can go back to the original court that imposed
12 that restriction to alter it?
13 HONORABLE GUY HERMAN: Right. The -- this
14 rehabilitation provision only applies to the people who
15 have been committed to a mental institution. It doesn't
16 apply to felons, drug addicts, or anyone else who has a
17 disqualifier. Family violence, doesn't apply to them.
18 There actually is one in Federal law. They can go up to
19 the ATF and see if they could get a rehabilitation. That
20 usually is not very successful, but in order to have the
21 Improvement Act certain groups demanded that all states
22 have to have a rehabilitation for the mentally ill, and
23 the idea behind it was there was a whole bunch of vets
24 that were going to be committed because of PSTD, and they
25 wanted them to have access to a way to get their guns

1 restored to them.
2 HONORABLE JAN PATTERSON: But is there
3 something in that original judgment --
4 HONORABLE GUY HERMAN: No.
5 HONORABLE JAN PATTERSON: -- restricting?
6 HONORABLE GUY HERMAN: The felony conviction
7 automatically gives you the disqualification, the
8 commitment to the mental hospital. We've had the --
9 HONORABLE JAN PATTERSON: Automatically.
10 HONORABLE GUY HERMAN: Automatically. The
11 disqualification has been there. The problem is we don't
12 give the information. So now we've been forced to give
13 the information, and the Federal government has said we're
14 going to force you to give it, but you also have to have
15 in place this rehabilitation for these mentally ill
16 people.
17 HONORABLE STEPHEN YELENOSKY: And how does
18 that respond to Richard's point?
19 CHAIRMAN BABCOCK: Justice Bland.
20 HONORABLE JANE BLAND: I understand
21 Richard's concern about stepping out there, but we have
22 done it before when it involves procedure. Like, for
23 example, with the guardian ad litem rules we have a
24 section where we talk about review by right of appeal in
25 Rule 174, and we have other rules where we say this is

1 reviewable by mandamus, and so if we're doing this
2 procedure as a gap filler because we're trying to
3 effectuate the Legislature's intent, I don't see it as --
4 I don't see it as doing violence to the substantive law,
5 because I don't think that the intent of the committee's
6 proposal is to affect anybody's substantive rights other
7 than to maybe give them more due process rather than less.
8 And there are a number of things that the
9 statute is silent on, like, for example, the court where
10 such a suit ought to be brought, and so the committee has
11 drafted a proposal that says let's bring it back to the
12 committing court, the judge that's to hear it, the time
13 for appeal, and all of those things, and those are all
14 basically procedural things that the Texas Supreme Court
15 has from time to time stepped in to fill a gap where there
16 was one -- one in the statute when it was -- when
17 everybody had a pretty good idea of what the Legislature
18 meant to do in passing a law.
19 CHAIRMAN BABCOCK: Okay. Carl had his hand
20 up first and then Richard.
21 MR. HAMILTON: Could we -- could we have the
22 language in the Federal act that tells us it has to be de
23 novo? Could we have the language?
24 HONORABLE TRACY CHRISTOPHER: David, do you
25 have the Federal language for de novo?

1 HONORABLE DAVID EVANS: I have the Federal
2 language for de novo both in the certification for form --
3 if anybody has internet access, it is online on our
4 website, and "The state must provide" -- it does say "de
5 novo judicial review of the denial," Tracy, and it says
6 "State must provide for de novo judicial review of relief
7 application denials. De novo judicial review includes the
8 following principles: (a), if relief is denied, the
9 applicant may petition the court of appropriate
10 jurisdiction to review the denial including the record of
11 the denying court, board, commission, or other lawful
12 authority; (b), judicial review is de novo in that the
13 reviewing court may, but is not required, to give
14 deference to the decision of the lawful authority that
15 denied the application for relief; and (c), the reviewing
16 state court must have discretion to receive additional
17 evidence necessary to conduct an adequate review."
18 You know, if the right to new trial didn't
19 have to depend upon newly discovered evidence it would
20 come as close to this except for the need for a new -- a
21 new adjudication -- a new judge on it, and that's -- you
22 know, we could -- if we could modify the right to new
23 trial in this area, it would be all right, but it would be
24 pretty tough to do it.
25 CHAIRMAN BABCOCK: Justice -- wait a minute,

1 I was out of order here. Somebody else had their -- Roger
2 did, Richard did. Roger, why don't you go and then we'll
3 go to Richard and then to Frank.
4 MR. HUGHES: Well, in terms of the de novo
5 review, the comment I heard earlier was that we may be
6 getting hung up on how the proposed rule is conducting de
7 novo review. What I see here is this that after the
8 initial judge makes the decision the person can file a
9 petition for review, which might sound like a motion for
10 new trial, in 15 days, which then turns around and
11 suspends the judgment. The rule then makes the next
12 judge's judgment the final judgment. I don't see this as
13 much different than saying, look, the first -- if somebody
14 timely files a petition or what might effectively be a
15 motion for new trial, it effectively vacates the judgment
16 and now we do it over again in front of the new judge
17 using slightly different procedures, which -- so that we
18 don't have a final judgment that's appealable until A,
19 nobody files a petition for review or motion for hearing
20 from the first judge's order, or if somebody does that, we
21 don't have a final and appealable judgment until after the
22 assigned judge makes a judgment. I think that gets rid of
23 the problem that we're creating some new form of appellate
24 review.
25 I mean, it's sort of like a -- you might use

1 a very poor and a loose analogy, a bill of review, which
2 we don't have a lot of problems with. We know how that
3 works, so consider it a kind of mini-bill of review that
4 before this -- the assigned judge's becomes final the
5 person files a motion, the original ruling is vacated, and
6 he gets to try it all over again. You know, I don't see a
7 procedural problem that we're creating some kind of new
8 animal. You may have to play with the terminology some,
9 but I think we're going to have to do something.
10 CHAIRMAN BABCOCK: Richard.
11 MR. MUNZINGER: My response, in all due
12 respect to Justice Bland, is we're enforcing the intent of
13 the Legislature, but the Legislature didn't speak to two
14 hearings, didn't speak to a de novo appeal. It just was
15 absolutely silent about the problem. It was their
16 mistake, and I'm sorry they made the mistake, but to cure
17 the mistake involves a basic philosophical judicial
18 constitutional law issue, who in the heck can create the
19 mistakes the Legislature -- can the Court do it, and are
20 you willing to blink your eyes at the truth? The truth is
21 the statute is silent, so we're going to call it a bill of
22 review. Where did you get the bill of review? Next time
23 I argue a case in front of the Supreme Court of Texas I'm
24 going to say, "Yes, your Honors, and it wasn't in the
25 statute, but look here, you did this in rule so-and-so.

1 Y'all created that out of that. That's precedent." We're
2 arguing precedence, and that's a precedent. The Supreme
3 Court of Texas wrote a rule with no authority to do so.
4 CHAIRMAN BABCOCK: Justice Bland.
5 HONORABLE JANE BLAND: On another topic,
6 David, I was wondering why the -- why 15 days. Is that
7 consistent with other kinds of time to file an appeal,
8 like a recommendation from the associate judge or a ruling
9 of associate judge, or I just don't -- we had this issue
10 with notices of appeal generally, how many days to file,
11 and if we can keep the days as consistent as possible then
12 there's less confusion among the Bar about how much time
13 they have.
14 HONORABLE DAVID EVANS: Well, there's an
15 area of confusion we haven't gone into, and that is we
16 were trying to shorten that deadline so that because of
17 we -- many of these people will be pro se. They could
18 file all at the same time a motion for new trial, motion
19 to modify and vacate, and a petition for review. Only the
20 petition for review gets an assigned judge, but the
21 problem is, is that many of these people have ongoing
22 problems in the probate court that are more involved than
23 just this issue, and so to take away the trial judge
24 completely that's been dealing with them, we tried to
25 segregate. This is so much of a work in progress, I

1 cannot tell you how much the committee members have a
2 reservation, but we tried to shorten it for that reason,
3 but we have real questions about the way we're doing that,
4 too. David --
5 CHAIRMAN BABCOCK: Okay. Frank, then Judge
6 Christopher, then Judge Yelenosky, then Richard.
7 MR. GILSTRAP: Let's push this new trial
8 analogy. I mean, the right to new trial, while it
9 probably came from statute, is in the rules. That's where
10 it came from. It's a rule. It's a Rule of Procedure, so
11 why couldn't you create another Rule of Procedure that
12 gave a right to new trial in this case, except that if the
13 person asked for it he automatically got it and it was
14 simply reviewed with deference to the old trial, and he
15 could bring it -- to the first decision. He could bring
16 in new evidence. Let's push it further. Is there
17 anything in the Federal statute that says it has to be
18 before a new judge?
19 HONORABLE DAVID EVANS: We only imply that
20 from this language that "the reviewing state court" and
21 that seems to indicate an administrative -- a review of
22 administrative decision. "Must have the discretion to
23 receive additional evidence," that was part of it, and
24 then it's the part about give deference to the decision of
25 the other court. I have to find that in here.

1 MR. GILSTRAP: Does it say "other court"?
2 Because if I'm a judge I could sure review it and give
3 deference to my earlier decision.
4 HONORABLE DAVID EVANS: "Give deference to
5 the decision of the lawful authority that denied the
6 application for relief." Now, we did point out to
7 ourselves in discussing it that on a motion for rehearing
8 we think the judges give deference to their own prior
9 decision, but we didn't think we could quite get away with
10 that argument before you, but --
11 MR. GILSTRAP: Works for me.
12 HONORABLE DAVID EVANS: In the new trial
13 analogy the court may -- I would think we would be on
14 better ground, but -- and it would certainly be easier
15 than assigning a new judge, but that's the real problem,
16 is whether we have to assign a new judge.
17 CHAIRMAN BABCOCK: Judge Christopher.
18 HONORABLE DAVID EVANS: That's the real guts
19 of the problem if we have to replace the judicial, and
20 these people are going to file claims that are going to
21 have everything in the world joined with them. These are
22 not going to be simple petitions, just petition for
23 relief. There will be all types of things that could come
24 with them.
25 HONORABLE TRACY CHRISTOPHER: I think since

1 the disability is imposed by Federal law then we are okay
2 in imputing the Federal procedures into our state
3 procedures in terms of removing the disability, so I would
4 be against giving essentially the state the right to
5 appeal by a petition de novo. So the way I would phrase
6 it is if the -- what do you call it? If the petition is
7 granted then the state can appeal at that point, just like
8 a regular order. If the petition is denied, the Federal
9 statute says there is a de novo review. But only when
10 it's denied. So at that point you don't have to worry
11 about who's got the burden and is it a shifting burden,
12 because it's the same person who had the original burden
13 having the same burden in the new de novo case, because
14 otherwise, if it's suddenly the state appealing, you've
15 got sort of this reverse burden, and it would be putting
16 the petitioner to, you know, his paces twice, which
17 doesn't strike me as right under the Federal statute, so
18 that's how I would rework it.
19 CHAIRMAN BABCOCK: Judge Yelenosky.
20 HONORABLE STEPHEN YELENOSKY: Yeah, I
21 actually got to the same point a different way. I was
22 thinking about -- and I don't remember it well, but I'm
23 sure Justice Hecht does, the opinion, the recent opinion
24 on motions for new trial, the discretion of the trial
25 court in that regard; and without some support somewhere

1 it would seem to me that if the state had the right of
2 appeal, somebody could make a pretty good argument that
3 without -- with no state law and no Federal law supporting
4 a de novo appeal for the state, where does that come from,
5 and doesn't that violate my rights?
6 HONORABLE DAVID EVANS: And all that would
7 mean is we would need -- we have to address the one -- one
8 of the issues we might want to address then is whether or
9 not you think there's a right to jury trial for the state.
10 And if that's fine then we can conduct two jury trials.
11 Now, we may have become focused on the jury trial -- two
12 jury trial issues unnecessarily, but that would be -- and
13 that's certainly doable. We can get a jury in there and
14 try that, but the state would probably be entitled to a
15 jury trial.
16 CHAIRMAN BABCOCK: Okay. Richard the
17 Second.
18 MR. ORSINGER: Okay, I think maybe the
19 conceptual problem that Richard Munzinger is having is
20 because we're just assuming that this is an appellate
21 process, and really it's a new trial process, because
22 we're going to have new evidence. We may have old
23 evidence. That's kind of irregular, but at least there's
24 new evidence, so this is really a new trial, and we
25 probably -- maybe we shouldn't call it de novo review, but

1 we should call it trial de novo, and if we call it trial
2 de novo then we're not going outside a constitutional
3 grounds because we know what trial court jurisdiction is
4 and we know that trial judges can grant new trials and all
5 we're saying is, is this is kind of like an automatic new
6 trial, if you lose the first hearing, and then if we do
7 that and just keep everything in the trial court then we
8 don't really have this issue about constitutional
9 jurisdiction.
10 HONORABLE STEPHEN YELENOSKY: But we can
11 only grant new trials on a limited basis.
12 MR. ORSINGER: Well, we're making up a
13 special rule.
14 HONORABLE TRACY CHRISTOPHER: And we have to
15 explain our reasons.
16 MR. ORSINGER: We're making up a special
17 rule for this new trial. Now then, you've got to -- it
18 seems to me if we're going to treat it like a new trial
19 you should have a provision that you can introduce the
20 record from the old trial, kind of like you do in
21 administrative appeal to the district court. It's
22 optional, it's not required. And then we have to give
23 deference to the first ruling, so you can do that in two
24 ways. You can either say give deference or you could, for
25 example, say whoever requests the new trial, in the new

1 trial it's their burden of proof to overcome the previous
2 finding.
3 So if the state appeals -- pardon me, in the
4 first case, the burden is on the petitioner for clear and
5 convincing evidence to prove that they're entitled to have
6 a firearm. If they win and the state wants a de novo
7 trial, you could just reverse the presumption and say that
8 whoever requests the new trial has the burden. That means
9 that the previous judgment fixes the burden of proof,
10 which is giving deference to it, and it's not really very
11 irregular. This is the kind of thing we do all the time.
12 So I think that if we could get away from the appellate
13 paradigm in the language and more to a new trial paradigm
14 then maybe a lot of these complaints go away.
15 And I'm not at all sure that I -- that the
16 state shouldn't have the right to a de novo trial. I see
17 that the statute, the effect of the mental health
18 provision is suspended during this process, and I don't
19 know if that means can somebody go out and buy a gun
20 during the suspension period?
21 HONORABLE DAVID EVANS: No, the idea or the
22 concept we discussed was come up with language that if the
23 initial decision is appealed, new trial, we need to -- we
24 would want -- we want to look at the ability of the trial
25 court to suspend its judgment until all appeals have run,

1 new trials have run, because if someone goes and buys a
2 gun that may be an issue. We haven't dealt with that.
3 That's one of those things we're still trying to deal
4 with, but we did suspend the judgment so that -- the
5 initial judgment granting relief so that they could not
6 buy a gun.
7 MR. ORSINGER: So, David, under your thing,
8 if there is a request for a new trial or de novo appeal --
9 HONORABLE DAVID EVANS: I like new trial.
10 MR. ORSINGER: -- then automatically -- even
11 if the finding is favorable to the petitioner it's
12 automatically stayed, or is the trial court
13 discretionary -- have discretion to stay it or not stay
14 it?
15 HONORABLE DAVID EVANS: If it's granted?
16 MR. ORSINGER: If it's granted and the state
17 is the one that's requesting the new trial.
18 HONORABLE DAVID EVANS: Well, I -- there's
19 no guidance from the Federal law, and there's no guidance
20 from the state Legislature, and that may be a decision --
21 MR. ORSINGER: Well, you see, if you don't
22 suspend the effect of the first ruling then you're really
23 not getting a de novo new trial upon request.
24 HONORABLE DAVID EVANS: Oh, I know.
25 MR. ORSINGER: You're really giving, if you

1 will, adjudicatory weight to the first finding, even
2 though we're wiping it out for purposes of the second
3 trial. So it seems to me that if either side requests a
4 new trial then there ought to be automatic nullification
5 of any favorable ruling that would allow someone to go get
6 a firearm, and furthermore, how complicated is it if they
7 have the firearm, then the ruling goes the other way?
8 Then who goes and gets the gun, under what order, and I
9 feel sorry for the deputy sheriff that's got to go knock
10 on the door at the house that looks like the Addams
11 Family, you know, and get back the gun that they shouldn't
12 have ever gotten.
13 CHAIRMAN BABCOCK: How did the Addams Family
14 get in this?
15 HONORABLE DAVID EVANS: We were talking
16 about suspending judgment, and I'm not sure "suspend" the
17 judgment is the best wording, but "stay," "vacate the
18 judgment" may be a better word, because, you know, when
19 you look at the case law on de novo appeals from JP courts
20 to county courts or from those rare instances where there
21 is a de novo right of appeal from a county court at law to
22 a district court in liquor licensing, that judgment is not
23 enforceable once that petition for de novo review is filed
24 in those courts, and so "suspension" is not a good word,
25 is not the best word, and it needs some craftsmanship.

1 The question I might have for the committee,
2 and I'll just phrase it this way, and, Richard, the only
3 thing I'd say is it's not "must give deference" but "may
4 give deference" and I don't know if that's going to shape
5 the answer on this question. Do we have to assign a new
6 judge for de novo -- for a new trial?
7 MR. ORSINGER: If I lost the first one, I
8 would say yes.
9 HONORABLE DAVID EVANS: What's that?
10 MR. ORSINGER: It's not really new if you've
11 already given it your best shot and you lost and you go
12 back in front of the same --
13 CHAIRMAN BABCOCK: Peeples, then you.
14 HONORABLE DAVID EVANS: I'm just asking, I
15 want to make sure --
16 MR. ORSINGER: It's not novo.
17 CHAIRMAN BABCOCK: Whoa, whoa, hang on.
18 Justice Hecht and then Judge Peeples and then Justice
19 Gaultney.
20 HONORABLE NATHAN HECHT: What do we think
21 the Feds think about that, Judge Herman? Do we have any
22 idea, or do they think we need --
23 HONORABLE GUY HERMAN: Under their system
24 they go from an administrative hearing over to ATF to a
25 Federal judge, and it's de novo, so it would be a

1 different judge, and that's what we came up with, was to
2 come up with a system of assigning, and the statute says
3 it has to be in the court that caused the
4 disqualification, which in the civil commitments would be
5 the probate court, but if it's incompetency to stand trial
6 it would be the criminal courts, so it would go there, and
7 that's how we decided about the new judge and who did the
8 appointment.
9 CHAIRMAN BABCOCK: Judge Peeples.
10 HONORABLE DAVID PEEPLES: Since this
11 subcommittee has to do some redrafting I want to be sure
12 we've got some clarity on a few issues. I've gone back
13 through the draft, and I'm glad that Richard Orsinger
14 focused us on the term "trial de novo," instead of "de
15 novo review." That's what the Feds said, was "de novo
16 review," and we just kind of went that way. I see we use
17 "trial de novo" in (j), but "de novo review" elsewhere,
18 but "trial de novo" is what is meant here, and I think
19 that needs to be very clear, trial de novo, not review,
20 not de novo review.
21 Now, can we agree that -- I'm talking about
22 focusing on the Court's rule-making authority. This is
23 not creation of a new court, and it's not substantive law,
24 so we don't run afoul of rule-making excesses on that.
25 What we've got is a second judge taking another shot at

1 what the first judge did. I frankly don't find that to be
2 extraordinary. We do it in Rule 18a basically. For 29
3 years we've had 18a on the books where a judge number one
4 can be replaced by rule by judge number two, and the
5 Legislature, as I understand it, didn't do that. That's
6 the Court did that, and I've not heard the argument that
7 that violated the Court's rule-making authority, and I
8 respectfully disagree with what seems to be assumed here
9 by some of the remarks that this violates the rule --
10 exceeds the rule-making authority. I don't accept that
11 premise.
12 If you agree with me, we're not creating a
13 new court, not an appeal of some kind to some new body.
14 It's not substantive law. It's just a procedural thing
15 that's basically mandated by Federal law, and I think it's
16 within the Court's rule-making authority, and it's trial
17 de novo by a second judge. Admittedly that's not a
18 widespread thing in our system, but I don't find it to be
19 outside of the Court's rule-making authority at all.
20 CHAIRMAN BABCOCK: Justice Gaultney. You've
21 been very patient, although these other people were all in
22 line ahead of you, believe it or not.
23 HONORABLE DAVID GAULTNEY: I appreciate it.
24 No, I just wanted to jump in a little bit. The -- we
25 started with the concept, I think, of a motion for new

1 trial, and we looked at some of the restrictions in terms
2 of what we needed, a new judge it looks like, and maybe
3 there needs to be a de novo, and it's not just new
4 evidence that comes along. So then we thought in terms of
5 an analogy to a recusal process because the statute sends
6 the decision to the committing court. Okay. Now, this is
7 the court that may be and likely is, in my view, in the
8 best position to decide whether the disability should be
9 released. However, the Federal statute talked about a de
10 novo review of that initial decision.
11 So the way we thought of it was in terms
12 of -- is an automatic recusal. Okay. The concept being
13 that someone different from the person who is intimately
14 involved in the process, maybe the Federal statute meant a
15 different judge ought to take a second look at it. So if
16 you think of it in terms of a motion for new trial with an
17 automatic recusal and an assignment of the judge by your
18 regional presiding judge or your presiding probate judge,
19 that is kind of the analogy or the structure that was
20 intended. Now, the rule does adopt the language of the
21 certification, and so instead of using "motion for new
22 trial" it uses "review de novo." Maybe the language
23 doesn't need to do that, and maybe that does create
24 conceptual problems when -- but to understand, that was
25 kind of the thought process that went forward.

1 CHAIRMAN BABCOCK: Okay. Wait a second.
2 Richard the First is in queue and then Richard the Second.
3 MR. MUNZINGER: If you use the word "de
4 novo" and pervert its meaning in this context why not
5 pervert it twice or three times or four times. If the
6 Federal standard says a different forum must pass upon the
7 petition to get this disability removed and now we are all
8 pretending and doing word games that we're going to have a
9 new trial but the new trial has to be in front of a
10 different judge than the first judge, it just seems
11 obvious to me that all these machinations are designed to
12 cover a problem that the Legislature caused that is
13 magnified by our Constitution, and you can call it
14 whatever you want, but the truth of the matter is you're
15 perverting what de novo means. Your statute itself that
16 you're called upon to write a rule on makes absolutely no
17 reference whatsoever to two bites at the apple, makes
18 absolutely no reference whatsoever to an appeal, makes
19 absolutely no reference to de novo, doesn't do any of
20 those things.
21 It says the person can go to the court or
22 who has a firearm disability can go to court, get an
23 order, and can appeal it. What is the effect on the Rules
24 of Procedure or the statutes governing appeals of a final
25 judgment under this when you have the de novo rule and

1 this rule. I don't know, I haven't briefed it. Is there
2 an effect on the Rules of Appellate Procedure. Don't know
3 that either, but it does seem to be apparent that what
4 you're doing is engaging in word games to avoid a problem
5 caused by the Legislature in the state Constitution.
6 CHAIRMAN BABCOCK: Well I'm personally going
7 to call it "Lawyers, guns, and money." Richard.
8 MR. ORSINGER: It seems to me that the
9 appealable order is the one that occurs after the second
10 trial, and that's where you have all of your appellate
11 jurisdiction. It also seems to me that this really isn't
12 appellate review, because appellate review by its nature
13 is not a fact acquisition process. It's a review of --
14 get ready, Jane -- nisi prius tribunal that heard the
15 original trial, and you review what they did, and you
16 review the facts that they got, and you don't call
17 witnesses yourself. All the things that are inherent in
18 the appellate process are to review the facts and rulings
19 from the first proceeding. In a sense we're kind of
20 wiping them out, maybe allowing them to put up the same
21 evidence, maybe they don't have to. To me it really isn't
22 appellate, and I don't know if the feds thought it was
23 appellate, but you know, we have a kind of a de novo
24 review if you have a special master that's appointed under
25 the Rules of Procedure and you get some kind of finding,

1 if either side appeals on that one you get de novo -- a
2 trial de novo in front of the district judge, so there's a
3 kind of a procedural precedent for it.
4 As long as we're rewriting this, I'm
5 thinking maybe we ought to discuss what the effect of a
6 final appealable judgment under (m), (n), (o), and (p) is,
7 because if you try to interface these with the supersedeas
8 rules they don't fit very well. I haven't checked the
9 language, but when you have a judgment that's other from
10 money or the possession of property, recovery of property,
11 you're off into a kind of a peculiar place when you're
12 trying to decide who can supersede a judgment and how, and
13 it seems to me like we perhaps should just automatically
14 say or just say that automatically the ruling granting the
15 license or the ability to apply for the license is
16 suspended during the appeal to the appellate court, or if
17 we don't do that, then how's the state going to post a
18 bond? I mean, who has the right to suspend the judgment
19 pending appeal and do you go to the trial court first and
20 do you review that denial in the appellate court or do you
21 file a motion. Maybe we ought to discuss that because the
22 supersedeas rule is not going to work very good on this
23 topic.
24 HONORABLE DAVID EVANS: That's true.
25 CHAIRMAN BABCOCK: Lonny and then Carl.

1 PROFESSOR HOFFMAN: And we talked about
2 that, but targeting back to the source of authority, can
3 the Federal Legislature give authority on which the
4 Supreme Court can enact a rule? I'm thinking about
5 actually a couple of years there was a controversy about a
6 statute that didn't pass the Lawsuit Abuse Reduction Act
7 that would have effectively directed that we tighten and
8 make more mandatory and nastier our civil sanctions rule.
9 MR. ORSINGER: Let me respond to that. The
10 Texas Supreme Court addressed that issue in *Eichelberger*
11 *vs. Eichelberger* where at the time the Supreme Court of
12 Texas had only conflict jurisdiction in divorce cases or a
13 dissent in the court of appeals. They just didn't have
14 general jurisdiction, and what happened was the
15 Eichelberger case was decided by a court of appeals, and
16 it conflicted with a U.S. Supreme Court decision, but it
17 didn't conflict with another court of appeals, and it
18 didn't conflict with the Texas Supreme Court, and there
19 was no dissent. So the question in Eichelberger was
20 whether the Texas Supreme Court had appellate jurisdiction
21 when the Constitution said they have jurisdiction only
22 with a conflict between the Texas courts or a dissent, and
23 they -- justice --
24 CHAIRMAN BABCOCK: One of those justices.
25 MR. ORSINGER: Oh, gosh, well, I'll tell you

1 in a minute. It will come to me. Wrote this long opinion
2 about implied jurisdiction and inherent jurisdiction on
3 the Supreme Court, and they concluded that there was
4 implied jurisdiction under the Texas Constitution and the
5 U.S. Constitution, which is the supreme law of the land,
6 which gave them the power to review it. So, by the way,
7 that came up in the Court of Criminal Appeals, too, where
8 the U.S. Supreme Court -- the Court of Criminal Appeals
9 have ruled against the state on an appeal of a criminal
10 prosecution, and the state appealed to the United States
11 Supreme Court. Does anybody remember that? And the
12 United States Supreme Court reversed the Court of Criminal
13 Appeals, but the state doesn't have the authority to
14 appeal a -- a reversal under the state constitution.
15 So, as I recall and I was in law school at
16 the time in Austin, almost half of the Court of Criminal
17 Appeals was ready to vote that they were going to ignore
18 the Supreme Court ruling because the state had no power to
19 appeal to the U.S. Supreme Court. That's a long way of
20 saying the answer is, yes, I think that the Texas courts
21 have jurisdiction inherently if Federal law requires them
22 to do something.
23 CHAIRMAN BABCOCK: So, Lonny, that would be
24 a yes. Carl
25 HONORABLE JANE BLAND: And a day is gone.

1 MR. HAMILTON: To answer what Richard was
2 saying, not aware that there's a statute either that
3 authorizes motions for new trial. They're Court-made
4 rules, so the Court I think could make a rule fashioning a
5 motion for new trial to fit this particular situation, and
6 I agree with Richard, that like injunctions, the trial
7 court can issue an order maintaining the injunction
8 pending an appeal, so we could also have an order
9 maintaining the denial of the removal of the disability
10 pending the appeal also.
11 CHAIRMAN BABCOCK: The courts also decide
12 evidentiary standards.
13 Okay. Judge Evans, you and your
14 subcommittee are going to redraft this in light of these
15 comments?
16 HONORABLE DAVID EVANS: Oh, yes. I think we
17 can draw them all together and make everybody happy.
18 CHAIRMAN BABCOCK: You think you can have a
19 little more enthusiasm?
20 HONORABLE DAVID EVANS: I'm waiting for
21 Richard to make a motion that I could second and take a
22 way out, but that's fine. We'll work on it. We may wait
23 for the transcript, just hopefully.
24 CHAIRMAN BABCOCK: That would be fine.
25 HONORABLE DAVID EVANS: In realtime.

1 CHAIRMAN BABCOCK: Seriously, thank you and
2 the subcommittee and our honored guests for their input.
3 Great discussion, and I hope you don't think we're nuts,
4 by the way.
5 HONORABLE DAVID EVANS: As long as I did my
6 best.
7 CHAIRMAN BABCOCK: Let's take our afternoon
8 break.
9 (Recess from 3:34 p.m. to 3:55 p.m.)
10 CHAIRMAN BABCOCK: Okay. We are on 737.11,
11 landlord's motion to modify the reduction in rent. So,
12 Judge Lawrence, let's see if we can knock all of this out
13 in the next hour or less.
14 HONORABLE TOM LAWRENCE: All right. "The
15 landlord may file a written motion seeking to modify the
16 order reducing the tenant's rent within the time provided
17 by Rule 737.10," and that is, of course, where you've got
18 an order to repair as well as an order reducing the rent.
19 "If the landlord does not file a motion with
20 the justice court to modify the order reducing the
21 tenant's rent, the rent will be restored to the amount in
22 the lease on the completion date of the order to repair or
23 remedy if one is entered by the court." So it's going to
24 be automatic, no requirement for another hearing. You set
25 an order to repair with a completion date, an order

1 reducing rent. Until it's completed you don't hear from
2 anybody, you assume everything is done, and on the date of
3 the completion, after that it reverts back to the market
4 rent.
5 "If the justice does not order a repair or
6 remedy of a condition then the landlord must request the
7 court to modify the reduction of the tenant's rent. (a),
8 if the landlord has been ordered to repair" -- (a) and
9 (b), (a) is where there's an order to repair, (b) is where
10 there is not an order to repair that goes along with the
11 order reducing rent. So (a), "If the landlord has been
12 ordered to repair or remedy a condition and the landlord
13 repairs or remedies the condition before the completion
14 date of the order to repair or remedy, the landlord may
15 request that the order to reduce the tenant's rent be
16 modified." And what's happening here is that completion
17 date is December 1st, the landlord finishes it by November
18 15th, and he wants the rent to go back up to the market
19 rent, so he's going to file a motion to have the rent
20 revert back to the market rent, and he has to do that
21 because it's presumed by the court and everyone else that
22 the rent is going to be reduced until the completion date
23 on the order to repair.
24 CHAIRMAN BABCOCK: Judge, why don't we just
25 talk first about when the landlord has been ordered to

1 repair or modify and then get to -- and then talk about
2 (b) separately?
3 HONORABLE TOM LAWRENCE: Yes.
4 CHAIRMAN BABCOCK: Does that work for you?
5 HONORABLE TOM LAWRENCE: Sure.
6 CHAIRMAN BABCOCK: Anybody have comments on
7 .11(a)?
8 HONORABLE TOM GRAY: Chip, would it be too
9 much to ask to revisit the first sentence of 10(b)? Only
10 because it says, "The justice shall prepare and issue the
11 order," and I meant to comment on that earlier. I had it
12 flagged and starred that if we don't change that, at the
13 appellate level when a lawyer is involved and prepares the
14 order and the justice signs it, the pro se party will be
15 complaining, because I get it even now in appeals, that
16 that order was not prepared by the judge, that was the
17 order that the opponent prepared and the judge just put
18 his name on it, and I would suggest you don't even need
19 that first sentence in that paragraph, but --
20 CHAIRMAN BABCOCK: Okay.
21 HONORABLE TOM GRAY: I apologize for going
22 backwards.
23 CHAIRMAN BABCOCK: Not at all. Your comment
24 is noted. In fact, I saw Justice Hecht just make a note
25 on your comment.

1 HONORABLE TOM GRAY: Yeah, but what did it
2 say?
3 CHAIRMAN BABCOCK: "The stupidest thing I've
4 ever heard."
5 HONORABLE TOM GRAY: That's what I'm afraid
6 of.
7 CHAIRMAN BABCOCK: No, not at all, not at
8 all.
9 HONORABLE JANE BLAND: Starred and flagged.
10 CHAIRMAN BABCOCK: Okay. Back to if the
11 landlord has been ordered to repair or remedy a condition.
12 Comments on that provision? No backsliding. Everybody
13 was so engaged this morning. Is this perfect? We don't
14 need to talk about it anymore? Judge Christopher. I knew
15 we could count on you.
16 HONORABLE TRACY CHRISTOPHER: I don't think
17 we should have it in here at all. I think we should just
18 be silent on this point, and, you know, if the landlord
19 somehow manages to get the repair done a week early, let
20 them figure out what to do rather than through some
21 Draconian procedure and notice in 12-point type, and et
22 cetera. I just can't imagine that it's going to happen
23 that often that they're going to get done early enough
24 that they're going to come back in and file a motion to
25 change, you know, the rent for a week. Maybe I'm wrong,

1 but I just say don't worry about it.
2 CHAIRMAN BABCOCK: Okay. Anybody else feel
3 that way?
4 HONORABLE STEPHEN YELENOSKY: Yeah.
5 CHAIRMAN BABCOCK: Justice Gray.
6 HONORABLE TOM GRAY: Well, I just agree with
7 her. You asked if anybody else agreed with her, I raised
8 my hand.
9 CHAIRMAN BABCOCK: Okay. And Lonny agrees.
10 HONORABLE STEPHEN YELENOSKY: Me, too.
11 CHAIRMAN BABCOCK: Justice Bland agrees,
12 Judge Yelenosky agrees, Bobby Meadows agrees, Jeff Boyd
13 agrees, Justice Gaultney. There's a tidal wave here.
14 Lamont Jefferson and Skip Watson. So, Judge Lawrence, why
15 do we need this?
16 HONORABLE TOM LAWRENCE: Well, because you
17 -- you know, there's more than that part to part (a).
18 Part of it is if the landlord finishes early and wants to
19 get the rent restored. You may not think it's important,
20 but I would suggest to you that landlords may think that
21 particular provision is important, and they may want the
22 opportunity to come back in and get the rent restored if
23 they've done something well in advance of the completion
24 date.
25 CHAIRMAN BABCOCK: Right.

1 HONORABLE TOM LAWRENCE: There's also
2 provisions in there that on the hearing that, you know,
3 there be a hearing and there be proof. The tenant can
4 contest the landlord's provision. It was just kind of a
5 due process concern that if you're going to set this order
6 that there be the opportunity for it to be modified --
7 that both parties have the right to try to correct
8 something if circumstances change.
9 CHAIRMAN BABCOCK: Judge Christopher.
10 HONORABLE TRACY CHRISTOPHER: We do a lot of
11 orders. We do a lot of like future damages that may or
12 may not occur, and nobody gets to come back and say,
13 "Well, they didn't really, you know, have $50,000 worth of
14 future medical, so I want a refund." Let's just keep it
15 simple.
16 CHAIRMAN BABCOCK: Carl.
17 MR. HAMILTON: Well, I was looking at this,
18 it says if an order was entered, the last line it says,
19 "order to repair or remedy, if one is entered by the
20 court." So I guess that means that there can be an order
21 reducing the rent even if you don't order repair.
22 HONORABLE TOM LAWRENCE: That's correct.
23 MR. HAMILTON: And so I went back to look at
24 that, and it does say that, but it doesn't say when that
25 rent terminates.

1 HONORABLE TOM LAWRENCE: Well, it does in
2 part (b). You have to have a hearing in that case,
3 because otherwise you're not going to know when the
4 landlord repairs something, so there's going to be a
5 requirement for a hearing to figure that out.
6 MR. HAMILTON: But we're not talking about
7 repairs. We're talking about you don't order repairs, you
8 just order a reduction of the rent.
9 HONORABLE TOM LAWRENCE: Yeah, but the
10 reduction in the rent is based on the condition that needs
11 to be repaired or remedied, and even if there is no order
12 to repair, the rent is going to stay reduced until that
13 condition is fixed. With or without an order to repair.
14 MS. PETERSON: And that comes from
15 92.0563 --
16 HONORABLE TOM LAWRENCE: Yeah.
17 MS. PETERSON: -- (a)(2), which I think is
18 in the report.
19 HONORABLE TOM LAWRENCE: This is all part of
20 this Property Code stuff.
21 CHAIRMAN BABCOCK: Okay. Any more comments
22 on subpart (a)? Okay. How about subpart (b), if the
23 landlord has not been ordered to repair or remedy a
24 condition?
25 HONORABLE TOM LAWRENCE: Well, then the only

1 way that the court is going to know that something's been
2 fixed and the rent should go up is if the landlord tells
3 the court and files a motion and there's a hearing on it
4 to determine that, yes, it has been fixed, the rent should
5 go up.
6 CHAIRMAN BABCOCK: Okay. Any other comments
7 on that? Yeah, Elaine.
8 PROFESSOR CARLSON: I don't understand
9 what's happening in (b). I'm not ordered to repair. You
10 reduce the rent because something isn't safe or healthy
11 and then the landlord repairs something voluntarily they
12 weren't supposed to or weren't ordered to, or what's going
13 on here?
14 HONORABLE TOM LAWRENCE: Well, that's
15 exactly right. Remember, there are five different things
16 that you can file a suit for under this rule, order to
17 repair, order reducing rent, actual damages, civil
18 penalty, attorney's fees, and court costs. You don't have
19 to sue for all of those. So you can file a suit to reduce
20 the rent and get civil penalties, let's say, but not file
21 for an order to repair, for whatever reason, but you can
22 do it.
23 PROFESSOR CARLSON: Okay.
24 HONORABLE TOM LAWRENCE: But the order
25 reducing rent is premised on the fact that whatever this

1 condition is, is unhealthy or unsafe; therefore, the rent
2 should be reduced in accordance with that, and you're
3 going to order the rent reduced until that's fixed
4 basically, if there's no order to repair. So there's got
5 to be some mechanism to have the landlord come in and say
6 "I fixed it. The rent needs to go back up to the market
7 rent now." So that's what this is about. Hopefully there
8 will always be an order to repair with the order reducing
9 rent so you don't have to worry about this part (b), but
10 there's no guarantee that there will always be an order to
11 repair, so you have to have some provision to have the
12 rent restored when it's finally fixed. And, no, the
13 landlord is not going to -- he's not ordered by the court
14 to fix it, but his motivation is that the rent is not
15 going back up until he fixes it, so presumably he's going
16 to want to get that fixed, notify the court, so the rent
17 can go up.
18 CHAIRMAN BABCOCK: Got it. Carl.
19 MR. HAMILTON: Well, under what
20 circumstances would you -- under one circumstance you can
21 order it repaired and then when it's repaired you put the
22 rent back. The other situation is you don't order it
23 repaired, and it just -- the rent stays down until the
24 landlord fixes it. So why even enter an order of repair?
25 Why not just let it -- the rent stay down until the

1 landlord fixes it? Under what circumstances would you
2 enter an order and when would you not enter an order?
3 HONORABLE TOM LAWRENCE: Well, first of all,
4 the tenant's got to ask for both of those. The tenant has
5 to ask that there be an order to repair and has to ask
6 that there be an order reducing the rent, so assuming that
7 they ask for both of those and there is a condition that
8 must be fixed under the Property Code, then presumably the
9 judge is going to order both of those, but who knows what
10 a tenant is going to ask for. They may ask for only one
11 of those or neither of those possibly. They may just ask
12 for damages and not for any of these, but they may just
13 ask for an order reducing rent, for whatever reason. I
14 can't tell you why they would want to do that, but it's
15 possible under the statute that they would.
16 CHAIRMAN BABCOCK: Okay. Any other comments
17 about this (b)? You okay, Carl?
18 MR. HAMILTON: I'm okay, but I don't know
19 that I understand it all.
20 PROFESSOR HOFFMAN: Here, here.
21 CHAIRMAN BABCOCK: You're not board
22 certified in rent repair reductions. Okay. Well, let's
23 go to 12 then.
24 HONORABLE TOM LAWRENCE: Motion to set aside
25 default judgment or dismissal. "A motion to set aside

1 default judgment or dismissal must be in writing and filed
2 within five days from the date the justice signs the
3 judgment or order. A party may file only one motion to
4 set aside a default judgment or dismissal for want of
5 prosecution. An order setting aside a default judgment
6 order of dismissal for want of prosecution must be signed
7 within 10 days after the date the justice signs the
8 default judgment or order of dismissal for want of
9 prosecution.
10 "If a written motion to set aside a default
11 judgment or dismissal for want of prosecution is timely
12 filed but is not granted by written order within 10 days
13 after the justice signs the default judgment or order of
14 dismissal for want of prosecution, then in order to
15 perfect an appeal the party filing the motion must file a
16 written notice of appeal within 15 days from the date the
17 justice signs the judgment." Now, the 15 days is to cure
18 a trap that currently exists in the motion for new trial
19 and motions to appeal in the justice court rules. You
20 have five days in the justice court rules to file a motion
21 for new trial, and that motion must be granted or denied
22 and within 10 days, and you have to appeal within 10 days.
23 The lack of action on the motion for new
24 trial or the denial of the motion for new trial does not
25 extend the appellate timetable. So you're reduced to

1 having to call the court, "Did he sign the motion for new
2 trial," and if you don't call and it's never signed then
3 on the 10th day you should have appealed or you have lost
4 your right to appeal because it's not extended under the
5 current rules. Also, since the five days is subject to
6 Rule 4, which excludes Saturdays, Sundays, and legal
7 holidays, and the 10 days is not -- a good example is next
8 week. If I sign a judgment next Tuesday, five days to
9 sign a motion for new trial. You start doing the
10 calculations, and the fifth day is the following Thursday
11 because Wednesday is day one; Thursday, Friday, Saturday,
12 Sunday don't count; Monday is day two; Thursday is day
13 three; Wednesday is day four; and Thursday is day five.
14 So the fifth day to file the motion for new trial is the
15 next -- is the following Thursday.
16 The 10th day to file the appeal is the next
17 day or Friday, so this is fixing that problem that
18 currently exists in the justice court rules so you don't
19 have that trap. So that's why you've got the 15 days
20 there, and then (c) is when both the tenant and landlord
21 appear for trial, no motion for new trial may be filed.
22 That is consistent with the eviction rules.
23 CHAIRMAN BABCOCK: Justice Bland, and then
24 Judge Christopher.
25 HONORABLE JANE BLAND: Tom, if we have a

1 problem in the -- with the other justice court rule, why
2 don't we fix that rule instead of creating a whole other
3 rule for appeals of this special kind of case, or is that
4 because we have to -- because of the statute?
5 HONORABLE TOM LAWRENCE: No, it's not --
6 HONORABLE JANE BLAND: Because now we're
7 going to have multiple appellate tracks in the justice
8 courts, and that doesn't seem to make a lot of sense.
9 HONORABLE TOM LAWRENCE: Well, now, whether
10 it makes sense or not, I don't know what to say about
11 that, but all I can tell you is that --
12 CHAIRMAN BABCOCK: You're moot on that
13 topic.
14 HONORABLE TOM LAWRENCE: All I can tell you
15 is that we want these rules to be as good as possible, and
16 that should be fixed, so that's why these rules are like
17 this. Now, yeah, I think the other rules should be fixed,
18 and we can take that up at a later date, but we're trying
19 to make these rules as good as we can, so we want to
20 remove that potential trap.
21 HONORABLE JANE BLAND: Why are these rules
22 self-contained with respect to motions for new trial and
23 appeal instead of just referring to the existing rules for
24 that out of the justice courts?
25 HONORABLE TOM LAWRENCE: The task force felt

1 with a great degree of unanimity that these rules are
2 superior to the existing rules, that these are clearer and
3 better.
4 HONORABLE JANE BLAND: Except now we'll have
5 two sets of rules for appealing justice court judgments,
6 depending on what the underlying claim is.
7 HONORABLE TOM LAWRENCE: We already have a
8 great diversity in justice court rules now with small
9 claims and justice court. There are already differences
10 that exist. There are more differences that exist on
11 evictions, so we have those conflicts now already, and,
12 yes, this will be a little bit different, but this is
13 better.
14 CHAIRMAN BABCOCK: Carl. And then Justice
15 Gray.
16 MR. HAMILTON: I think paragraph (b) needs
17 to be fixed a little bit. We say that "if the motion is
18 not granted by written order within 10 days." Usually we
19 say something like it's overruled by operation of law, but
20 then we skip from no order to the time for appeal without
21 saying what happens to the motion. Shouldn't we need to
22 say it's overruled by operation of law and then the time
23 for appeal?
24 HONORABLE TOM LAWRENCE: Well, I think we
25 could do that. Yeah, that might make sense.

1 MR. HAMILTON: Because there's no connection
2 really between the failure to do the order and the time
3 for an appeal.
4 HONORABLE TOM LAWRENCE: Okay. I think
5 that's a good idea.
6 CHAIRMAN BABCOCK: Okay. Justice Gray.
7 HONORABLE TOM GRAY: I feel relatively
8 certain that if Professor Dorsaneo were here at this point
9 he would say this would be a good time to make that 7
10 days, 14 days, and 21 days, because of the multiples of
11 seven and not having to incur the problem of the falling
12 on a holiday or weekend. Would there be -- would that be
13 too long for those periods to not fall on 7, 14, and 21?
14 HONORABLE TOM LAWRENCE: I don't know if it
15 would be too long or not. It's the -- you know, it's the
16 tenants that have the interest in moving this along as
17 quickly as possible. We tried to keep it as consistent as
18 we could with the existing JP rules. We changed it where
19 we thought it needed to be changed, but the 5 and 10 days
20 is consistent with what the JPs are used to. That was
21 really why those time limits were selected, just
22 consistency.
23 CHAIRMAN BABCOCK: Okay. Frank.
24 MR. GILSTRAP: Why do we only allow the
25 court to set aside a default judgment or a DWOP? I mean,

1 I mean, is there -- there's no general right to a new
2 trial? I mean, why these two?
3 HONORABLE TOM LAWRENCE: Well, we took this
4 from the eviction rules in the interest of this being
5 speedy. Since there is no appeal bond to appeal, if
6 you're unhappy you can appeal, but if it's a DWOP or
7 dismissal, and there's some -- you know, some reason for
8 that, it seems like somebody ought to get a bite at the
9 apple and have their day in court without just having to
10 appeal. I guess the alternative would be no setting
11 aside, just appeal everything, but you don't want to send
12 all of this stuff up to county court on appeal if you can
13 handle it at the JP court level. That's where it ought to
14 be --
15 MR. GILSTRAP: I'm just wondering why there
16 might not be another grounds for setting it aside. I
17 mean, setting it aside if there's -- once you've had a
18 hearing as opposed to a default or a DWOP.
19 HONORABLE TOM LAWRENCE: Well, we didn't
20 think that was needed because of the ability to appeal, at
21 least by the landlord, without posting an appeal bond.
22 MR. GILSTRAP: One more thing. Can you
23 direct me to the analogous provision in the eviction
24 rules?
25 HONORABLE TOM LAWRENCE: For the no new

1 trial?

2 MR. GILSTRAP: Yeah. Yeah. For this

3 particular 737.12.

4 HONORABLE TOM LAWRENCE: Okay. Well, some

5 of this is going to be found in 567, 566, 570, and some of

6 the other part is going to be found -- well, let's see.

7 MR. GILSTRAP: That's fine. I don't want to

8 take up any more time. Thank you.

9 HONORABLE TOM LAWRENCE: Well, somewhere in

10 the eviction rules it says "no new trial," but I can't put

11 my finger on it.

12 MR. GILSTRAP: Okay. Thanks.

13 CHAIRMAN BABCOCK: Justice Bland.

14 HONORABLE JANE BLAND: I appreciate that

15 these rules are better, but if they are better, we ought

16 to just have one set of rules and fix the ones that we

17 have or get rid of the ones that we have that are bad. We

18 shouldn't have two sets of rules for appeals out of

19 justice courts depending on what the nature of the claim

20 is. Or we shouldn't have multiple sets. It sounds like

21 we have more than two. We should be going toward simpler

22 and fewer appellate tracks and deadlines rather than more,

23 and if these -- and I'm sure these are better, and if

24 these are better, we ought to just get rid of the ones

25 that are bad.

1 CHAIRMAN BABCOCK: Munzinger, you're not
2 going to be mad about these, are you?
3 MR. MUNZINGER: No, no.
4 CHAIRMAN BABCOCK: Okay.
5 MR. MUNZINGER: I just want to point out
6 that you use the phrase "dismissal for want of
7 prosecution" twice in 737.12 but do not use "for want of
8 prosecution" in 737.7(f), which I assume is what you --
9 they're the same order, and you ought to be consistent, I
10 think.
11 HONORABLE TOM LAWRENCE: Okay.
12 CHAIRMAN BABCOCK: All right. Anything else
13 on this .12? Let's go to .13.
14 HONORABLE TOM LAWRENCE: Okay. This is
15 going to be almost as much fun as the contempt issue.
16 Appeal. Here's the way -- the statute says that an owner
17 of real property who files a notice of appeal of a
18 judgment of a justice court to the county court perfects
19 the owner's appeal and stays the effect of the judgment
20 without the necessity of posting an appeal bond. So the
21 owner of real property, the landlord, gets a free appeal.
22 It doesn't say that the tenant gets to appeal without
23 posting an appeal bond. Statute doesn't say that.
24 The task force was of the opinion, although
25 it was a divided vote, that -- that it would be fairer to

1 allow the tenant the same rights to appeal, you know,
2 meaning without posting an appeal bond. If you don't
3 think that that's the way to go, there are two
4 alternatives. Alternative one is that the -- you can't
5 change the landlord. That's in the statute. So he's
6 going to get an appeal by filing a notice of appeal. That
7 really can't be changed, but you can require the tenant to
8 post an appeal bond if you think that that's proper, and
9 there are really two ways to do it.
10 One way is to track Rule 571, which is the
11 justice court's civil rule, and that basically is they
12 would have do pay twice the amount of the cost, would be
13 the appeal bond. That's what a plaintiff has to pay who
14 does not prevail. They have to pay twice the amount of
15 the costs. Normally a defendant who has a judgment
16 written up against them pays twice the amount of the
17 judgment to appeal in a justice civil, but the tenant, who
18 would be like the plaintiff, under Rule 571 would only pay
19 twice the amount of the costs.
20 The alternative would be to base it on Rule
21 749, which is the eviction appeal where the justice sets
22 the appeal bond as he sees fit. So those would be two
23 alternatives to the way the task force has it written.
24 CHAIRMAN BABCOCK: Frank.
25 MR. GILSTRAP: The first alternative gets us

1 right back into the problem we dealt with when we first
2 reworked the eviction rules, which was the problem that
3 you -- under the Constitution you couldn't require the
4 posting of rent as a condition for appeal. I mean, I
5 think, Elaine, we were -- wasn't that what triggered all
6 of that?
7 PROFESSOR CARLSON: I hate to admit this,
8 Frank, but I was reading another rule. I'm sorry.
9 MR. GILSTRAP: Well, all right, but we
10 had --
11 CHAIRMAN BABCOCK: Well, pay attention.
12 MR. GILSTRAP: You know, I think that was
13 what sent us down the road, was the determination that if
14 you're going to require people to put up money to appeal,
15 that that violates the Constitution, and I suspect that
16 might have been one reason the Court didn't act on it,
17 because I think it was a very unpopular provision with
18 landlords.
19 CHAIRMAN BABCOCK: Other comments about
20 this?
21 MR. HAMILTON: About 13?
22 CHAIRMAN BABCOCK: Yeah. Yeah, Justice
23 Gray. Then Carl.
24 HONORABLE TOM GRAY: There's the usual
25 problem of 10 days within the date the justice signs the

1 judgment, if it's the -- the parties don't know when that
2 happens. I know this normally occurs at the end of the
3 hearing in these, but as I recall there was some recent
4 round of discussion in this committee about the justice's
5 ability to take issues under advisement and in effect
6 issue an opinion -- or a judgment at a later date, so you
7 have the how do we know when that 10 days starts.
8 The Supreme Court has -- and with regard to
9 the next sentence, "The perfection of the appeal will be
10 considered perfected with the filing of the notice of
11 appeal." The conjunction, "and the payment of a
12 transcript fee in the justice court." I mean, understand
13 that that is a dual requirement to invoke the appellate
14 jurisdiction of the next court, both of which must happen,
15 and I think that's the almost identical language that had
16 to do with filing -- and the filing of a affidavit of
17 indigency, which I think it's Higgins and another case
18 that we -- it's the filing of the notice of appeal that
19 invokes the jurisdiction of the court and that the payment
20 of a fee, in that case the filing fee, isn't
21 jurisdictional. In effect, the filing of the affidavit is
22 not jurisdictional, so basically I'm asking can we really
23 tie the perfection of the notice of appeal to both of
24 those -- I'm sorry, perfection of the appeal to both the
25 filing and the payment of the transcript fee, or should we

1 only tie it to the notice of appeal filing?
2 HONORABLE TOM LAWRENCE: Well, we put that
3 in there to tip-off the tenant or the landlord that
4 they've got to pay this, because the local Government Code
5 says that until I get my 10-dollar transcript fee that
6 nothing gets sent up or that they do the affidavit of
7 inability, the indigency. So that's there just as a
8 tip-off to let them know that's got to be paid, because
9 that's a condition precedent to me processing that appeal,
10 local Government Code. So, no, it -- that transcript fee
11 doesn't have to be in there. We're just doing that to
12 help out the litigants.
13 HONORABLE TOM GRAY: And is it only the
14 landlord that has to pay that fee? Did I understand that
15 correctly?
16 HONORABLE TOM LAWRENCE: Well, all the
17 statute -- no. Anybody that appeals has to pay that fee.
18 All the statute did is say the landlord doesn't have to
19 post an appeal bond. It didn't except the landlord from
20 paying the transcript fee. It didn't change the local
21 Government Code that requires that.
22 HONORABLE TOM GRAY: So can the landlord not
23 pay a -- I'm sorry, can the landlord not use an affidavit
24 of indigency?
25 HONORABLE TOM LAWRENCE: Yeah, he could use

1 an affidavit of indigency for the 10-dollar transcript fee
2 if he wanted to. Sure.
3 CHAIRMAN BABCOCK: Carl.
4 MR. HAMILTON: I think my question has been
5 answered, but --
6 CHAIRMAN BABCOCK: Okay. Any other -- yeah,
7 Justice Gaultney.
8 HONORABLE DAVID GAULTNEY: The Government
9 Code doesn't -- you're saying it just requires the payment
10 of the transcript fee, so you can separate that out,
11 right, and just if you wanted to inform them you could
12 say, "The appellant must pay the payment of the transcript
13 fee," and then it's perfected upon the filing of the
14 notice of appeal?
15 HONORABLE TOM LAWRENCE: Well, yeah, we can
16 take that out, but then that sort of sets up a trap where
17 somebody doesn't know that they have to pay the transcript
18 fee, but it can come out. It just may cause some
19 confusion for the litigants. It's just there to help the
20 litigants, to tip them off that they're going to have to
21 pay that fee to get it processed.
22 HONORABLE TOM GRAY: I guess what I'm trying
23 to focus on is, is that jurisdictional to the appeal? Is
24 that necessary to perfect the appeal, or is it only the
25 notice of appeal, and sooner or later you're either going

1 to have to pay the transcript fee or file an affidavit of
2 indigency?
3 HONORABLE TOM LAWRENCE: Well, I didn't
4 bring the section of the local Government Code, but I
5 think the way it's worded is you have to get in the $10
6 before you send the paperwork up to the county court,
7 before you process that appeal, I think is the way it's
8 worded. I don't remember exactly. But that's the fee to
9 prepare the transcript to send it up to county court, so
10 until you get the fee it doesn't go up to county court.
11 HONORABLE TOM GRAY: Okay.
12 HONORABLE TOM LAWRENCE: Now, I don't
13 know -- I understand what you mean by perfecting the
14 appeal. We're going to talk more about that a little bit
15 later in this rule. I don't know that -- I don't remember
16 if there's any case law that talks about the transcript
17 fee for protecting. There is case law that the payment of
18 the filing fee in county court, which is why we've got a
19 rule drafted a little bit later that's going to cover
20 that.
21 CHAIRMAN BABCOCK: Why did -- why did the
22 task force prefer this version of subparagraph (a) as
23 opposed to the alternatives in Footnote 5?
24 HONORABLE TOM LAWRENCE: Well, and Wendy and
25 Kennon, correct me if I'm wrong, but I think they felt it

1 was -- if it was going to be a no appeal bond for the
2 landlord, it was fair to have that same provision for the
3 tenant. I think, Wendy, was that pretty much the only
4 concern?
5 MS. WILSON: And I think, though, the reason
6 we came to that determination is there had been -- I think
7 Mr. Fuchs had said in our task force meeting that there
8 was some equal protection case law out there that you
9 couldn't have -- that if you had no bond posted for the
10 landlord, that it would have to be the same for the
11 tenant; and I think based on, you know, that supposition
12 we decided that, you know, it should be the same for both.
13 You know, I know that from being involved in
14 the drafting of it that it was intended that the --
15 certainly the landlords should not have to post a bond,
16 and Mr. Doggett is not here, but, you know, I think that
17 the idea was that the tenants would post a bond, but that
18 the bond in this case would typically be much greater for
19 a landlord, who is presumably going to have some judgment
20 or order of repair that's significant in nature. But,
21 again, we did decide as, you know, based on that possible
22 line of cases dealing with equal protection that what's
23 good for one is possibly good for the other.
24 HONORABLE TOM LAWRENCE: This was not a
25 unanimous vote on the task force --

1 MS. WILSON: Right.
2 HONORABLE TOM LAWRENCE: -- to allow the
3 tenants the free appeal.
4 CHAIRMAN BABCOCK: Okay. All right.
5 Anything else on (a)? Yeah, Elaine.
6 PROFESSOR CARLSON: I just want to say
7 normally outside of the JP arena, you know, plaintiff
8 doesn't have to put up any type of appellate security to
9 secure a take-nothing judgment. There's nothing to
10 secure. But Judge Lawrence reminds me that that is not
11 the rule in justice court, that plaintiff who suffers a
12 take-nothing judgment, if I understood this correctly, is
13 normally required to put up double the amount of the
14 costs.
15 HONORABLE TOM LAWRENCE: Costs. Rule 571.
16 CHAIRMAN BABCOCK: Right. That was
17 alternative one, based on 571.
18 HONORABLE TOM LAWRENCE: And then
19 alternative two is based on Rule 749, which would let the
20 justice set the appellate bond at whatever he thought was
21 proper.
22 CHAIRMAN BABCOCK: A majority of the task
23 force, however, was in favor of what we have here in
24 the --
25 HONORABLE TOM LAWRENCE: A narrow majority.

1 CHAIRMAN BABCOCK: So was it like 11 to 10
2 or --
3 HONORABLE TOM LAWRENCE: We were a congenial
4 group. We didn't take a lot of votes. We just --
5 MS. PETERSON: Got a sense for it.
6 CHAIRMAN BABCOCK: Okay. All right. Gene,
7 sorry.
8 MR. STORIE: Yeah, I just want to observe
9 that if there's an equal protection issue on this then
10 wouldn't it will also be true of Rule 571?
11 (Sotto voce by Justice Duncan)
12 THE REPORTER: I didn't hear what you said,
13 I'm sorry.
14 HONORABLE SARAH DUNCAN: That's why Elaine
15 and I think 571 is unconstitutional.
16 MR. STORIE: Yeah, that's the one in the
17 footnote.
18 CHAIRMAN BABCOCK: She and Elaine, speaking
19 for Elaine, think that 571 is unconstitutional.
20 PROFESSOR CARLSON: That is what we talk
21 about.
22 CHAIRMAN BABCOCK: Huh?
23 PROFESSOR CARLSON: This is our world. We
24 talk about this kind of stuff.
25 CHAIRMAN BABCOCK: Judge Bland is down there

1 studying a case so that she can tell us about it. Sarah.
2 HONORABLE JANE BLAND: It's 5:00 o'clock
3 somewhere, Chip.
4 CHAIRMAN BABCOCK: She is thirsting for the
5 Four Seasons, I can tell. Sarah.
6 HONORABLE SARAH DUNCAN: Judge Lawrence,
7 where is the provision in the Senate bill that a notice of
8 appeal stays the effect of the judgment?
9 HONORABLE TOM LAWRENCE: Well, it's not, but
10 that's -- typically in any JP court appeal when the appeal
11 is perfected, that's it. It's -- the case law calls the
12 judgment a nullity, and it goes up to county court on a de
13 novo, trial de novo.
14 CHAIRMAN BABCOCK: Okay.
15 MR. ORSINGER: Is that de novo review or a
16 trial de novo?
17 CHAIRMAN BABCOCK: Stop it. All right.
18 Let's go to subparagraph (b). Any comments on (b)?
19 HONORABLE TOM LAWRENCE: All right.
20 HONORABLE SARAH DUNCAN: But they're all
21 stayed, is what you're saying.
22 CHAIRMAN BABCOCK: Right. Any comments on
23 (b)?
24 MS. PETERSON: Just a side note, the
25 statute --

1 MS. WILSON: The statute does say that it
2 stays the effect of the judgment.
3 HONORABLE SARAH DUNCAN: Right, but the rule
4 doesn't.
5 MS. WILSON: Oh, okay, that was your point.
6 HONORABLE SARAH DUNCAN: But what Judge
7 Lawrence is saying, and I don't know what rule this is, is
8 that there's somewhere else it says that every judgment
9 from JP court is suspended -- enforcement is suspended
10 pending appeal. I don't know that to be true. I'm going
11 off of what he says.
12 PROFESSOR CARLSON: I think --
13 CHAIRMAN BABCOCK: Elaine.
14 PROFESSOR CARLSON: I think Justice Duncan
15 makes a good point. I think that should be in the rule,
16 because that's how the statute -- that the taking of an
17 appeal -- when any party timely files a notice of appeal
18 of the judgment of a justice court to the county court the
19 underlying judgment is stayed without the necessity of
20 posting an appeal bond. Don't you think the parties
21 should know that?
22 CHAIRMAN BABCOCK: What does subparagraph
23 (b) say?
24 HONORABLE TOM LAWRENCE: That's why we put
25 (b) in there.

1 PROFESSOR CARLSON: Oh, okay, I'm sorry, I
2 didn't see it. I thought it was not in there. Never
3 mind.
4 CHAIRMAN BABCOCK: Richard.
5 MR. MUNZINGER: (b) still -- I'm not trying
6 to beat a dead horse, but remember we've discussed the
7 problem of the use of "order" in one context and
8 "judgment" in another --
9 CHAIRMAN BABCOCK: Right.
10 MR. MUNZINGER: -- and this persists
11 throughout the rule, which I'm assuming somebody is
12 addressing, because we're going to have all kinds of
13 trouble with whether an order is the same as a judgment
14 and whether appeal suspends an order and not a judgment,
15 et cetera, if we're not careful with that phraseology.
16 CHAIRMAN BABCOCK: Kennon has been taking
17 copious notes whenever that issue has arisen.
18 MS. PETERSON: Yes.
19 CHAIRMAN BABCOCK: She's all over it.
20 HONORABLE SARAH DUNCAN: That assumes
21 there's a difference.
22 CHAIRMAN BABCOCK: Carl.
23 MR. HAMILTON: If we're going to appeal a
24 judgment, why don't we just say that instead of saying
25 "repair or remedy as well as any other actions," whatever

1 that means? Why don't we just say it stays the judgment?
2 CHAIRMAN BABCOCK: Yeah. That's what you're
3 trying to get at, isn't it? No?
4 No, I was thinking maybe you, Judge
5 Lawrence. Weren't you trying to get at the concept that
6 you're trying to stay the judgment, whatever it may be?
7 HONORABLE TOM LAWRENCE: You have the
8 judgment that's signed on the day of trial that sets the
9 statutory penalty, the civil penalty, attorney's fees, and
10 court costs. That part of the judgment is a money
11 judgment for the tenant that the tenant can levy and
12 execute on. Then you also have these orders to repair and
13 orders reducing rent. You -- it is known with finality on
14 the day that the judgment is rendered in court how much
15 the money judgment is going to be for the civil penalty
16 and the statutory damages. What you don't know at that
17 point is exactly what it's going to cost to repair or how
18 much the order reducing rent is going to be. So you
19 need -- if you modify the order to repair, reducing rent,
20 you need to give the landlord the opportunity to appeal
21 that, and that timetable is not going to be the same as
22 the date that the judgment was originally rendered on the
23 trial date. That's what I was trying to get at.
24 CHAIRMAN BABCOCK: Gotcha. Thanks.
25 Richard.

1 MR. MUNZINGER: But I thought that was the
2 problem that we had discussed at least to some extent. If
3 the justice enters two orders, one for the 500-dollar
4 civil penalty and what have you and the other, but then he
5 doesn't know how much it's going to cost to repair the
6 building, the landlord has no way of appealing an order to
7 repair the building and doesn't know what he's appealing
8 at all, and he -- but he can be held in contempt for it,
9 be put in jail for it, and no one can review the order and
10 authority of a justice of the peace in doing this.
11 HONORABLE TOM LAWRENCE: Well, I believe
12 that he can appeal it. I believe that there are
13 provisions in the rules that he can appeal that.
14 MR. MUNZINGER: Well --
15 HONORABLE TERRY JENNINGS: Even if it's
16 treated as a separate order and he's held in contempt, he
17 would have habeas corpus rights.
18 MR. MUNZINGER: Well, he would have habeas
19 corpus for contempt, but let's forget for the moment just
20 contempt. "Munzinger, put a new roof on your apartment
21 building, cost you $72,000." I can't appeal it.
22 HONORABLE TOM LAWRENCE: I wouldn't be able
23 to enter a judgment if that's what it cost because you're
24 outside of my jurisdictional limit.
25 MR. MUNZINGER: Okay, 9,999, same point.

1 It's my money, my property, I'm told I must do something,
2 and I've got no appeal for it.
3 CHAIRMAN BABCOCK: Now, you're getting mad
4 again.
5 MR. MUNZINGER: No, I'm not. I'm not mad.
6 I'm just emotionally labile.
7 HONORABLE TOM LAWRENCE: But I believe that
8 you can appeal. The landlord can appeal the order. He
9 can appeal it when it's rendered on the day of trial. He
10 can appeal it if he finds out later that it's going to
11 cost more than he thought. He can file a motion to have
12 that modified and then we're going to put in there that he
13 can appeal that, so he's got at least two bites at the
14 appellate apple.
15 MR. MUNZINGER: But I thought this was the
16 problem that we have where the judgment is one document
17 and the order is another, and do we have the right to
18 appeal from these because one is final and the other
19 isn't. That's the problem I'm having. It may be my
20 fault. I may be stupid. I'm certainly not mad, but I may
21 be stupid.
22 CHAIRMAN BABCOCK: You're not stupid.
23 MR. MUNZINGER: But I don't understand this,
24 that a justice of the peace has the authority to hold this
25 within his court and deprive me of the right to appeal.

1 It doesn't make sense to me.
2 CHAIRMAN BABCOCK: Carl.
3 MR. MUNZINGER: It may be the way the
4 Legislature wrote the bill causes the problem with the
5 6-day and 10-day trial thing, but in essence what it ought
6 to be saying to the litigants is come to court and know
7 within 6 days or 10, whatever the time limit is, what the
8 cost is going to be.
9 CHAIRMAN BABCOCK: Carl.
10 MR. HAMILTON: I think what I understood you
11 to say, Tom, was that the judgment really is not complete
12 because you don't know some things, so isn't that really
13 just an interlocutory judgment?
14 HONORABLE TOM LAWRENCE: This is a
15 difficulty with this statute and trying to make this all
16 work. The elements of the judgment that are money damages
17 are going to be known and entered on the day of the trial,
18 and presumably it may well work out that if you have an
19 order to repair and an order reducing rent and a
20 completion date, that those are going to be finite numbers
21 that aren't going to change because it's going to be
22 fixed, you know, on that date, and you're going to know
23 exactly how much it's going to cost. But we also had to
24 build in provisions that if the landlord figures out that,
25 oh, this is going to cost me a lot more, that they be able

1 to come in, and there's a mechanism to appeal if the judge
2 doesn't grant him an order modifying the rent -- the order
3 to repair, then he can appeal the whole thing, even though
4 it may be separate and apart from the judgment based on
5 the money damages.
6 You know, I recognize after all the comments
7 that everybody is having great difficulty. I have to tell
8 you the task force was able to separate these things out,
9 and it didn't really cause us any concern, but obviously
10 if it's causing this much difficulty, it's confusing, but
11 we believe that the due process is built in. We believe
12 that everybody has got more than sufficient ability to
13 appeal both the initial judgments and modifications to the
14 judgment all the way down the line.
15 CHAIRMAN BABCOCK: Sarah.
16 HONORABLE SARAH DUNCAN: Well, I'm looking
17 at -- now that I've read (b), where I see that the notice
18 of appeal stays enforcement, then I drop down to (e). "If
19 the appellant fails to pay the costs on appeal in
20 accordance with 143a," and I go back to 143a. The problem
21 has always been -- at least what I understand from the
22 case law -- is the failure to differentiate between an
23 appeal bond, which is to secure the costs of the appeal,
24 and a supersedeas bond, which is to secure payment of the
25 judgment; and what has gotten the Texas rules in trouble

1 before, and I think gets the JP rules in trouble, is that
2 they merge the two, and they basically say that to appeal
3 you have to supersede; and that's the reason for the
4 double the amount of the judgment or whatever.
5 But there's nothing that I can find in 143a
6 that says "pay the costs on appeal" means the costs of the
7 appeal, and then I look -- and this may not make any
8 sense, but then I look at 749, which says, yeah, you can
9 appeal, but the justice sets the amount of the bond in
10 eviction proceeding, and I go over to 752, and it says on
11 the trial of the cause in the county court you can recover
12 damages. What does 143a mean? Does it mean the costs of
13 appeal or --
14 HONORABLE TOM LAWRENCE: No. No. 143a
15 is -- this is a tricky little part of JP world where a
16 party can post their appeal bond, pay their transcript
17 fee, it gets sent up to the court, but they still must pay
18 the court costs at county court under Rule 143a, and if
19 they don't pay the court costs then that appeal gets sent
20 back, and it's deemed to be no longer perfected, and the
21 original judgment of the JP court is reinstated, so to
22 speak. So that's the purpose of putting this here, is
23 that it is a -- it is a trap, and, you know, it's crazy,
24 but the judgment, the final judgment of the JP court, then
25 it's appealed, and that judgment becomes what's called a

1 nullity. That's what the case law calls it. It's a
2 nullity, and it's perfected in county court, but if you
3 don't pay the court costs in county court then it's
4 unperfected. It gets sent back to JP court, and it's
5 reinstated.
6 So part (e) is to take that into
7 consideration, and that's why (e) is there. This is the
8 law now, and you can find this if you go to 143a and then
9 go to case law, but it's not clear from reading the JP
10 rules, so we're just trying to put this in the rule so
11 everybody understands what the law is.
12 HONORABLE SARAH DUNCAN: But what are the
13 costs of appeal? What are those considered to be? Is it
14 filing fees?
15 HONORABLE TOM LAWRENCE: Well, in JP court
16 it's the filing fee and service fees and various other
17 things. If you're asking under Rule 571, double the costs
18 would be the cost in JP court, but we don't collect the
19 county court filing fee. We collect the JP court costs.
20 HONORABLE SARAH DUNCAN: I understand that.
21 But 143a talks about -- first of all, 143 says that you
22 can be required to give security for costs in any case,
23 but what that rule has been interpreted to mean is court
24 costs, right, and that's -- that's because the clerk feels
25 insecure about the ability to collect court costs, but

1 143a just says, "the costs on appeal," not "of appeal."
2 So I'm not sure that is just filing fees, and the bonds
3 that the JP courts have required, like under the 751 type
4 rule for double the amount of what the damages are, I
5 mean, that's *Dillingham vs. Putnam*, and that's -- I don't
6 understand (e). I understand (b), and I understand (a),
7 but I don't understand (e) because it says "the costs on
8 appeal," not "the costs of appeal."
9 HONORABLE TOM LAWRENCE: (e) represents the
10 current status of the law. That's what --
11 CHAIRMAN BABCOCK: Did you say (e)?
12 HONORABLE TOM LAWRENCE: (e).
13 CHAIRMAN BABCOCK: (e).
14 HONORABLE NATHAN HECHT: You just copied
15 143a.
16 HONORABLE TOM LAWRENCE: 143a, and in
17 essence some case law that explains what happens if you
18 don't pay the county court fee.
19 HONORABLE SARAH DUNCAN: But that's what I'm
20 asking, is what fees are we talking about?
21 HONORABLE TOM LAWRENCE: The court costs in
22 county court.
23 HONORABLE SARAH DUNCAN: The filing fees?
24 HONORABLE TOM LAWRENCE: Yes.
25 CHAIRMAN BABCOCK: Okay.

1 PROFESSOR CARLSON: But even then you can be
2 an indigent, right?
3 HONORABLE TOM LAWRENCE: Oh, yeah.
4 PROFESSOR CARLSON: And be excused from
5 paying.
6 HONORABLE TOM LAWRENCE: Oh, yeah. Yeah.
7 You can file an affidavit of inability and then you don't
8 have to pay it, and you can file an affidavit of inability
9 at JP court and be exempt from all of those. Well,
10 actually, I think once it's approved at JP court it goes
11 all the way up, but --
12 CHAIRMAN BABCOCK: Okay. Let's talk about
13 14 real quick.
14 HONORABLE TOM LAWRENCE: All right.
15 "Discovery in trial. Reasonable discovery shall be
16 permitted." You can't have full blown discovery with a 6-
17 to 10-day limit here, so we are tracking the small claims
18 court rules, which I think is a very workable set of rules
19 for this. "Reasonable discovery shall be permitted.
20 Discovery is limited to that considered appropriate and
21 permitted by the justice and must be expedited. In the
22 case of a bench trial the justice may develop the facts of
23 the case in order to ensure justice."
24 Now, in small claims court the justice can
25 develop the facts of the case. The justice can summon

1 witnesses in small claims court if he wants to. So since
2 we're going to have a lot of pro ses, we thought that it
3 would be a good idea to allow the court to develop the
4 facts in a bench trial to get at what's really happening.
5 "The failure of any party to respond to an
6 order of the court for discovery may be punished in
7 accordance with Rule 215.2," which is contempt, and then
8 that gets us to this little handout, the issue of a jury
9 charge. Rule 554 says you can't charge the jury in civil
10 cases. Now, we charge the jury in criminal cases, but we
11 can't do it in civil cases under 554, so I started
12 thinking about this, and think about how the jury is going
13 to render a judgment on this type of case without some
14 information from the court, some charge, and I think it
15 would be a good idea to allow the court to charge the jury
16 in these particular cases. So that's -- that's Rule 14.
17 CHAIRMAN BABCOCK: Okay. Comments about 14?
18 Justice Gray.
19 HONORABLE TOM GRAY: I'm -- oh, wait,
20 Richard did have his hand up, so I'm going to defer to him
21 because he's probably going to talk about the Spanish
22 Inquisition.
23 MR. MUNZINGER: No, but the second sentence
24 I think is surplus. I think the common law says that any
25 judge, jury trial or bench trial, can participate in the

1 proceeding to ensure justice. I'm not so sure in cases
2 where a jury is requested and the parties are pro se that
3 you wouldn't want the same rule to apply so that justice
4 is done, and my suggestion would be that we either say,
5 "The justice may participate to develop the facts of the
6 case in order to ensure justice," period, regardless of
7 whether it's a bench trial or not.
8 CHAIRMAN BABCOCK: Good point. Justice
9 Gray.
10 HONORABLE TOM GRAY: I was actually going --
11 I assumed he would be really contrary to that, which I am.
12 I would prefer that the justice not become the advocate
13 for anybody, or both sides, got no business participating
14 in the development of the case.
15 HONORABLE TOM LAWRENCE: Well, I would only
16 point out the Legislature has said for small claims court
17 that that is permissible.
18 HONORABLE TOM GRAY: Small claims, I just
19 kind of -- that's a group over there kind of by itself. I
20 just have a problem with the justice of the peace or any
21 judge becoming a person that's going to go out and gather
22 up facts, even if it's just by inquisition of the parties.
23 CHAIRMAN BABCOCK: Justice Bland.
24 HONORABLE JANE BLAND: I don't think we
25 should have 737.14 about discovery in trial, and if

1 there's rules about discovery in small claims court then
2 let's just use those but not make some special discovery
3 rules for this kind of claim. If we do make special
4 discovery rules for this kind of claim, I don't think we
5 should say, "Reasonable discovery shall be permitted," but
6 we might say "may be permitted." For a case that's
7 supposed to be concluded with as rapidly as these are,
8 with amounts in controversy as low as these are, the idea
9 that discovery shall be permitted to me seems burdensome.
10 I think it ought to be the exception where discovery is
11 permitted instead of the rule.
12 CHAIRMAN BABCOCK: Okay. Anything else --
13 yeah, Gene.
14 MR. STORIE: I thought it was a little
15 ambiguous as to whether the justice can send out discovery
16 if the justice gets to develop the facts. I mean, I don't
17 think we mean that.
18 CHAIRMAN BABCOCK: Yeah. Not intended for
19 the judge to send out --
20 HONORABLE TOM LAWRENCE: No. No.
21 CHAIRMAN BABCOCK: -- discovery? Okay.
22 HONORABLE DAVID PEEPLES: Does "develop the
23 facts" mean anything other than may ask questions during
24 trial?
25 HONORABLE TOM LAWRENCE: Well, that's what

1 we intend, may ask questions, try to understand what the
2 case is about. I think probably a lot of you that are
3 used to trials with lawyers on both sides may not
4 appreciate how difficult it is to understand what's going
5 on with two pro ses before you and it's --
6 HONORABLE TOM GRAY: Been there. Municipal
7 judge.
8 HONORABLE DAVID PEEPLES: Well, that happens
9 in district court all the time for the judges to ask
10 questions. I'm just wondering if this gives power beyond
11 that.
12 HONORABLE TOM LAWRENCE: We tried to track
13 the existing language in the Small Claims Court Act that
14 the Legislature has already promulgated that the JPs are
15 familiar with, and that's why it's written like that, just
16 to track that language.
17 CHAIRMAN BABCOCK: Okay. Okey-dokey.
18 Anything else? Yeah.
19 PROFESSOR HOFFMAN: But, again, following on
20 David's point, you do that in other cases, in other issues
21 already, right, without a corresponding rule? Why do you
22 need it here?
23 HONORABLE TOM LAWRENCE: Well, I'm not sure
24 that -- I'm not sure it's always done universally in all
25 cases in JP court. I know that it's done in small claims

1 court because the rule permits it, but if you look at the
2 justice court rules, there's nothing there that would seem
3 to specifically provide for this, so I'm not sure that
4 that's universally done across the state by all courts.
5 PROFESSOR HOFFMAN: So would the
6 promulgation of this rule and this specific kind of action
7 then send the message to JPs in other actions that they
8 lack such a power?
9 HONORABLE TOM LAWRENCE: I don't know. I
10 mean, there's a big inference there. I don't know that it
11 would. I don't think that I would get that inference
12 necessarily. We're only working with these rules. We're
13 not amending the others. If we were amending the 500
14 series today, I would put this rule in the 500 series
15 because I think this would be advantageous to have it in
16 the existing civil rules, but, you know, for these set of
17 rules I think this improves the rules and makes it more
18 workable. It's to ensure justice, ensure that you get the
19 story of what's going on, is the whole point.
20 CHAIRMAN BABCOCK: Justice Bland.
21 HONORABLE JANE BLAND: Well, I don't think
22 that a justice of the peace that wanted to find out what
23 was going on would need this rule to do that, and to me
24 it's going to start encouraging lawyers to ask for
25 discovery in justice courts, which I think is a bad idea.

1 And this is a nonrecord court, right?
2 HONORABLE TOM LAWRENCE: Yes.
3 HONORABLE JANE BLAND: So we don't have any
4 record to review or transcript of proceedings. The check
5 that is built in is the appeal to the county court trial
6 de novo, and I just think that we ought not micromanage
7 these sorts of proceedings, and let them proceed ahead,
8 and if there's a problem then that will have to be handled
9 with an appeal to county court, but when we're talking
10 about $10,000 or less at issue, cost becomes a giant
11 factor, and it's just not fair to burden these parties
12 with additional costs to get this relatively small dispute
13 resolved.
14 CHAIRMAN BABCOCK: Okay. Let's have some
15 comments about .15, effective writ of possession.
16 HONORABLE TOM LAWRENCE: All right. "If the
17 judgment for the landlord for a possession of the leased
18 premises becomes final, any order to repair or remedy is
19 vacated and unenforceable."
20 CHAIRMAN BABCOCK: Seems uncontroversial to
21 me, but --
22 HONORABLE TOM LAWRENCE: All right.
23 CHAIRMAN BABCOCK: No, no, no, but go ahead.
24 Any comments about it? Yeah, Frank.
25 MR. GILSTRAP: Well, we all know what final

1 judgment means, but do the litigants?
2 HONORABLE TOM LAWRENCE: The task force
3 wrote this rule several different ways. One way we said
4 it, "if it is not appealed." I don't remember. There
5 were several ramifications. This was considered to be --
6 "becomes final" was considered to be the best way to do it
7 because you didn't want to put a burden on the landlord to
8 actually request and pay for the writ of possession. You
9 just want the tenant's rights to appeal have been
10 terminated, or I'm not saying that right. You want his
11 right to appeal to have expired. At that point the tenant
12 is going to be evicted, so the order to repair is kind of
13 pointless at that point. So that's the point of the rule,
14 but you don't want that to happen until the tenant's
15 appeal has been exhausted, because if it goes to county
16 court on appeal then obviously this separate judgment of
17 the JP court is going to remain in effect while the appeal
18 is -- of the eviction is working its way up.
19 MR. GILSTRAP: But it's not final.
20 HONORABLE TOM LAWRENCE: Tenant still has
21 right to possession.
22 MR. GILSTRAP: But it's not final.
23 HONORABLE TOM LAWRENCE: What's not final?
24 MR. GILSTRAP: That separate judgment.
25 HONORABLE TOM LAWRENCE: No, the judgment

1 under these rules is going to be final. The appeal of the
2 eviction rules, once that becomes final and the tenant is
3 going to be evicted, then that stays the enforcement of
4 the order to repair or remedy. But if the tenant perfects
5 his appeal on the eviction -- and the eviction is going to
6 be a part of what's going on here.
7 MR. GILSTRAP: That's what I'm saying. When
8 the tenant perfects his appeal on the eviction, the order
9 for possession is not final.
10 HONORABLE TOM LAWRENCE: That's correct.
11 MR. GILSTRAP: Okay.
12 HONORABLE TOM LAWRENCE: It's vacated.
13 CHAIRMAN BABCOCK: All right. Comments
14 on .16?
15 HONORABLE TOM LAWRENCE: This is just for
16 county court. This is part of the statute, or part of the
17 bill. "The suit shall be tried de novo in the county or
18 district court. Judgment shall be rendered. An appeal of
19 a judgment after justice court under these rules takes
20 precedence in county court and may be held at any time
21 after the 8th day after the date the transcript is filed
22 in county or district court." That's not really a JP
23 issue, but it's in the statute, so we put it in.
24 CHAIRMAN BABCOCK: Any comments on that?
25 MR. MUNZINGER: Why do you say "a judgment

1 shall be rendered"? I mean, that's what courts do.
2 HONORABLE TOM LAWRENCE: Well, I think
3 that's what the statute says. I think that we took that
4 from either the 700 rules or the 500 rules. That's the
5 same language. Let me see if I can find that. It must be
6 in the 500 rules. 550 or something like that probably.
7 591. We took it from 591. So that's why it's like that.
8 CHAIRMAN BABCOCK: Okay. Any other comments
9 about that?
10 Judge Lawrence, thank you and the task
11 force; and, Wendy Wilson, thanks for sitting here today.
12 Really terrific job under trying circumstances, and you're
13 probably ready for a drink right now.
14 HONORABLE TOM LAWRENCE: I'm ready for an
15 adult beverage, yes.
16 CHAIRMAN BABCOCK: Thank you.
17 (Applause)
18 CHAIRMAN BABCOCK: We are going to be
19 meeting tomorrow. We have a lot of really important
20 things to talk about tomorrow. I mean, everything is
21 important, but so make every effort to get here if you
22 can; and one of the things that we're going to talk about,
23 and if y'all have a chance tonight to read, it's the
24 Institute for the Advancement of the American Legal System
25 and the American College of Trial Lawyers have come up

1 with some proposed rules and some case flow management
2 guidelines, and the purpose of our discussing it is
3 twofold. One, the Court is -- you may recall, about a
4 year ago we had sort of an initiative with Jeff Boyd's
5 subcommittee that we're trying to think of ways to improve
6 our system, and my read of these rules is there are some
7 ideas in here that are worthy of our consideration; and
8 secondly, the institute and the college would like our
9 feedback to them as they go about trying to talk about
10 these -- this project and these proposals. The institute
11 is chaired by Becky Kourlis, who is a former justice at
12 the Colorado Supreme Court, and the American College
13 devoted a lot of resources to this project. So that's one
14 of the things we're going to go over tomorrow, and we're
15 not going to have a lot of time to spend on it, but I'll
16 try to highlight some things that I think we should talk
17 about, and then next, our next meeting we can come back
18 and talk about it in more depth, and then we have the
19 recusal rule that we have to talk about. We've got the
20 civil cover sheets, and we've got the juror -- juror
21 questions during deliberations, so a lot of really
22 important things. And we'll see you tomorrow morning at
23 9:00 o'clock. We're in recess. Thank you.
24 (Meeting recessed at 4:58 p.m.)
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2 **REPORTER'S CERTIFICATION**
MEETING OF THE
3 SUPREME COURT ADVISORY COMMITTEE

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

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

10 the above meeting of the Supreme Court Advisory Committee

11 on the 20th day of November, 2009, and the same was

12 thereafter reduced to computer transcription by me.

13 I further certify that the costs for my

14 services in the matter are $1,960.00.

15 Charged to: The Supreme Court of Texas.

16 Given under my hand and seal of office on

17 this the 8th day of December, 2009.

18

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