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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

September 28, 2012

(FRIDAY SESSION)

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

**INDEX OF VOTES**

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

**Documents referenced in this session**

12-14 Small Claims Task Force Report

12-18 Supplemental Small Claims Task Force Report

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

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

1                   PROFESSOR CARLSON: Yes, sir.

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

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

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

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

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

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

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

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

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

25 CHAIRMAN BABCOCK: Okay. Any comments on

1 740? No changes in the current rules. If nobody knows of  
2 any problems in the current rule then we will move on to  
3 741.

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

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

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

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

1 this will be a lot better.

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

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

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

20           CHAIRMAN BABCOCK: Buddy.

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



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

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

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

20 MR. LOW: "Must."

21 MR. ORSINGER: "Must."

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

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

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

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

7 MR. LOW: Yeah, there.

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

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

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

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

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

25 MS. BARON: I have a question.

1 CHAIRMAN BABCOCK: Pam.

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

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

7 MS. BARON: In what -- I'm looking at Rule  
8 71, citation, is that not the current proposal?

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

25 I think the issue that you might run into if

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

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

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

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

8 CHAIRMAN BABCOCK: Pam.

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

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

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

17 MR. TUCKER: Yes.

18 CHAIRMAN BABCOCK: Robert.

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

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

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

4 CHAIRMAN BABCOCK: Okay. Any more comments  
5 about 741?

6 MR. ORSINGER: I just had a question. You  
7 may have discussed this before, excuse me if you did, but  
8 it says that the rules are at [www.therules.com](http://www.therules.com), and I'm  
9 wondering who maintains that domain and the accuracy of  
10 it.

11 MR. TUCKER: Yeah, [therules.com](http://therules.com) was just our  
12 placeholder in the rules.

13 MR. ORSINGER: Oh, okay.

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

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

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

22 HONORABLE NATHAN HECHT: OCA maybe.

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

25 MR. TUCKER: Yeah.

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

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

1 and an immediate possession bond was on file.

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

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

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



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

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

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

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

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

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

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

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

10 MR. TUCKER: Yeah.

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

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

1 reading of the actual words on the page.

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

12           CHAIRMAN BABCOCK: Judge Casey.

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

1 there is a problem.

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

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

19           CHAIRMAN BABCOCK: No, go ahead, Bronson.

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

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

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

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

3 CHAIRMAN BABCOCK: Where are those judges  
4 located?

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

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

9 MR. TUCKER: You were number four.

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

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

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

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

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

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

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

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

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

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



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

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

17 CHAIRMAN BABCOCK: Buddy.

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

25 MR. TUCKER: Yeah, really a writ of

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

13 CHAIRMAN BABCOCK: Okay. Professor Carlson.

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

17 MR. TUCKER: Yes.

18 PROFESSOR CARLSON: I have some real  
19 concerns.

20 CHAIRMAN BABCOCK: Speak up.

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

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

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

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

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

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

13 CHAIRMAN BABCOCK: Richard Munzinger.

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

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

19 MR. MUNZINGER: What are they at law today?

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

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

25 MR. TUCKER: Currently, no. The reason why

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

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

17 MR. TUCKER: Yes, sir.

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

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

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

9 CHAIRMAN BABCOCK: Kent.

10 HONORABLE KENT SULLIVAN: Under the proposed  
11 742(a), you talk about plaintiff filing or posted a bond  
12 in cash or surety in an amount approved by the judge, and  
13 then it says, "The surety may be the landlord or its  
14 agent," implying to me, of course, that the party could be  
15 its own surety. I must be missing something. Why is that  
16 a good idea? Why does that make sense?

17 MR. TUCKER: Well --

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

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

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

5 CHAIRMAN BABCOCK: Judge Peeples, and then  
6 Professor Carlson.

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

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

25 CHAIRMAN BABCOCK: Professor Carlson, then

1 Carl.

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

10 MR. TUCKER: Yeah.

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

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



1 CHAIRMAN BABCOCK: Carl.

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

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

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

14 MR. TUCKER: Right.

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

17 MR. TUCKER: Six days later.

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

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

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

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

25 CHAIRMAN BABCOCK: Lisa.

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

6 MR. TUCKER: Sure.

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

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

12 CHAIRMAN BABCOCK: Professor Carlson.

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

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

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

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

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

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

7 CHAIRMAN BABCOCK: Richard.

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

14 MR. TUCKER: Yeah.

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

17 MR. TUCKER: Okay.

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

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

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

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

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

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

21 HONORABLE NATHAN HECHT: Yes.

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

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

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

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

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

3 CHAIRMAN BABCOCK: That's what I heard.

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

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

17 MR. TUCKER: Immediate possession.

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

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

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

25 MR. TUCKER: Well, somewhat. Somewhat. I

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

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

19 MR. TUCKER: Yes, sir.

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

23 MR. TUCKER: Yes. Yes.

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



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

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

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

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

25 MR. TUCKER: Prevails.

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

3 CHAIRMAN BABCOCK: Richard.

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

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

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

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

14                  CHAIRMAN BABCOCK: Professor Carlson.

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

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

21                  PROFESSOR CARLSON: Thank you.

22                  CHAIRMAN BABCOCK: Lisa.

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

25                  MR. TUCKER: A small percentage. From my

1 understanding, less than five percent of them are  
2 appealed.

3 CHAIRMAN BABCOCK: Okay. Yeah, Richard.

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

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

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

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

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

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

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

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

4 MR. TUCKER: Yeah.

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

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

16 HONORABLE TERRY JENNINGS: Can you speak  
17 louder?

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

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

4 MR. TUCKER: Yeah, and that's a point  
5 well-taken, and I guess we're trying to balance all of  
6 that between there are going to be issues that are only  
7 listed in those rules that don't necessarily -- aren't  
8 addressed in eviction rules. We do have a rule right at  
9 the start of that section that says this section, the 738,  
10 755, these govern the eviction rules, and the others only  
11 apply if there's silence, but it's certainly well-taken  
12 that is someone going to understand that and can someone  
13 implement that, and so the question that would have to be  
14 answered is, is showing them these rules may also apply,  
15 is that favorable or detrimental to their understanding of  
16 the situation?

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

22 MR. TUCKER: Right. Yeah.

23 MR. ORSINGER: See what I'm saying?

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

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

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

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

5 CHAIRMAN BABCOCK: Richard, and then Judge  
6 Peeples.

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

10 CHAIRMAN BABCOCK: Do it now.

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

14 HONORABLE RUSS CASEY: Depends.

15 MR. TUCKER: Right.

16 MR. MUNZINGER: Yes, which?

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

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



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

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

8 CHAIRMAN BABCOCK: Judge Peeples.

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

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

19 HONORABLE DAVID PEEPLES: And why not?

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

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

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

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

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

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

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

25           CHAIRMAN BABCOCK: Okay. Any more questions

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

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

5 CHAIRMAN BABCOCK: Let's do that.

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

25 743, here's where that says that they must

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

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

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

17 MR. TUCKER: No.

18 MS. SECCO: Okay.

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

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

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

12 MR. TUCKER: Current rules.

13 MS. SECCO: Okay.

14 HONORABLE NATHAN HECHT: And why is it  
15 limited?

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

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

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

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

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

16 CHAIRMAN BABCOCK: Where is Frank?

17 MR. ORSINGER: What?

18 CHAIRMAN BABCOCK: Where is Frank?

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

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

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

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

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

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

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



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

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

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

9 MR. TUCKER: Right, absolutely.

10 CHAIRMAN BABCOCK: Professor Carlson.

11 PROFESSOR CARLSON: Yeah, I think the  
12 current rules for citation refer back to Rule 536(a) and  
13 536(a) was amended to include a possibility, Richard, of  
14 the unsworn declaration in lieu of affidavit. That's  
15 already in there, and that probably happened while y'all  
16 were working on your task force, and you weren't -- you  
17 know, may not have got that.

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

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

6 MR. TUCKER: Okay.

7 HONORABLE RUSS CASEY: That would be good.

8 CHAIRMAN BABCOCK: Okay, good. Yeah, Peter.

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

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

1 be an officer.

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

4 MR. TUCKER: Right, yeah.

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

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

20 CHAIRMAN BABCOCK: Okay. Any comments on  
21 744? Yeah, Richard.

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

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

4 PROFESSOR CARLSON: Yeah, Rule --

5 MR. ORSINGER: -- liability is conceded.

6 PROFESSOR CARLSON: -- 239a.

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

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

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

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

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

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

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

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

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

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

25 CHAIRMAN BABCOCK: So "may" should be

1 "must."

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

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

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

7 MR. ORSINGER: Sorry, I forgot.

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

11 CHAIRMAN BABCOCK: Yeah, Professor Hoffman.

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

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

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

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

9 CHAIRMAN BABCOCK: Professor Albright.

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

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

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

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

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



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

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

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

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

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

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

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

16           MR. TUCKER: Yes, sir.

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

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

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

12 MR. RODRIGUEZ: Well, I --

13 CHAIRMAN BABCOCK: Go ahead.

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

22 CHAIRMAN BABCOCK: Right. Okay. Elaine.

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

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

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

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

17 MR. TUCKER: Yeah.

18 CHAIRMAN BABCOCK: Peter, then Judge  
19 Wallace.

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

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

3 CHAIRMAN BABCOCK: Justice Wallace.

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

11 MR. TUCKER: Right.

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

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

1 CHAIRMAN BABCOCK: Justice Jennings.

2 HONORABLE TERRY JENNINGS: I have a  
3 question. This concerns eviction cases, right, Section  
4 10, and the remedy that the plaintiff is seeking here is  
5 immediate possession, right? And now the plaintiff can  
6 also join a suit for rent. Can the Rule 744 be read as --  
7 as far as a default being concerned, being concerned only  
8 with the remedy of immediate possession? In other words,  
9 is there really any need to be concerned about proving up  
10 damages? Is the suit for rent being treated differently?  
11 You get the default in the eviction and then you can prove  
12 up your damages in the suit for rent separately. How is  
13 that handled?

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

15 HONORABLE TERRY JENNINGS: All at one time.

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

22 CHAIRMAN BABCOCK: Okay. Richard, and then  
23 Marisa.

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

1 immediate possession?

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

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

11 MR. TUCKER: Right.

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

14 MR. TUCKER: Yes, sir.

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

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

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

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

20 MR. TUCKER: Right. Right. Yeah.

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

23 MR. TUCKER: And shouldn't be fancy.

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



1 CHAIRMAN BABCOCK: Marisa.

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

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

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

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

18 CHAIRMAN BABCOCK: Justice Gaultney.

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

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

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

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

14 CHAIRMAN BABCOCK: Richard.

15 MR. ORSINGER: I totally would second what  
16 Justice Gaultney said, because if you look at the  
17 reference back to Civil Rules of Procedure 500 through  
18 575, it's going to pick up all of those answer rules,  
19 which is going to include venue changes, it's going to  
20 include general denials, sworn affirmative whatever; and  
21 it seems to me like, first of all, I would reiterate, I  
22 think we ought not to globally refer to a bunch of rules  
23 that don't apply; and secondly, this set of rules ought to  
24 be a standalone set of rules for pro ses where they can  
25 just pick up a photocopy of this from the JP's office and

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

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

16 MR. ORSINGER: Okay.

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

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

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

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

17                   MR. TUCKER: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 office or --

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

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

10 MR. TUCKER: Uh-huh.

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

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

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



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

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

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

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

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

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

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

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

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

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

9           (Off the record for the reporter)

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

25           CHAIRMAN BABCOCK: Okay. Any comments?

1 Robert.

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

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

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

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

6 MR. TUCKER: Right.

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

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

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

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

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

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

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

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

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

14                  MR. TUCKER:   Yes, sir.

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

17                  MR. TUCKER:   Three.

18                  MR. ORSINGER:   Three, okay.

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

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

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

3 MR. ORSINGER: Okay.

4 MR. TUCKER: Right. Sure. You bet.

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

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

12 CHAIRMAN BABCOCK: The whole comment?

13 MR. ORSINGER: No, just that last part.

14 CHAIRMAN BABCOCK: 746.

15 MR. ORSINGER: Nonresponsive.

16 CHAIRMAN BABCOCK: Trial postponed.

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



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

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

17           CHAIRMAN BABCOCK: Okay. Comments about  
18 746? Yeah, Justice Gray.

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

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

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

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

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

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

11 CHAIRMAN BABCOCK: Richard.

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

18 MR. TUCKER: That's reasonable.

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

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

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

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

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

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

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

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

25                  MR. LEVY: What does it mean?

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

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

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

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

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

18 CHAIRMAN BABCOCK: Okay. Buddy.

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

21 MR. TUCKER: Right.

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

25 CHAIRMAN BABCOCK: Yeah. Okay. Anything

1 else on 747?

2 MS. HOBBS: I just --

3 CHAIRMAN BABCOCK: Yeah, Lisa.

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

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

6 Yeah.

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

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

18 CHAIRMAN BABCOCK: Okay. Anything else on  
19 747? Yeah, Richard.

20 MR. MUNZINGER: Why was the reference to the  
21 chapter -- section 24.001 of the Property Code deleted?  
22 The existing rule, if my computer is right, says, "In case  
23 of forcible entry or forcible detainer, under sections  
24 24.001 through 24.008, Texas Property Code." If that is  
25 what the rule says, and I'm trusting my computer that it's

1 accurate, why was that language deleted?

2 CHAIRMAN BABCOCK: That is what it says.

3 That is what it says.

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

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

11 MR. TUCKER: Right.

12 MR. MUNZINGER: Or in those sections rather.

13 MR. TUCKER: Right.

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

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

25 MR. MUNZINGER: If the Legislature has said

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

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

11 MR. MUNZINGER: Certainty.

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

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

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

25 CHAIRMAN BABCOCK: Not in so many words, but



1 they are unwilling to take the uncertainty side of the  
2 argument there, Richard. Okay. Any other comments on  
3 747? Let's move to 748, trial. Now we're getting  
4 somewhere.

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

12 CHAIRMAN BABCOCK: Okay. Richard.

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

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

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

1 days in advance of trial requirement.

2 MR. TUCKER: That's fair.

3 CHAIRMAN BABCOCK: Okay. Did you change the  
4 language from the current rule, which is one number off,  
5 747?

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

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

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

12 MR. TUCKER: Right.

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

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

21 MR. TUCKER: Sure.

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

25 HONORABLE RUSS CASEY: I think that makes a

1 lot of sense to combine those.

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

7 CHAIRMAN BABCOCK: Consistent with having  
8 certainty.

9 MR. TUCKER: Yes. Absolutely.

10 CHAIRMAN BABCOCK: Okay. Anything else in  
11 748? Yeah, Professor Carlson.

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

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

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

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

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

24 HONORABLE RUSS CASEY: Yeah. No charge.

25 PROFESSOR CARLSON: Thank you.

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

14                   PROFESSOR CARLSON: Thank you.

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

17                   HONORABLE RUSS CASEY: Yeah.

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

20                   MR. ORSINGER: That Judge Barton wrote?

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

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

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

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

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

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

16 CHAIRMAN BABCOCK: You think this shifts the  
17 burden?

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

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

1 Court addresses the question.

2 MR. TUCKER: Page 543.

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

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

11 MR. TUCKER: Yes.

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

14 MR. TUCKER: No, yeah.

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

19 HONORABLE RUSS CASEY: Yes.

20 MR. TUCKER: Yeah, the justice court has  
21 exclusive right -- exclusive jurisdiction in eviction  
22 suits to determine the issue of possession. Now, if there  
23 is a breach of contract for back rent that exceeds our  
24 10,000-dollar cap, that would have to be brought in a  
25 separate court. Okay. So where we say we can add rent,

1 rent has to be within our scope, our jurisdiction of  
2 \$10,000. So if I'm evicting somebody that's renting a  
3 building or whatever for \$75,000 a month, they don't pay  
4 it, I get possession from the justice court, but I have to  
5 sue elsewhere to recover my \$75,000.

6 CHAIRMAN BABCOCK: Any other comments on  
7 this rule?

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

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

1 CHAIRMAN BABCOCK: Professor Carlson.

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

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

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

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



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

6 CHAIRMAN BABCOCK: Any other comments?

7 Okay. Let's move on to 748a, representation by agents.

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

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

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

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

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

25 MR. TUCKER: No. They can represent

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

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

9 MR. TUCKER: Right.

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

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

21 CHAIRMAN BABCOCK: Justice Bland.

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

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

5 MR. TUCKER: Yeah. And --

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

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

15 CHAIRMAN BABCOCK: Professor Hoffman, and  
16 then Justice Gaultney.

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

1 that provision, apparently this is inconsistent with the  
2 law.

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

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

8 PROFESSOR HOFFMAN: Chapter 27 of the  
9 Government Code?

10 HONORABLE RUSS CASEY: Yes.

11 MR. TUCKER: Yes.

12 CHAIRMAN BABCOCK: Justice Gaultney.

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

18 HONORABLE RUSS CASEY: Yes.

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

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

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

8 MR. TUCKER: 24.011 of the Property Code.

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

1 CHAIRMAN BABCOCK: Robert, and then Buddy.

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

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

21 CHAIRMAN BABCOCK: Buddy.

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

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

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

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

7 CHAIRMAN BABCOCK: Buddy.

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

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

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

25 MR. TUCKER: If it's an eviction for



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

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

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

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

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

3 CHAIRMAN BABCOCK: Judge Casey.

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

10 CHAIRMAN BABCOCK: Marisa.

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

17 MR. TUCKER: Yes.

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

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

1 MS. SECCO: Okay.

2 CHAIRMAN BABCOCK: Judge Wallace.

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

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

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

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

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

2 CHAIRMAN BABCOCK: Justice Hecht, then  
3 Justice Bland.

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

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

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

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

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

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

17 HONORABLE RUSS CASEY: I think that --

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

25 CHAIRMAN BABCOCK: Go ahead, Justice Bland,

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

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

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

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

21 HONORABLE RUSS CASEY: I would agree with  
22 that.

23 CHAIRMAN BABCOCK: Richard.

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

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

14 MR. ORSINGER: *Unius*.

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

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

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

9 CHAIRMAN BABCOCK: Richard.

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

23 MR. MUNZINGER: May I respond, Chip?

24 CHAIRMAN BABCOCK: Sure.

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



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

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

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

24 CHAIRMAN BABCOCK: Richard.

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

1 amend the Property Code.

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

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

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

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

18 CHAIRMAN BABCOCK: Kent.

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

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

10 CHAIRMAN BABCOCK: Justice Gaultney.

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

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

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

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

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

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

15 CHAIRMAN BABCOCK: Lisa.

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

1 CHAIRMAN BABCOCK: Okay. Justice Bland.

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

16 CHAIRMAN BABCOCK: Peter.

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

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

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

18                   We also added "except as provide by Rule  
19 742" where it says, "No writ of possession may issue until  
20 five days have expired," so other than as provided by the  
21 immediate possession bond.

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

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

13           The tenant sometimes will live there for 6,  
14 8, 10 months and then will do something that the landlord  
15 disagrees with, so the landlord will then go to the  
16 justice court and say, "I want that writ of possession on  
17 that judgment I got 10 months ago." Well, that's really  
18 not proper to terminate this because a new agreement has  
19 been created, one that was not terminated by that judgment  
20 for possession 10 months ago, and so our court, though,  
21 under the rules doesn't have any discretion. It just says  
22 you shall give that writ of possession, so our court has  
23 to give that writ of possession even though the tenant's  
24 rights are really being infringed on at that point. The  
25 tenant could theoretically go to a higher court and get an



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

3           So what we did to try to address that  
4 problem is to say that "A writ cannot be issued after the  
5 30th day after the judgment for possession." That allows  
6 enough time if the landlord wants to say, "Look, I'll give  
7 you a couple of weeks, you know, to get your stuff  
8 together," we don't think that's a new contract. That's  
9 just giving a concession, but we thought 30 days was a  
10 reasonable amount of time to say, look, if they're there  
11 more than 30 days after the judgment it's because you guys  
12 have come to some new agreement and if you subsequently  
13 want to terminate that agreement then you need to use the  
14 process that's set up, which is an eviction. You're going  
15 to have to start over, and also it has to be executed  
16 within 30 days after it issued.

17           So that was the reason we included that  
18 30-day period, was just to prevent this situation where  
19 landlord is going to have this writ hanging over a  
20 tenant's head that they can then drop, and keep in mind if  
21 a landlord does that, we're eight months after the  
22 judgment, landlord goes and gets the writ. That means the  
23 tenant from that time has 24 hours to be out or the  
24 constable will come and move their stuff. The tenant  
25 doesn't even have time to arrange for a moving at that

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

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

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

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

25           MR. ORSINGER: These may be a little more

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

5 MR. HAMILTON: "Must."

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

12 MR. HAMILTON: Yeah.

13 MR. ORSINGER: We did?

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

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

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

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

15 MR. TUCKER: Yes, sir.

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

18 MR. TUCKER: The Property Code.

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

22 MR. TUCKER: Right.

23 MR. ORSINGER: Okeydoke.

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

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

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

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

23 MR. TUCKER: Yeah. Yeah. I agree.

24 CHAIRMAN BABCOCK: Richard, and then Carl.

25 MR. MUNZINGER: Rule 749, the second

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

12 HONORABLE RUSS CASEY: Exactly.

13 MR. MUNZINGER: -- interpreted so far?

14 MR. TUCKER: Yes, sir.

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

21 MR. TUCKER: Well --

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

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

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

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

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

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

20 CHAIRMAN BABCOCK: Are you a screenwriter?

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

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

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

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



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

7 CHAIRMAN BABCOCK: Lisa, then Carl.

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

20 MR. TUCKER: It is.

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

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

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

23 MS. HOBBS: Oh.

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

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

4 CHAIRMAN BABCOCK: Carl.

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

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

24 HONORABLE RUSS CASEY: "It's Christmas."

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

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

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

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

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

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

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

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

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

21 CHAIRMAN BABCOCK: Such a downer.

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

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

6 MR. TUCKER: Okay. Yeah. Makes sense.

7 CHAIRMAN BABCOCK: Yeah. Richard. Then  
8 Carl.

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

16 MR. TUCKER: Yes, sir.

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

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

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

4 CHAIRMAN BABCOCK: Carl.

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

10 CHAIRMAN BABCOCK: Okay. Judge Wallace.

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

1 of that stuff --

2 MR. TUCKER: Right, no, I agree we don't  
3 want to discourage that. My only concern is that we also  
4 don't want to have a tenant who negotiates in good faith  
5 to do something like that to then be on the tightrope of  
6 24-hour eviction for the rest of the time they live there.

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

9 CHAIRMAN BABCOCK: Justice Bland.

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

22 CHAIRMAN BABCOCK: Kent. Kent Sullivan.

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



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

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

17 MR. LOW: No.

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

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

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

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

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

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

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

23                  MR. HAMILTON: Break for lunch.

24                  CHAIRMAN BABCOCK: Break for lunch.

25                  HONORABLE R. H. WALLACE: Lunch, lunch.

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

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

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

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

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

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

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

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

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

25 MS. HOBBS: There is the use of the word

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

3 MR. TUCKER: In 750?

4 MS. HOBBS: No, in --

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

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

9 MR. TUCKER: Yeah, no.

10 MR. ORSINGER: It matters a lot.

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

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

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

1 MR. TUCKER: No, not damages to premise.

2 MR. ORSINGER: Not damages to premise.

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

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

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

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

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

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

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

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

23 HONORABLE RUSS CASEY: I would totally agree  
24 about that.

25 MR. ORSINGER: Okay.

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

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

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

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

1                   CHAIRMAN BABCOCK: Carl.

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

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

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

16                  MR. TUCKER: No.

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

19                  MR. TUCKER: That's right.

20                  CHAIRMAN BABCOCK: Makes sense. Professor  
21 Carlson.

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



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

8 PROFESSOR CARLSON: Uh-huh. Uh-huh.

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

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

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

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

21 PROFESSOR CARLSON: Right.

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

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

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

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

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

15 PROFESSOR CARLSON: Uh-huh.

16 CHAIRMAN BABCOCK: Lisa.

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

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

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

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

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

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

16 MR. TUCKER: Right.

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

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

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

24 MR. TUCKER: Yeah, that's right.

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

1 the bond is.

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

8 CHAIRMAN BABCOCK: Okay. Justice Gaultney.

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

13 HONORABLE RUSS CASEY: Yes.

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

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

18 MR. TUCKER: Yeah.

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

21 CHAIRMAN BABCOCK: Any other comments?

22 Okay. Moving on to 750 -- oh, I'm sorry. Eduardo.

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

1 the judge. Do we specify which judge we're talking about?

2 Is it the county court judge, or is it the JP judge?

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

7 CHAIRMAN BABCOCK: Okay.

8 MR. RODRIGUEZ: I would clarify and say  
9 that.

10 CHAIRMAN BABCOCK: Professor Hoffman.

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

15 CHAIRMAN BABCOCK: Justice Gaultney.

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

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

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

5 CHAIRMAN BABCOCK: Buddy.

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

10 MR. TUCKER: That would make sense.

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

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

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

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

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

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

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

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

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

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

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

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

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



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

7 MR. HAMILTON: Okay.

8 CHAIRMAN BABCOCK: Lisa.

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

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

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

21 MR. TUCKER: Right.

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

1 MR. TUCKER: Right.

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

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

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

11 CHAIRMAN BABCOCK: Okay. Richard.

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

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

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

23 MR. TUCKER: Yes, sir.

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

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

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

9                   MR. ORSINGER: Huh.

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

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

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

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

16 CHAIRMAN BABCOCK: Carl.

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

20 MR. TUCKER: That's right.

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

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

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

4                   MR. HAMILTON: Slightly ahead.

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

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

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

19                  HONORABLE RUSS CASEY: I would agree with  
20 that.

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

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

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

6 HONORABLE TOM GRAY: And you will get  
7 reversed.

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

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

12 MR. ORSINGER: Throwing his weight around.

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

15 MR. TUCKER: Wow.

16 CHAIRMAN BABCOCK: Marisa.

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

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

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

4 MS. SECCO: Okay.

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

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

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

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

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

24 MR. TUCKER: Right.

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

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

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

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

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

12 MR. MUNZINGER: -- notification?

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

14 MR. TUCKER: Yeah, no.

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

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



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

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

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

25                   MR. TUCKER: Okay.

1                   CHAIRMAN BABCOCK: Moving right along.

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

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

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

10 CHAIRMAN BABCOCK: Yeah, Robert.

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

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

16 MR. LEVY: Don't worry about that.

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

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

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

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

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

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

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

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

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

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

1 the deposit of rent?

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

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

12 HONORABLE RUSS CASEY: Yes.

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

15 MR. HAMILTON: That's the initial deposit.

16 MR. TUCKER: Yes, sir.

17 CHAIRMAN BABCOCK: Richard.

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

1 MS. SECCO: Uh-huh.

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

4 CHAIRMAN BABCOCK: Okay. Anybody else on  
5 750b? All right. Let's go to 750c.

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

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

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

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

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

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

15 MR. TUCKER: Okay. Makes sense.

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

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

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

24 CHAIRMAN BABCOCK: Okay. Anything other on  
25 750c, the elder? Richard.

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

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

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

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

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

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

14                  MR. TUCKER: Huh-uh.

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

20                  MR. TUCKER: That's right.

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

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



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

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

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

11 MR. LEVY: Well, this is confusing then in  
12 that respect, because it says 750a or b, so if you just do  
13 750a but don't pay the rent.

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

23 MR. LEVY: Ah, okay.

24 CHAIRMAN BABCOCK: Okay. Yeah, Justice  
25 Gray.

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

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

6 CHAIRMAN BABCOCK: Go ahead, Richard.

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

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

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

22 MR. TUCKER: Yes, sir.

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

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

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

7 MR. TUCKER: Yeah, and I guess my response  
8 to that and if -- certainly obviously if we want to add  
9 750c I have zero objection, but I guess my thought on that  
10 is the pauper's affidavit that's discussed in the first  
11 750c would have to have been approved under 750a or 750b  
12 before we ever got that to that point. That's why we  
13 didn't include it, perfectly happy to include it if you  
14 think that adds clarity.

15 CHAIRMAN BABCOCK: Yeah, Robert.

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

22 MR. TUCKER: Yeah, I -- I think you're  
23 actually correct. I think that that's right. I think  
24 750a is probably sufficient.

25 CHAIRMAN BABCOCK: Where Marisa -- is that

1 what you wanted to say?

2 MS. SECCO: Uh-huh.

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

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

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

9 MR. HAMILTON: Well, I'm confused about, are  
10 you saying that we're going to choose one or the other of  
11 750c?

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

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

24 MR. TUCKER: How much wood would a --

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

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

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

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

8 MR. LEVY: Is there any way --

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

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

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

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

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

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

23 MR. TUCKER: No, that's right, though,  
24 because "appeal perfected" contemplates -- I see what it  
25 says because appeal perfected says "appeal bond or

1 affidavit" and then 751 just says "appeal bond."

2 PROFESSOR CARLSON: And it says "in the  
3 preceding article."

4 MR. TUCKER: Yeah. Yeah.

5 PROFESSOR CARLSON: "Rule"?

6 MR. TUCKER: So should we just say "in Rule  
7 750c"?

8 PROFESSOR CARLSON: Uh-huh, or c(c).

9 MR. TUCKER: Yeah. In rule whatever Marisa  
10 rennumbers it as.

11 PROFESSOR CARLSON: Uh-huh.

12 CHAIRMAN BABCOCK: All right, good.

13 Anything else on this one? Richard.

14 MR. ORSINGER: Yeah, there's that "cost and  
15 damages" again, and I'm not -- whatever the fix is we did  
16 before, would the same fix work here?

17 MR. TUCKER: Well, and I was actually just  
18 getting ready to get to that, because -- and where we're  
19 talking about damages as it relates to appeal, we might  
20 actually want to leave the word "damages" because I had  
21 forgotten momentarily that in Rule 753 on the trial of the  
22 cause in the county court, "The appellant or appellee will  
23 be permitted to plead, prove, and recover his damages, if  
24 any, suffered from withholding or defending possession  
25 during the appeal." So there are additional damages at

1 the county court level, so any reference to damages during  
2 appeal process is actually appropriate to call it damages.

3 MR. ORSINGER: So, in other words, the  
4 damages for the appeal bond are different from the damages  
5 for the immediate possession counter-bond. Or bond. No,  
6 counter-bond.

7 MR. TUCKER: Possibly, yes. On immediate  
8 possession, though, what we had contemplated was you're  
9 supposed to try to estimate what the damages are for  
10 withholding or defending the property. I guess the  
11 confusing part is those can be damages that are only  
12 recoverable in the county court and not at the justice  
13 court, even though the justice court is setting that bond.  
14 So that's the part that kind of feels awkward, I guess.

15 MR. ORSINGER: Well, then that makes me  
16 think that the earlier fix on "damages" maybe wasn't  
17 appropriate.

18 MR. TUCKER: Well, but when we fixed damages  
19 earlier we were talking about exactly what the justice  
20 court could award, and the only thing the justice court  
21 can award is attorney's fees and back rent as far as  
22 monetary damages in these cases. We weren't talking about  
23 it in the context of a bond. We were talking about it in  
24 the context of the judgment, and so in that situation  
25 "damages" is misleading. At the county court damages

1 encompasses those and any other damages for withholding or  
2 defending the premises, so there's extra damages at county  
3 court.

4 MR. ORSINGER: This is not just limited to  
5 evictions and suits for delayed rent or behind rent?

6 MR. TUCKER: Not at the county court level.  
7 They can add damages they've suffered because of the  
8 appeal.

9 CHAIRMAN BABCOCK: Carl.

10 MR. HAMILTON: Over in 742 we talk in the  
11 bond for possession the surety can be the same as the  
12 principal, so I don't know that that's really a bond, but  
13 it talks about "any surety," and over in this 751 it talks  
14 about "sureties," plural. There's no place where it tells  
15 us there has to be one surety or more than one surety, and  
16 I assume that if it's just one surety that even on this  
17 bond the principal as the surety can be the same. Is that  
18 right?

19 MR. TUCKER: You know, I don't know that I  
20 have an answer to that. I'm looking to see if the  
21 Property Code gives guidance on that.

22 CHAIRMAN BABCOCK: Depending on what the  
23 Property Code says you may be the leader in the clubhouse.  
24 Another potentially great point.

25 HONORABLE RUSS CASEY: You have to forgive



1 him. Like I said, we didn't really touch this a whole  
2 lot, so we weren't prepared to defend existing data.

3 MR. TUCKER: Yeah. These last few rules  
4 here we really left as they exist, at least in large part  
5 because they really reflect what happened at the county  
6 court, and we didn't know if that was really within our  
7 purview of addressing these cases just because they  
8 initiated in our court if we should get into what happens  
9 with the county court or not.

10 CHAIRMAN BABCOCK: That's a pretty good  
11 point. Unless what we've done in a previous rule makes  
12 this rule not fit --

13 MR. TUCKER: Right.

14 CHAIRMAN BABCOCK: -- in some way.

15 MR. TUCKER: Right.

16 CHAIRMAN BABCOCK: So that ought to be the  
17 scope of our inquiry probably.

18 MR. ORSINGER: You think so? Because this  
19 is probably the only time anybody will look at this for 50  
20 years.

21 HONORABLE RUSS CASEY: That's a very valid  
22 point.

23 CHAIRMAN BABCOCK: Well, that's a good  
24 point. I defer to Justice Hecht and Marisa about that.

25 HONORABLE NATHAN HECHT: Well, we ought to

1 fix what we need to fix.

2 MR. ORSINGER: That sounds like a --

3 CHAIRMAN BABCOCK: That's a Delphic oral  
4 statement.

5 HONORABLE NATHAN HECHT: This only goes back  
6 to '75, though, right?

7 MS. SECCO: That's 47 years.

8 HONORABLE NATHAN HECHT: We have to blame  
9 this on Buddy.

10 CHAIRMAN BABCOCK: All right. We've  
11 identified that as a problem. Anything else?

12 MR. LOW: I went on in '76.

13 CHAIRMAN BABCOCK: Anything else on 751?  
14 Okay. Let's go to 752. Any -- any comments about 752?

15 HONORABLE RUSS CASEY: Can I start off on  
16 this one?

17 CHAIRMAN BABCOCK: Yes, absolutely.

18 HONORABLE RUSS CASEY: Okay. And I don't  
19 know if we really address it here, but 752 has a problem  
20 with the last legislative session when we were talking  
21 about writ of possession when rent wasn't paid, but 751  
22 starts off of "When an appeal has been perfected the  
23 justice shall stay all further proceedings on the  
24 judgment," yet statutory we are sometimes required to do  
25 things after that because the appeal is perfected whenever

1 we receive the bond. There is the obligation to pay rent  
2 at times, which is still the appeal has been perfected,  
3 but if the rent hasn't been paid then we shall issue a  
4 writ of possession --

5 MR. TUCKER: Right.

6 HONORABLE RUSS CASEY: -- at our level  
7 instead of waiting a month for the county court to do it.

8 MR. TUCKER: Right.

9 HONORABLE RUSS CASEY: So I think we do need  
10 to address that wording on that because --

11 MR. TUCKER: "Except as provided by" --

12 HONORABLE RUSS CASEY: Yeah.

13 MR. TUCKER: We can either list the specific  
14 numbers or we can say "except as provided by statute or  
15 rule," blah, blah, blah.

16 HONORABLE RUSS CASEY: However the Supreme  
17 Court wants to address it.

18 MR. TUCKER: Exactly.

19 HONORABLE RUSS CASEY: But that is something  
20 that needs to be addressed.

21 MR. TUCKER: That's a great point. And  
22 there's also -- there's a number there that obviously  
23 needs to be changed. It says, "including sums tendered  
24 pursuant to 750b(a)." That would need to be modified, I  
25 think. I don't know if that's the right number.

1 CHAIRMAN BABCOCK: Lisa.

2 MS. HOBBS: Maybe we should just call this a  
3 record or a clerk's record or something other than a  
4 transcript since we don't really use that terminology  
5 anymore.

6 CHAIRMAN BABCOCK: Okay. Anything else on  
7 this one, on 752? Richard.

8 MR. ORSINGER: In the middle of the thing we  
9 talk about both the appellant and the adverse party, but  
10 then we talk about the notice must advise the defendant,  
11 and so it's -- the appellant might be the plaintiff, in  
12 which event the adverse party is the defendant, or the  
13 appellant might be the defendant, in which the adverse  
14 party is the plaintiff, right?

15 MR. TUCKER: Yes, sir.

16 MR. ORSINGER: And so what is happening is  
17 we are now telling the clerk of the county court at law  
18 about notices that they must give to the -- both sides of  
19 the case, right?

20 MR. TUCKER: Yes, sir.

21 MR. ORSINGER: And this is in a rule that  
22 applies only to justice courts, or does this apply to  
23 county courts as well?

24 MR. TUCKER: Well, and that's an interesting  
25 question, and it's -- this is how it exists now. It's an

1 interesting question. I'm sure, I mean, it's being  
2 followed, but it is an interesting question about, you  
3 know, what attaches this rule to a county court and  
4 imposes on them an obligation to follow it.

5 MR. ORSINGER: Well, it just -- we have a  
6 special set of definitions for these rules. I'm not sure  
7 whether they are or are not triggered by this language,  
8 but I'm wondering if we shouldn't mirror this in a -- in  
9 the rules for district court and county courts or if we  
10 not -- otherwise somehow ought to alert everybody that  
11 there are actually rules here that apply at least to the  
12 clerk of the county court.

13 MR. TUCKER: Right. And one thing about it  
14 is these are not in the section entitled "Justice Court  
15 Rules." These are in "Rules for Special Proceedings" is  
16 what it's called, so there's nothing that explicitly only  
17 makes them apply to a justice court. They're not in that  
18 subsection that only applies to justice court.

19 HONORABLE RUSS CASEY: But that's how it is  
20 now, but proposed they would be in the justice court  
21 rules, so --

22 MR. TUCKER: Well, no, because the title  
23 would still be the same. They would still apply to our  
24 courts, but they would still be Section 10 that's --

25 HONORABLE RUSS CASEY: Okay. You're right.

1 You're right.

2 CHAIRMAN BABCOCK: Okay. Anything else?

3 MR. ORSINGER: Yeah, maybe this detail is  
4 not warranted, but when you give notice to the defendant  
5 to file a response, is it -- is it as if he was served  
6 with a citation, or what is the answer day, or is there an  
7 answer day? Is it Monday following the 20th day after  
8 this notice is given? Is any of this defined anywhere, or  
9 how does it work?

10 MR. HAMILTON: It is defined. There's  
11 another rule that says if you file an answer in the JP  
12 court, that goes up and he doesn't have to file another  
13 answer.

14 MR. ORSINGER: Really? Well, that's not --

15 CHAIRMAN BABCOCK: That's what this says.  
16 If he's just done it orally then he's got to file  
17 something in writing.

18 MR. ORSINGER: I see. It's only if he's  
19 done it orally.

20 MR. TUCKER: Yeah. Rule 754 says, "If  
21 defendant made no answer in writing in justice court and  
22 if he fails to file a written answer within eight full  
23 days after the transcript is filed in county court the  
24 allegation of the complaint may be taken as admitted and  
25 judgment by default may be entered accordingly." So they

1 have eight days after it gets filed in the county court to  
2 file a written answer if they didn't do so in the justice  
3 court.

4 MR. ORSINGER: Okay. Okay.

5 CHAIRMAN BABCOCK: Okay. 753, damages on  
6 appeal.

7 MR. TUCKER: And that's the one I was  
8 talking about that says on the -- at the county court you  
9 can also, in addition to the things we talked about,  
10 recover additional damages for the appeal itself. So the  
11 landlord can say, "Well, I have suffered additional  
12 damages because you withheld premises during the appeal,"  
13 and so the county court can award those, so that's why  
14 when we're talking about issues in the county court the  
15 term "damages" is probably not inaccurate. But note -- no  
16 substantive change there.

17 CHAIRMAN BABCOCK: Anything else on 753,  
18 damages on appeal? Yeah, Peter.

19 MR. KELLY: Here we finally say "reasonable  
20 attorney fees." It should probably be consistent  
21 throughout the earlier provisions dealing with awards of  
22 attorney's fees and just say -- don't specify reasonable,  
23 and also I think earlier you said attorney's, apostrophe  
24 S, fees, instead, and you have here "attorney fees."

25 MR. TUCKER: Yeah, definitely, yeah, needs

1 to be consistent.

2 CHAIRMAN BABCOCK: Okay. Anything else  
3 about 753? Yeah, Buddy.

4 MR. LOW: As I read it, it only calls for  
5 damages limited to loss of rental during pendency. What  
6 about move out -- oh, that -- well, no, that would already  
7 have occurred earlier, the move out, so there would be no  
8 other damages other than the landowner?

9 MR. TUCKER: Well, it says, "The appellant  
10 or appellee will be permitted to plead, prove, and recover  
11 damages, if any, suffered from withholding or  
12 defending" --

13 MR. LOW: Right.

14 MR. TUCKER: -- "which may include, but are  
15 not limited to loss of rentals during the pendency of the  
16 appeal and reasonable attorney's fees." So there could be  
17 any other --

18 MR. LOW: It says "not limited," but it  
19 looks like it's just favoring the person who owns the  
20 property there, but I take it literally and probably can't  
21 do anything about that.

22 MR. TUCKER: Yeah, and it was probably  
23 written from that perspective just because I would say the  
24 majority of the time --

25 MR. LOW: Yeah.



1 MR. TUCKER: -- by far the appellant is the  
2 tenant, but, yeah, certainly, I think it applies on its  
3 face to either side, and it's really going to be up to  
4 that county court to ultimately decide what was proven.

5 CHAIRMAN BABCOCK: Okay. Anything else on  
6 that? Okay. 754, judgment by default on appeal.

7 MR. TUCKER: Didn't touch it.

8 CHAIRMAN BABCOCK: Didn't touch it.

9 MR. ORSINGER: Would you like us to sit on  
10 opposite sides?

11 CHAIRMAN BABCOCK: I've got a camera on this  
12 phone, you know. Richard.

13 MR. ORSINGER: We're being recorded. I  
14 guess because this language is so old it's archaic, also  
15 because we're talking about the allegations of the  
16 complaint may be admitted, and under this new set of rules  
17 it's petition, and it really I think would be salutary to  
18 say "sworn petition," because we want a default judgment  
19 in the county court to be supported by a sworn petition,  
20 right?

21 MR. TUCKER: Uh-huh.

22 MR. ORSINGER: We're not -- they don't get a  
23 pass on it just because they moved from one level to  
24 another. So I would recommend that we say, "The  
25 allegations of the sworn petition may be taken as

1 admitted," and then the question is "may be" or "must be."

2 MR. TUCKER: Yeah, and our -- yeah, and  
3 that's the language that's there. I think that the  
4 thought is that that's -- they're going to have to do  
5 that, but again, we didn't touch that.

6 CHAIRMAN BABCOCK: Okay. What else? Carl.

7 MR. HAMILTON: I need to go back to 753.  
8 I'm still bothered by the fact that the landlord can be  
9 both principal and surety, and in 753 it talks about  
10 damages against the adverse party and recover against a  
11 surety, but if they're one in the same there can't be any  
12 recovery because there really aren't any sureties.  
13 There's just a principal. The landlord can be both  
14 principal and surety.

15 CHAIRMAN BABCOCK: Okay. Richard.

16 MR. ORSINGER: I think also the second to  
17 last word "entered" may be "entered accordingly." I think  
18 in modern parlance we talk about "rendering judgments."

19 CHAIRMAN BABCOCK: What rule are you on?

20 MR. ORSINGER: 754.

21 CHAIRMAN BABCOCK: Okay.

22 MR. ORSINGER: You know, years ago we didn't  
23 distinguish entered from rendered, but we've been trying  
24 to the last 20 or 30 years, and then now then the first  
25 sentence there that it can be submitted to trial at any

1 time, subject to trial. Does that mean it aggregates the  
2 45 days' notice under the general rules?

3 MR. TUCKER: Yes.

4 MR. ORSINGER: So you could go to trial on  
5 one day's notice or three days' notice?

6 HONORABLE RUSS CASEY: Yes.

7 MR. ORSINGER: Okay.

8 CHAIRMAN BABCOCK: Anything else? 754.  
9 Justice Bland.

10 HONORABLE JANE BLAND: Well, 754 really  
11 talks about taking a default judgment, not appealing  
12 default judgment, and so it really should be moved to the  
13 section that involves judgments. But they don't -- that's  
14 okay. I'm confused. I'm sorry.

15 MR. TUCKER: Yeah, this is if they don't  
16 show up for their trial de novo.

17 HONORABLE JANE BLAND: Yeah, you said that  
18 at the very beginning, and it just is --

19 CHAIRMAN BABCOCK: You okay?

20 HONORABLE JANE BLAND: No. I don't think --  
21 well, I think we've already spoke, but I agree that we  
22 shouldn't have this rule in here.

23 MR. TUCKER: This rule, 754?

24 HONORABLE JANE BLAND: Yeah.

25 CHAIRMAN BABCOCK: Why do you not like 754?

1 HONORABLE JANE BLAND: Because I think it's  
2 confusing to the people that are going to be using these  
3 rules. And --

4 MR. TUCKER: Do you not like the concept or  
5 just the way it's written?

6 HONORABLE JANE BLAND: The concept and then  
7 also the way it's written.

8 MR. TUCKER: The daily double.

9 HONORABLE JANE BLAND: Because it -- so  
10 maybe something like "trial in the county court must be  
11 had" or "can be had any time after expiration of eight  
12 full days."

13 HONORABLE RUSS CASEY: I think one of the  
14 things in practice in regards to this is very -- I mean,  
15 it's less than half of one percent of cases that we  
16 actually get a written answer in the justice court, so it  
17 may in the best interest of justice to try to make it  
18 plain to tell them that they need to have a, you know,  
19 written answer now sort of thing, but --

20 MR. TUCKER: Yeah, I mean, I think the goal  
21 when they wrote this was to say once it goes to county  
22 court you have to file a written answer within eight days  
23 unless you filed a written answer with the justice court,  
24 and if you don't do so, you're going to get a default  
25 judgment against you.

1 HONORABLE JANE BLAND: Okay. So in Rule 753  
2 when we first started talking about this, it starts off  
3 "on the trial of the cause in the county court" and in  
4 Rule 754 it does not. So as -- so I was confused about  
5 what a default judgment was.

6 MR. TUCKER: Right. Yeah, no.

7 HONORABLE JANE BLAND: So if I was confused,  
8 maybe someone else might be, even someone paying more  
9 attention than I obviously was.

10 MR. KELLY: The archaic language "said  
11 cause," if the rules are talking about causes in justice  
12 courts, that's generally "said cause," but we're talking  
13 about the new county court cause. Also, it fails the test  
14 of gender neutrality. We have "his appearance," and we  
15 also have another issue in the second sentence of "the  
16 same shall be given to constitute," and it's not clear  
17 precisely what the antecedent should be there, and I think  
18 the rule would be more clear and less archaically written.

19 HONORABLE RUSS CASEY: That's a very good  
20 point.

21 MR. TUCKER: Yes.

22 HONORABLE RUSS CASEY: I agree with that.

23 CHAIRMAN BABCOCK: Professor Hoffman.

24 PROFESSOR HOFFMAN: And so then just to  
25 piggyback on Jane's earlier comment, I mean, I think the

1 response you got seems right. If the main point of the  
2 rule is you didn't file an answer, you've got to file one  
3 now, otherwise you're going to be in default, and it could  
4 really matter, then we should say that in the first  
5 sentence, and maybe that's the only sentence we need.

6 MR. TUCKER: Yeah, right. Yeah. Cut to the  
7 chase and lose a lot of the superfluous language.

8 PROFESSOR HOFFMAN: Yeah.

9 CHAIRMAN BABCOCK: Justice Bland.

10 HONORABLE JANE BLAND: Well, and then part  
11 of it is the flipping between the courts. "If the  
12 defendant filed a written answer in the justice court," so  
13 we're back in justice court, and we're talking about the  
14 answer there or not to answer there, and so -- and then we  
15 say, "The same shall be taken to constitute his appearance  
16 in county court," but we don't -- the problem is we don't  
17 ever talk about what the -- we should start out with the  
18 answer -- the fact is that he didn't answer in county  
19 court.

20 MR. TUCKER: Okay. Yeah. So to say, "If  
21 the appellant fails to" -- or the -- if the defendant  
22 fails to file a written answer in county court within  
23 eight days after it's filed, default judgment may be taken  
24 against them, unless they had previously filed a written  
25 answer with the justice court, which will be taken as

1 their answer in county court.

2 CHAIRMAN BABCOCK: Judge Estevez.

3 HONORABLE ANA ESTEVEZ: I can't hear you  
4 very well. Did you call me?

5 CHAIRMAN BABCOCK: Yes.

6 HONORABLE ANA ESTEVEZ: Thank you. We were  
7 just wondering what the "eight full days." We don't have  
8 the word "full" any other place.

9 MR. TUCKER: Yeah, and that again, was  
10 already in existence, so, yeah, like I said, we really  
11 didn't get into modifying these too much because we were  
12 slightly uncomfortable doing so, just because, again, it's  
13 really the county court procedure, but, yeah, eight full  
14 days, yeah, what is that? Yeah. I don't see any reason  
15 to leave "full" in there. I think "eight days" would make  
16 a lot more sense.

17 CHAIRMAN BABCOCK: Say "eight days a week."

18 HONORABLE KEM FROST: Sing it.

19 CHAIRMAN BABCOCK: Justice Bland.

20 HONORABLE JANE BLAND: And maybe for all of  
21 these if you could identify in the title that you're in  
22 county court now, this is a county court rule.

23 MR. TUCKER: Yeah, we actually added "on  
24 appeal" to the title of all of those to try to clarify  
25 that.

1 HONORABLE JANE BLAND: That added confusion,  
2 at least for me, when it was in connection with default  
3 judgments because I thought it was an appeal of a default  
4 judgment.

5 MR. TUCKER: Right. Yeah. No, I --

6 HONORABLE JANE BLAND: Not an appeal of  
7 the --

8 MR. TUCKER: Yes, not a default judgment of  
9 the --

10 HONORABLE JANE BLAND: Not a default  
11 judgment on appeal.

12 MR. TUCKER: -- but an appeal of the default  
13 judgment. Gotcha, yeah. That totally makes sense, and,  
14 yeah, that was what we added to try to clarify that, but  
15 obviously we need to tinker with that.

16 CHAIRMAN BABCOCK: Okay. Let's wrap this up  
17 with 755. Any comments on this?

18 MR. TUCKER: 755, again, we didn't touch  
19 much. We did add the last sentence there that brings in  
20 information from the Property Code that talks about how a  
21 judgment from the county court may be stayed, and we just  
22 used the language and directed them to the Property Code  
23 and the rules that dictate that.

24 CHAIRMAN BABCOCK: Okay. Good. Yeah, Kent.

25 HONORABLE KENT SULLIVAN: I want to go back



1 for a second to the default. It just occurred to me  
2 there's a real potential trap there for somebody. We've  
3 got a lot of pro se parties. Somebody maybe is  
4 uncomfortable with the idea of filing a written answer in  
5 JP court or otherwise, so they make a personal appearance.  
6 That's their answer in JP court. Say they actually win  
7 the case in JP court, someone else is going to appeal it.  
8 How are they going to know they have to file a written  
9 answer, unless, of course, they know to look at Rule 754,  
10 which a pro se party is not going to know that that's what  
11 they need to do? So they think they've made an appearance  
12 by way of their activity and presumably they actually  
13 tried the case in JP court and then they get defaulted in  
14 county court because they weren't aware of a rule that  
15 required them to file a written response. I think that's  
16 a real practical issue, given the number of pro se parties  
17 that participate in these proceedings.

18 MR. TUCKER: I agree.

19 MR. RODRIGUEZ: I think they can find it in  
20 Rule 741 because it sends them to go to [www.therules.com](http://www.therules.com),  
21 and I'm sure they can find those rules there.

22 HONORABLE KENT SULLIVAN: If someone knows  
23 to look for the rules, the specific rules, they're not  
24 going to have any problem.

25 PROFESSOR HOFFMAN: Actually, that website

1 doesn't work. I went there.

2 CHAIRMAN BABCOCK: Lisa.

3 MS. HOBBS: So is there a provision that  
4 stays the writ or prohibits the clerk from issuing the  
5 writ of possession for 10 days? Or is it immediately --  
6 is the judgment immediately executable?

7 MR. TUCKER: Yeah, this I have to pull up.  
8 Since I don't teach the county judges I'm not immediately  
9 familiar with it, but, yeah, there's a provision that  
10 basically says how long there is to -- let's see. It  
11 actually -- it doesn't say that it can't be issued within  
12 10 days.

13 MS. HOBBS: Yeah, I think it's an omission.  
14 I mean, I think we need to be clear that it's  
15 automatically stayed for 10 days to allow you to seek a  
16 stay or permanently by filing a bond, but right now it's  
17 assumed I think but not stated, and I think it's important  
18 that it's stated.

19 CHAIRMAN BABCOCK: Buddy.

20 MR. LOW: If I can answer Kent's problem,  
21 would you require the clerk then to notify them that since  
22 they haven't filed an answer they must file an answer in  
23 that court?

24 MR. HAMILTON: That's covered by 752.

25 MR. LOW: Well, if it's covered then why is

1 it a problem?

2 MR. HAMILTON: It's not.

3 CHAIRMAN BABCOCK: Carl never said it was a  
4 problem.

5 MR. LOW: Well, I was trying to answer his  
6 problem. Carl didn't tell me there wasn't a problem.

7 MR. TUCKER: I personally think it would  
8 make sense for the defendant to receive a written notice  
9 that if they fail to file a written answer in county court  
10 they're going to automatically lose. Where that should  
11 occur and who it comes from, pretty flexible.

12 CHAIRMAN BABCOCK: Professor Carlson.

13 PROFESSOR CARLSON: Yeah. I think it should  
14 come in Rule 750, and 750 says to give notice as provided  
15 in Rule 515, and I looked up 515, and it's repealed.

16 MR. TUCKER: It's in proposed 515.

17 CHAIRMAN BABCOCK: Proposed 515.

18 PROFESSOR CARLSON: Proposed 515.

19 MR. TUCKER: Sorry.

20 PROFESSOR CARLSON: Okay.

21 CHAIRMAN BABCOCK: Thought you had one  
22 there, huh?

23 PROFESSOR CARLSON: No, I was trying to  
24 figure out what the notice is that these people are  
25 getting.

1 MS. HOBBS: I think the notice is in the  
2 transcript provision of 752, right?

3 CHAIRMAN BABCOCK: Justice Bland.

4 HONORABLE JANE BLAND: Does the Property  
5 Code or some other statute require a separate answer in  
6 county court? Because wouldn't the perfection of the  
7 appeal from justice court notify everybody that you're  
8 contesting the judgment, and why would we require a  
9 summary answer at that point?

10 MR. TUCKER: I guess the thought is I think  
11 because in the county court we're going to be in a more  
12 formalized procedure that they're going to be -- we want  
13 to have a written answer, and someone did mention, yeah,  
14 752. 752 actually does say that. The county clerk must  
15 notify both sides that the transcript has been received  
16 and such notice must advise the defendant of the necessity  
17 for filing a written answer in the county court when the  
18 defendant appeared orally in the justice court, so there  
19 is a requirement that they receive notice.

20 MS. HOBBS: Only if they pleaded orally,  
21 though.

22 MR. TUCKER: Right. If they filed a written  
23 answer, though --

24 MS. HOBBS: It's presumed.

25 MR. TUCKER: -- then it goes up. There's a

1 separate rule that says your answer in the justice court  
2 is your answer in the county court also.

3 CHAIRMAN BABCOCK: So we're totally cool  
4 with that.

5 MR. TUCKER: Copacetic.

6 HONORABLE DAVID GAULTNEY: So the notice  
7 gives them the deadline?

8 MR. TUCKER: Yes. Well, I guess it doesn't  
9 explicitly state that. It says "of the requirement." I  
10 would read that to say it should have the time frame, but  
11 it doesn't explicitly say that. If I were a judge I would  
12 certainly make sure it was on there, but --

13 PROFESSOR CARLSON: Where is that? I'm  
14 sorry.

15 MR. TUCKER: 752.

16 CHAIRMAN BABCOCK: 752.

17 MR. TUCKER: "Must advise the defendant of  
18 the necessity for filing a written answer." I think  
19 implicit in that is the necessity of when it has to be  
20 filed.

21 CHAIRMAN BABCOCK: Within eight full days.

22 MR. TUCKER: Eight full days, not partial  
23 days.

24 CHAIRMAN BABCOCK: Yeah, Lisa.

25 MS. HOBBS: I would suggest that a rule

1 discussing the clerk's record and what the JP needs to  
2 send up, what the docket is going to look like that goes  
3 up, is not the place to tell the county clerk what her  
4 obligations are for notifying the parties of their rights.  
5 I would also suggest that even though I think I understand  
6 what happens in JP court by reading these rules now or  
7 what happens in county courts on appeal from JP courts,  
8 I'm not sure that's the best way. I'm not sure we don't  
9 want everybody to just file another answer. I mean, I get  
10 why it was written where we would presume that your JP  
11 answer is your county court answer, but it makes for  
12 really confusing rules, and why not just tell the clerk,  
13 "You need to tell the defendant that he needs to file an  
14 answer, and he needs to do so by 10:00 a.m. on the 20th  
15 day" and make him file another answer?

16 CHAIRMAN BABCOCK: Lamont.

17 MR. JEFFERSON: Yeah, I would go one way or  
18 the other. I mean, either you've got to file an answer in  
19 county court or you don't need an answer. I kind of side  
20 with the you don't need an answer under the circumstances  
21 when you're already appealing and everybody knows you're  
22 in court, and I mean, what's the purpose of a written  
23 answer? Is it to assure the parties that you're really  
24 going to contest the judgment, or is it to show that  
25 you're going to participate?

1                   MR. TUCKER: I think what parties would  
2 argue, especially parties that participate in complex  
3 commercial litigation in regards to the eviction context,  
4 would be this allows us to have some notice of what  
5 you're -- what you're doing, you know, are we going to --  
6 theoretically we're in county court now so the rules like  
7 Rule 93 are going to apply. If you're going to file  
8 something that has to be written and sworn, that's going  
9 to have to be on file now with the county court, things  
10 like that.

11                  MR. JEFFERSON: Can't you presume a general  
12 denial? I mean, if someone has already appeared in JP  
13 court and the appeal is perfected then everybody knows  
14 we're in county court now.

15                  MR. TUCKER: Right.

16                  MR. JEFFERSON: Why have just kind of a trap  
17 to where if you don't file another piece of paper you're  
18 subject to default, and if you're going to have it then I  
19 don't know why you would make a distinction between the  
20 guys who filed something in JP court and the guys who just  
21 showed up and said, "I contest what the other side is  
22 doing."

23                  CHAIRMAN BABCOCK: Justice Bland, then  
24 Eduardo.

25                  HONORABLE JANE BLAND: The problem I have I

1 think is that we're requiring an answer to what? To the  
2 petition that was originally filed in justice court that  
3 may have never been answered? And ordinarily if it is  
4 trial de novo, wouldn't we just start the process all over  
5 again? The appeal has been perfected, require a county  
6 court petition and a county court answer, but what I don't  
7 think you can do is require one side to file an answer in  
8 a de novo trial when there's no requirement that there's a  
9 petition.

10 MR. TUCKER: Well, the petition will go up,  
11 but, yeah, your point makes sense. I mean, to me having  
12 the same type of petition and answer format that we had in  
13 justice court in the county court would make sense. I  
14 just don't know and I don't want to speak for if it makes  
15 sense for the people who do litigation there, but that's a  
16 separate issue, I guess, but, yeah, that make sense to me.

17 HONORABLE JANE BLAND: And the idea that you  
18 can default your appellate right because you defaulted in  
19 the justice court, what are you defaulting from? You've  
20 already filed a piece of paper with the court saying  
21 you're contesting the justice court judgment.

22 MR. TUCKER: Uh-huh.

23 HONORABLE JANE BLAND: So --

24 HONORABLE RUSS CASEY: That's a very valid  
25 point.



1 MR. TUCKER: I think so.

2 MR. MUNZINGER: What would happen if the  
3 person who lost in the justice court concluded they didn't  
4 want to pursue the appeal further? In other words, the  
5 landlord is appealing an adverse verdict --

6 CHAIRMAN BABCOCK: Right.

7 MR. MUNZINGER: -- and the tenant says, "Oh,  
8 the heck with it, I'm just going to leave. I'm not going  
9 to participate further."

10 MR. TUCKER: So the landlord lost at justice  
11 court?

12 MR. MUNZINGER: He's appealing, but the  
13 tenant says, "I don't want to fool with it anymore. I'm  
14 just going to get out of here."

15 MR. TUCKER: So the tenant decides to just  
16 move out?

17 MR. MUNZINGER: Yeah. Or not contest the  
18 appeal.

19 MR. TUCKER: Right. Then it would be up to  
20 the landlord generally if they want to pursue -- to go  
21 ahead and finish the case to get a judgment and a writ of  
22 possession in the county court, which prevents any  
23 situation where the tenant then comes back and says, "No,  
24 you can't prove that I don't have a right to possession"  
25 and they have to go through the whole process again. So

1 that would kind of be an elective situation if they want  
2 to keep through the appeal process and get that writ of  
3 possession. Obviously neither side is going to be able to  
4 nonsuit the eviction if the other side is trying to get  
5 some sort of affirmative relief, and that issue has come  
6 up with the possible situation with the immediate  
7 possession bond and could -- the same argument could say  
8 that could happen.

9           In the current situation with the payment of  
10 rent into the registry, the thought is, well, I'm the  
11 landlord. Russ isn't paying his rent, okay, so I evict  
12 Russ. Russ files a pauper's affidavit and he pays -- he  
13 doesn't pay rent into the registry of the court. Okay.  
14 So Russ gets evicted. He gets removed, but he still gets  
15 his appeal, right? So the thought is, well, when we're on  
16 appeal, he's already out. Can I just nonsuit my appeal  
17 now? And really the answer is going to be "no" because he  
18 still has a claim for affirmative relief to be put back  
19 into the premises.

20           CHAIRMAN BABCOCK: Tricky.

21           MR. TUCKER: Yeah.

22           CHAIRMAN BABCOCK: Justice Gray.

23           HONORABLE TOM GRAY: At this stage of the  
24 proceeding we're now in county court and have to have  
25 lawyers, is that correct, for corporations?

1 MR. TUCKER: For corporations, yes.

2 HONORABLE TOM GRAY: So if your defendant  
3 happens to be a corporation and didn't file an answer in  
4 JP court, the -- who their advocate is at that point and  
5 all the contact information is provided by the written  
6 answer that they provide at that point?

7 MR. TUCKER: I would imagine that to be the  
8 case.

9 HONORABLE TOM GRAY: So that may be a reason  
10 to have an answer in county court that you don't have in  
11 JP court.

12 CHAIRMAN BABCOCK: What do we do? Do we  
13 give him a good or a great for that point?

14 MR. TUCKER: That is very solid, very solid  
15 point.

16 CHAIRMAN BABCOCK: A solid point.

17 HONORABLE TOM GRAY: New measure.

18 HONORABLE RUSS CASEY: Between good and  
19 great, I think.

20 CHAIRMAN BABCOCK: Workman-like and solid  
21 point. What about Rule 755? Any solid points to be made  
22 about that? Yeah, Pete.

23 MR. KELLY: I'll defer to Professor Carlson.  
24 I'm trying to read her papers here. On the idea of  
25 supersedeas, Texas Property Code 24.007 requires the

1 filing of the supersedeas bond and in very clear, direct  
2 language. Texas rule -- Supersedeas bond, not just  
3 suspension of judgment. Texas Rule of Appellate  
4 Procedure, following House Bill 4, allows for alternate  
5 security, reduction in the amount, caps in the amount,  
6 does not necessarily require a bond. You're allowed to  
7 have some sort of alternate security. Does -- what's  
8 going to govern on this 24.007, which requires --  
9 specifically requires the filing of supersedeas bond or  
10 the more loose supersedeas suspension of judgment  
11 requirements of TRAP 24? If you see the conflict.

12 CHAIRMAN BABCOCK: Professor Carlson.

13 PROFESSOR CARLSON: Yeah, you know, TRAP 24  
14 is not going to be applicable to the trial court  
15 proceeding. TRAP 24 is mandated by the Legislature in I  
16 think it's Civil Practice and Remedies Code 52.006, so now  
17 you've got two legislative provisions, right? This one,  
18 Property Code 24.007, and the Civil Practice and Remedies  
19 Code 52.006. So I would say the Property Code because  
20 it's more specialized to this situation, off the top of my  
21 head.

22 MR. KELLY: But then is the reference to  
23 TRAP 24 surplusage?

24 CHAIRMAN BABCOCK: That means we don't need  
25 it?

1                   PROFESSOR CARLSON: No, we don't need it. I  
2 know what surplusage means. Yeah, I don't think we need  
3 it.

4                   MR. KELLY: And that would mean the caps and  
5 limitations, present net worth, et cetera, apply of --  
6 CPRC 52.006 apply to the supersedeas bonds that are  
7 required in Property Code 24.007.

8                   PROFESSOR CARLSON: You have two legislative  
9 provisions, so now you get down to legislative intent.  
10 52.006 doesn't have any language that I recall that says  
11 it trumps any other statute, but I could be wrong. I know  
12 it says that the rules cannot be inconsistent, the Rules  
13 of Appellate Procedure cannot be inconsistent, so I would  
14 really have to look at the face of the statute again to  
15 see, and it would ultimately be a question of legislative  
16 intent. How's that for a law professor answer?

17                   MR. KELLY: Just asking the question.

18                   HONORABLE R. H. WALLACE: Probably in the  
19 book *The Law in the JP Court*.

20                   CHAIRMAN BABCOCK: I bet it's in there.  
21 They wrote that before House Bill 4, I don't know.

22                   All right. Is that it for that? Well,  
23 great. Everybody may think, if they weren't here last  
24 meeting, that we're done with these, but you'd be wrong  
25 because we skipped like a gazillion rules to get back to

1 these, and I don't know why we did that, but somebody  
2 thought it was a good idea. So I would entertain  
3 requests, Bronson and Judge, on where to go, but my  
4 suggestion would be go to Section 9 on page 28. But we're  
5 going to do all of these rules, so it doesn't really  
6 matter.

7 MR. TUCKER: Is Section 9 the -- yeah, Rule  
8 737?

9 MS. SECCO: The task force did not edit  
10 those rules at all.

11 CHAIRMAN BABCOCK: Didn't edit these rules?

12 MR. TUCKER: We made one -- we only made one  
13 modification which applies to 737.1 and 2, and the only  
14 thing we wanted to change -- because those are newly  
15 promulgated we assume they reflect the will of the Supreme  
16 Court. What we just would want to do, the time frame on  
17 those is 6 to 10 days from service of the citation just  
18 like evictions are. We would want to modify those to be  
19 the same time frame as whatever the eviction time frame is  
20 modified to. So if it is 10 to 21 days from filing of an  
21 eviction suit, to change those to 10 to 21 days from  
22 filing also just to make those congruent.

23 CHAIRMAN BABCOCK: That makes sense. That's  
24 great. Well, that's helpful. And, Marisa, where do you  
25 think we should go now?

1           MR. ORSINGER: Well, Chip, before we leave  
2 the topic entirely, there's a representation of parties  
3 rule, 737.5, and that would apply in the justice court,  
4 right?

5           HONORABLE RUSS CASEY: No.

6           MR. ORSINGER: No?

7           MR. TUCKER: This only applies to these  
8 cases, one category of cases. These rules apply to cases  
9 where you're my landlord, I've done what I'm supposed to  
10 do to get you to make a repair, and you've failed to do  
11 that. I now have a right to come get judicial remedy, so  
12 the 737 rules only apply to that very limited scope of  
13 cases.

14          MR. ORSINGER: And is there statutory  
15 authority to deviate from the rule about representation of  
16 corporations not appearing pro se, et cetera? Or no?

17          MR. TUCKER: Not that we're aware of, but,  
18 you know, separate task force --

19          MR. ORSINGER: So when it says the parties  
20 may represent themselves, if the landlord is a corporation  
21 then I don't want to provoke any of the earlier discussion  
22 that was so heartfelt about this subject, but are we not  
23 authorizing corporations to appear through representatives  
24 other than lawyers without express legislative authority?

25          HONORABLE RUSS CASEY: That legislative

1 authority appears in Government Code for Chapter 27.

2 MR. ORSINGER: For this type of proceeding?

3 MR. TUCKER: Because it's in justice court  
4 also.

5 HONORABLE RUSS CASEY: But there's nothing  
6 separate from -- there's nothing separate -- there's  
7 nothing to separate out these proceedings from the other  
8 proceedings because they're all under Chapter 27.

9 MR. ORSINGER: So the argument we had  
10 earlier either -- does it or does it not apply to this  
11 rule?

12 HONORABLE RUSS CASEY: These set of rules  
13 here are only for specific types of situations of the  
14 repair and remedy situation.

15 MR. ORSINGER: Right.

16 HONORABLE RUSS CASEY: When I made my  
17 comment earlier when we were talking about parties in  
18 eviction suits, the language here in 737.5 specifically  
19 says that this does not authorize a person to go into the  
20 practice of law.

21 MR. ORSINGER: Right.

22 HONORABLE RUSS CASEY: And so if you were  
23 concerned about that situation of parties in those suits,  
24 this is, you know, language that was effective January  
25 2010. You guys came up with this then. I thought you



1 might want to look back at it if you wanted to see what it  
2 was like or if you wanted to reflect that language in the  
3 other parts of the rules as it is.

4 MR. TUCKER: Right. Yeah, the task force  
5 ultimately had debated that. It was raised -- of course,  
6 the issue in 737.5, on those cases if you want your  
7 authorized agent to represent you, you have to not be  
8 there basically. If you're there, you're either pro se or  
9 you have an attorney. You can't just show up with your  
10 brother Jim Bob, who is not a lawyer, and he represents  
11 you while you're there, under 737.5. It was discussed  
12 whether we wanted to do that in eviction suits also. The  
13 task force ultimately decided not to, but obviously that's  
14 something you guys could consider if you want to continue  
15 that idea.

16 CHAIRMAN BABCOCK: Okay. So, Bronson, are  
17 there other rules that your task force did deal with that  
18 we have not discussed yet?

19 MR. TUCKER: That we did deal with? I'm  
20 trying to -- I frankly -- I can't recall all the ones from  
21 the 500 but did we -- which ones --

22 CHAIRMAN BABCOCK: We skipped some, yeah.  
23 We did --

24 MS. SECCO: Only -- I think at the first  
25 meeting we only went through Rule 506, and we did not even

1 address 506, so --

2 CHAIRMAN BABCOCK: Yeah, we went through 505  
3 is what my notes suggest.

4 MS. SECCO: Yeah.

5 CHAIRMAN BABCOCK: So we would pick up with  
6 506.

7 MR. TUCKER: Okay.

8 CHAIRMAN BABCOCK: Lisa.

9 MS. HOBBS: Can I just go on record saying  
10 that was a lot of rules for a small slice of cases of  
11 trying to get a landlord to repair and remedy something in  
12 a residential -- I mean, that is so complicated I am not  
13 sure I understand exactly what it -- I don't know why it's  
14 different than other rules. It's just that's a lot -- I  
15 mean, if we're talking about simplifying this, that seems  
16 ridiculous.

17 MR. TUCKER: And, I mean, those just came  
18 into effect two years ago, so, you know, we obviously  
19 weren't going to mess with that. But, yeah, I mean,  
20 literally 90 percent of justice courts have never had one  
21 of those cases.

22 MS. HOBBS: Okay.

23 HONORABLE RUSS CASEY: One of those things  
24 that that addressed is except for really right there in  
25 the repair and remedy justice courts have no injunction

1 relief. We do not have injunctive powers. So let's say  
2 the landlord decides to take your front door off the  
3 apartment until you pay the rent. I could not tell him to  
4 put the front door on the apartment. So there's --

5 MR. TUCKER: You could.

6 HONORABLE RUSS CASEY: To put a front door  
7 back on? Okay. The whole idea was to get injunctive  
8 relief. The landlord won't fix bad plumbing. The  
9 landlord won't, you know, repair the broken window,  
10 whatever you want to say. We could get -- it allows the  
11 JP to take that action there, and it is my opinion that  
12 the whole number of those rules was to try to make sure  
13 that it was limited to exactly that type of scope.

14 CHAIRMAN BABCOCK: Lisa, Justice Hecht tells  
15 me you were the rules attorney that came up with those  
16 complicated rules.

17 MS. HOBBS: Was I really?

18 CHAIRMAN BABCOCK: I didn't think so, but --

19 MS. HOBBS: That was Chris Griesel.

20 CHAIRMAN BABCOCK: You would have scotched  
21 them if you had been the rules attorney, I'm sure. All  
22 right. 506, exclusion of witnesses. Are you with us?

23 MR. TUCKER: Yeah. Yep, I'm here. 506,  
24 basically, again, you know, we mentioned when we talked  
25 last time that what we ultimately decided was that the

1 Rules of Evidence are not going to apply to justice court,  
2 and we had some good language that we'll have included in  
3 the document that I submitted that the committee really  
4 liked as far as the judge will evaluate what you have and  
5 decide what evidence goes to the -- is evaluated by the  
6 judge or jury, so since the rules don't apply we wanted to  
7 incorporate the Rule. We thought that was important  
8 enough, so we explicitly put the Rule in there to allow  
9 exclusion of witnesses.

10 CHAIRMAN BABCOCK: I think we should have a  
11 sentence that says this rule shall be known as "the Rule."

12 MR. TUCKER: The unrule. We don't have  
13 rules except "the Rule."

14 CHAIRMAN BABCOCK: Richard.

15 MR. MUNZINGER: Look at subparagraph (3) of  
16 this rule. You say that the people that can stay would be  
17 include "a person whose presence is shown by a party to be  
18 essential to the presentation of the party's cause." Do  
19 you mean that the person's presence in the courtroom is  
20 essential to the presentation of the cause or if the party  
21 can't win the case without that witness?

22 MR. TUCKER: My -- and that's directly from  
23 the Rules of Evidence. My interpretation of that has  
24 always been that that means their presence in the  
25 courtroom.

1 CHAIRMAN BABCOCK: Does that mean experts?  
2 Typically you let experts.

3 MR. ORSINGER: Especially if it's experts.

4 MR. TUCKER: Yeah.

5 PROFESSOR CARLSON: *In re: Drylex*, no.

6 CHAIRMAN BABCOCK: What?

7 PROFESSOR CARLSON: *In re: Drylex*, not  
8 necessarily.

9 MR. PERDUE: I had a judge interpret the  
10 Rule, "I don't care if it says 'spouse,' she can't sit in  
11 here."

12 CHAIRMAN BABCOCK: Really?

13 MR. PERDUE: Yeah.

14 CHAIRMAN BABCOCK: Wow. Okay. Yeah,  
15 Richard.

16 MR. ORSINGER: Here's another use of the  
17 word "shall," which I guess comes right out of the Rules  
18 of Evidence, but I don't know if we mean "shall" here or  
19 whether we mean "must" because I think the court has -- or  
20 does the court have discretion, even if they meet -- no,  
21 the court doesn't have discretion, so it should be "must."  
22 Does that rule apply to county?

23 CHAIRMAN BABCOCK: "Must."

24 MR. ORSINGER: Maybe we ought to change the  
25 other rule of evidence while we're at it.

1 HONORABLE NATHAN HECHT: Well, Buddy's  
2 working on that.

3 MR. ORSINGER: Hopefully Buddy's making a  
4 note of that.

5 MR. TUCKER: Yeah, take notes.

6 HONORABLE NATHAN HECHT: We're restyling the  
7 Rules of Evidence like Federal courts have, and that  
8 project should be finished soon.

9 MR. LOW: I hope so. Have you talked to him  
10 lately?

11 HONORABLE NATHAN HECHT: Yeah.

12 MR. ORSINGER: On the expert rules are we  
13 adopting their language or are we just adopting their  
14 titles of structure?

15 HONORABLE NATHAN HECHT: We're just using  
16 their styling and our substance.

17 MR. ORSINGER: Good. Good, good, good.

18 CHAIRMAN BABCOCK: Not everybody agrees with  
19 that. Professor Hoffman.

20 PROFESSOR HOFFMAN: So I'm looking at Rule  
21 267 of the Rules of Civil Procedure, and, you know, it's  
22 the exact same language right here that they've got in 506  
23 except the Rules of Civil Procedure have two additional  
24 provisions that aren't here. Were these left out on  
25 purpose? One talks about if a person violates the rule

1 they can be punished for contempt of court, and the other  
2 one says, "Witnesses when placed under Rule 613 of the  
3 Rules of Civil Evidence shall be instructed they're not to  
4 converse with each other or read any reports," et cetera.

5 MR. TUCKER: Yeah, I don't think that was an  
6 intentional exclusion by the task force. Frankly, I think  
7 it came from when we were grabbing the language from it we  
8 grabbed it from the Rule of Evidence rather than this  
9 rule, but, I mean, those provisions seem reasonable to  
10 include, I would think.

11 HONORABLE NATHAN HECHT: But can the justice  
12 of the peace hold someone in contempt?

13 PROFESSOR HOFFMAN: Right.

14 MR. TUCKER: Yeah.

15 PROFESSOR HOFFMAN: Was the answer "yes" to  
16 that?

17 MR. TUCKER: Yes. They have limited  
18 contempt powers. They can hold you in contempt for a fine  
19 of up to a hundred dollars and up to three days in jail.

20 HONORABLE RUSS CASEY: When we were putting  
21 this together our intention was that the justice would be  
22 able to apply whatever Rules of Civil Procedure he needed  
23 to under certain situations, so I think this is one of  
24 those situations where we were talking about instead of  
25 repeating every single thing that may come up, that we

1 would have a reference back to the Rules of Civil  
2 Procedure --

3 MR. TUCKER: Right.

4 HONORABLE RUSS CASEY: -- if we needed to.  
5 So it was -- it was intentional that we left it out but  
6 not unintentional -- or it was intentional that we left it  
7 out. We did not mean for it not to apply.

8 MR. TUCKER: Perfectly stated. Exactly  
9 right.

10 PROFESSOR HOFFMAN: Well, I mean, that's --  
11 okay. I guess my suggestion would be if this is another  
12 rule of procedure specific to these cases, if you leave it  
13 out I think the witness is going to say, "You can't hold  
14 me in contempt. Look, you had that power in 267. You  
15 don't have it here." So if you want to enforce these  
16 rules, I would think you would want that provision. And  
17 then as to that section (d) of 267 about witnesses aren't  
18 supposed to converse with each other, et cetera, I mean,  
19 if you don't want that to happen then we ought to put that  
20 in here, too. It's not a Rule of Evidence.

21 MR. TUCKER: And I agree, and that's  
22 something we'll have to note as we go through these, and  
23 just as Judge Casey mentioned, when we drafted these we  
24 drafted them with the intention that the judge could use  
25 other Rules of Civil Procedure where appropriate. The



1 committee last time when we discussed that really didn't  
2 like that provision, and so some of these things would  
3 probably need to be explicitly put into these rules or  
4 some other way for us to be able to use them, but nobody  
5 really liked that provision that the judge could use other  
6 rules where necessary.

7 HONORABLE RUSS CASEY: But we were trying to  
8 keep things as brief as we possibly could, and even as  
9 much as we did there is quite a few people who thought we  
10 had too much as it was, so --

11 CHAIRMAN BABCOCK: Okay. We're good?  
12 506.1, subpoenas.

13 MR. TUCKER: Okay. Again this is directly  
14 lifted from pre-existing Rules of Civil Procedure that we  
15 wanted to have located in these rules, but no substantive  
16 from how it exists right now.

17 CHAIRMAN BABCOCK: Any comments about 506.1?  
18 Going once.

19 PROFESSOR HOFFMAN: The only question I  
20 would have is statutorily do JP courts have the same  
21 subpoena powers and range as county court judges do?

22 MR. TUCKER: Yeah. 150 miles.

23 PROFESSOR HOFFMAN: I mean, just as a  
24 general observation, if we're copying the rule verbatim,  
25 you know, then the short thing to do is say "see the other

1 rule," don't put all this stuff in there.

2 MR. TUCKER: Yeah.

3 PROFESSOR HOFFMAN: Unless there's a reason,  
4 if we're tweaking it.

5 MR. TUCKER: One of the things with this,  
6 what we really wanted to do is make these rules one stop  
7 shopping as much as we could so a party can see these  
8 rules and this is what's going to apply. Now, obviously  
9 there are going to be some things that hopefully what we  
10 wanted to do is have those things be things that are very  
11 rare, but some things are not going to be explicitly  
12 listed because that just gets massive, but we thought this  
13 was important enough to have located within these rules so  
14 if a party pulled up just the justice court rules they  
15 have that information.

16 HONORABLE RUSS CASEY: For example, on  
17 subpoenas that's something our clerks get asked a lot,  
18 what do I do about a subpoena, what if I want to bring  
19 someone, and we wanted to have it there.

20 MR. TUCKER: Yeah.

21 HONORABLE RUSS CASEY: But like, for  
22 example, on what happens if the person doesn't obey the  
23 judge, we really didn't figure that that was something  
24 that had to be there.

25 PROFESSOR HOFFMAN: I mean, that makes

1 sense, and that's a sensible -- that's right that's a  
2 sensible compromise. My only follow-up would be the one I  
3 had about 506, just make sure if you are planning on  
4 taking the whole rule, take the whole thing. If you take  
5 less than that it looks like that's the choice, you left  
6 it out on purpose.

7 MR. TUCKER: Like I said, we were trying to  
8 copy the Rule of Evidence not the Rule of Civil Procedure,  
9 so that was just an oversight, not realizing that there  
10 was a separate rule that had that other information.

11 MR. LEVY: Does this rule track what is in  
12 the regular rules?

13 MR. TUCKER: Yes, sir.

14 CHAIRMAN BABCOCK: Anything else on this  
15 one? Judge Estevez.

16 HONORABLE ANA ESTEVEZ: I have a question  
17 just on ramifications if subpoena -- if they don't come  
18 when they're subpoenaed. You just told me that the JP has  
19 a different contempt than the district court or the county  
20 court, but here all three of them can give contempt. So I  
21 guess shouldn't you state what the contempt could be here  
22 and also what the fine would be, because I believe the  
23 fine is a hundred dollars in district court, and I know  
24 our contempt is up to 500 and up to 180 days in jail, but  
25 you just said the JP would have a hundred-dollar fine with

1 three days, and I think that's important for them to know.

2 MR. TUCKER: Okay. Yeah, and that's  
3 perfectly reasonable. That's located in the Government  
4 Code, but it's -- it's a valid point that it might be  
5 beneficial to have the specific consequences there in the  
6 rules, though.

7 CHAIRMAN BABCOCK: There's a provision in  
8 here that says, "If a subpoena commanding testimony is  
9 directed to a corporation, partnership, association,  
10 government agency, and the matters on which examination is  
11 required is requested or described with reasonable  
12 particularity, the organization must designate one or more  
13 persons to testify on its behalf as to matters known  
14 reasonably available to the organization." Right, and it  
15 further says in the previous paragraph that "If the  
16 witness is a party and is represented by an attorney, the  
17 subpoena may be served on the witness' attorney of  
18 record." So I've got a corporate defendant and we're  
19 going to trial, and I get a subpoena served on me that  
20 says, "I want you to produce somebody that knows what Joe  
21 Blow knows," and Joe Blow is a manager who is in the  
22 Schenectady -- Schenectady, New York, office of the  
23 corporate defendant. Are you telling me that you can  
24 subpoena that guy down here that way? And is this the  
25 same as the civil procedure rules?

1 MR. TUCKER: Yes, sir.

2 CHAIRMAN BABCOCK: I don't know about that.

3 MS. HOBBS: It is. I'm looking at it.

4 PROFESSOR CARLSON: It's in the discovery  
5 rules.

6 MR. MUNZINGER: What's the rule number?

7 MS. HOBBS: 176.

8 MR. MUNZINGER: 1-7 what?

9 MS. HOBBS: 176.

10 CHAIRMAN BABCOCK: Yeah, Judge Estevez.

11 HONORABLE ANA ESTEVEZ: My understanding,  
12 also, is that if someone doesn't obey a subpoena I cannot  
13 hold them in contempt as a district judge. I can only  
14 fine them. I can do a writ of attachment. He can come  
15 back. After a hearing, then I can determine what  
16 happened, but I don't know that this -- and it could be  
17 different in JP court, but it says if the district court  
18 can do it, and the district court can't do it because the  
19 district court holds somebody in contempt when they have  
20 violated a court order, and the subpoena is not issued by  
21 a judge. It is not an order.

22 MR. TUCKER: But that's straight -- I mean,  
23 that's straight from the Rule 176.

24 HONORABLE ANA ESTEVEZ: I just -- I don't  
25 know if there's case law. I don't know why, but I've

1 never been -- we have subpoena issues all the time, and we  
2 do writ of attachment, and they show up, and they have a  
3 whole statute of what we are allowed to do with them, and  
4 it does not include holding them in contempt because they  
5 didn't appear when they didn't answer a subpoena.

6 CHAIRMAN BABCOCK: Hang on for a second.

7 You say this language --

8 HONORABLE ANA ESTEVEZ: So it may be a  
9 conflict.

10 CHAIRMAN BABCOCK: -- that I'm talking about  
11 is 176 what?

12 MS. SECCO: The language Judge Estevez is  
13 talking about is 176.8(a).

14 CHAIRMAN BABCOCK: That's contempt.

15 MS. SECCO: Yeah.

16 CHAIRMAN BABCOCK: Yeah, but these are  
17 discovery rules.

18 PROFESSOR CARLSON: Right.

19 CHAIRMAN BABCOCK: These are discovery  
20 rules.

21 MR. ORSINGER: But that's where the  
22 subpoenas for hearings and trials are, in the same set of  
23 rules, and I think that the depositions of a organization  
24 have the same provision about getting notice to the  
25 organization.

1                   CHAIRMAN BABCOCK: Sure, but then you've got  
2 to go -- you've got to go to Schenectady to do that.

3                   MR. ORSINGER: Well, they're only 150 miles.

4                   MR. TUCKER: Right.

5                   CHAIRMAN BABCOCK: Right.

6                   MR. ORSINGER: So if you subpoena a  
7 corporation that has a local office here and the  
8 headquarters is in New York, I'm not sure that they have  
9 an obligation to fly someone from New York down.

10                  CHAIRMAN BABCOCK: That's my point.

11                  MR. TUCKER: No, I would agree with that  
12 also. It's only 150 miles.

13                  CHAIRMAN BABCOCK: So they can't compel my  
14 Schenectady guy to come to trial in Texas, right?

15                  MR. TUCKER: No, I don't think so.

16                  MR. ORSINGER: I think the business is still  
17 required to specify a representative to testify on subject  
18 matter, but they can't say it has to be someone from New  
19 York.

20                  CHAIRMAN BABCOCK: But they -- right. Well,  
21 of course, if it said, "I want to know what Joe Blow  
22 knows," maybe, but let's say they say, "We want to know  
23 the guy who designed the widget that is at issue, we want  
24 testimony from the guy who designed the widget based in  
25 Schenectady." They can go up and take his deposition,

1 can't make him come to trial.

2 MR. TUCKER: The question would be which  
3 provision trumps. Is it the 150-mile provision that  
4 trumps or the provision here that talks about that when a  
5 corporation has to name somebody and produce them that has  
6 knowledge?

7 CHAIRMAN BABCOCK: Well, the 150-mile  
8 provision is in the statute. It's not only in the rule.

9 MR. TUCKER: Yeah, so, I mean --

10 CHAIRMAN BABCOCK: So that --

11 MR. TUCKER: That would be my thought also.  
12 That would be -- that would control over the requirement  
13 for the corporation to produce.

14 CHAIRMAN BABCOCK: Yeah, Judge Wallace.

15 HONORABLE R. H. WALLACE: The discovery rule  
16 is used to get somebody who can come and testify, not on  
17 personal knowledge but that has an obligation to actually  
18 go out and find out the answers to these things.

19 CHAIRMAN BABCOCK: Right.

20 HONORABLE R. H. WALLACE: And then in a  
21 deposition they can come in and say, "Well, I know such  
22 and such because Chip Babcock" --

23 CHAIRMAN BABCOCK: Told me.

24 HONORABLE R. H. WALLACE: -- "told me that  
25 such and such happened." You can't do that at trial.



1                   CHAIRMAN BABCOCK: That's hearsay.

2                   HONORABLE R. H. WALLACE: That would be  
3 objectionable. So you wouldn't have to bring the guy from  
4 Schenectady, and you wouldn't be able to get that evidence  
5 in at trial unless you did.

6                   HONORABLE RUSS CASEY: We have no hearsay  
7 rule in small claims court which would apply here.

8                   HONORABLE R. H. WALLACE: Yeah, but that's  
9 what I'm wondering, but, yeah, so but that wouldn't mean  
10 you would have to bring the guy from Schenectady. If the  
11 hearsay rule doesn't apply then they can come in and  
12 testify as the -- I would think, however they learned that  
13 information.

14                  CHAIRMAN BABCOCK: Yeah, and obviously if  
15 I'm the corporate defendant and I need the guy from  
16 Schenectady, I can just bring him down. The question is  
17 whether or not the -- whether the plaintiff can compel the  
18 guy from Schenectady to come down.

19                  HONORABLE R. H. WALLACE: No, I don't  
20 believe he can.

21                  CHAIRMAN BABCOCK: I don't think he can  
22 either, but -- and 176 makes a distinction about  
23 discovery. You can go up and take the corporate rep, you  
24 can go up and take Joe Blow who lives in Schenectady if  
25 you want, but you can't make him come down here, and this

1 506.1 doesn't make those distinctions. That's my point.

2 MR. TUCKER: Right, and I guess my thought  
3 is neither does 176.6(b), which has the exact same  
4 language.

5 MS. SECCO: 176.3 does make a distinction on  
6 range between discovery and witnesses at trial, and that's  
7 omitted from this rule.

8 CHAIRMAN BABCOCK: Right. Yes. Thank you.  
9 Now, is that a solid point, a good point, or a great  
10 point?

11 MR. TUCKER: All the above.

12 CHAIRMAN BABCOCK: Or maybe an extraordinary  
13 point.

14 HONORABLE RUSS CASEY: I think that that's  
15 an extraordinary point.

16 CHAIRMAN BABCOCK: Thank you.

17 HONORABLE RUSS CASEY: And we were trying  
18 to -- and, of course, you know, what we put on there was  
19 basically to try to just throw in something on subpoenas  
20 for people to take -- you know, I want to get my landlord  
21 here sort of thing, but yet again, we have -- these Rules  
22 of Civil Procedure, the Rules of Evidence, you know, these  
23 are based upon hundreds of years of trial experience, and  
24 we wanted to be able to have some information here, but  
25 then be able to fall back upon a greater pool of

1 information --

2 CHAIRMAN BABCOCK: Right.

3 HONORABLE RUSS CASEY: -- which we were  
4 talking about, and, of course, if we're going to limit it  
5 to just what's there, we need to try to make it as  
6 comprehensive as we can.

7 MR. ORSINGER: But there is a 150-mile  
8 limitation in here. Is that what we're talking about?

9 MS. SECCO: No.

10 MR. ORSINGER: What are we talking about?

11 MS. SECCO: 176.3 distinguishes between a  
12 person who can be required to, you know, appear within the  
13 range and a subpoena during discovery where you can get a  
14 deposition of anyone, anywhere.

15 MR. ORSINGER: But this rule --

16 MR. MUNZINGER: Can y'all speak up?

17 MR. ORSINGER: This rule that applies to the  
18 justice courts says that "A person may not be required by  
19 subpoena to appear in the county that is more than 150  
20 miles from where the person resides or is served," so why  
21 isn't that the protection you need?

22 CHAIRMAN BABCOCK: Because a corporation is  
23 a, quote, person and down here you say -- you say that you  
24 can serve on a party -- you can serve the party's  
25 attorney, and then the next paragraph says you can -- you

1 can direct a subpoena to a corporation, and if you tell  
2 them with reasonable specificity they've got to produce  
3 somebody, and if the corporation is in Schenectady and  
4 that's the only place they have people, without the  
5 limitations of 176.3 making it clear that that applies to  
6 discovery and not trial, you might be -- you might be  
7 inadvertently pulling somebody down from Schenectady to  
8 testify in a JP case.

9 MR. TUCKER: And I guess my feeling is that  
10 176.3 is kind of -- is an enlarging because it says, okay,  
11 for a subpoena only 150 miles. However, if we're talking  
12 about a deposition, that can be larger.

13 MS. SECCO: That's true.

14 MR. TUCKER: And for this here we're just  
15 saying this is only subpoenas, so it's only 150 miles, and  
16 then later we're going to talk about discovery, which is  
17 entirely within the purview of the judge to allow or deny.

18 MR. ORSINGER: And I would point out I  
19 believe there is another discovery rule that a person  
20 cannot be forced to appear for deposition that's a  
21 nonparty outside of the county of their residence, so  
22 there's not 150-mile subpoena limitation on the  
23 deposition. You can take it in any county in Texas where  
24 the witness is. I don't see the 150 miles as a discovery  
25 limitation. I see it as a trial court limitation. It's

1 based on 150 miles from where the case is pending.

2 CHAIRMAN BABCOCK: Yeah, I agree with that.

3 MR. ORSINGER: So if a corporation has a  
4 branch office, like let's say it's a brokerage company  
5 like in a small town.

6 CHAIRMAN BABCOCK: Right.

7 MR. ORSINGER: And they may keep their  
8 documents in Washington state. So you subpoena the  
9 organization locally, they're within 150 miles. They have  
10 to produce their records even if they're kept in another  
11 state, but I don't think that they have to bring a  
12 custodian down from Washington. They can just send over a  
13 local representative saying -- so I'm not sure I see that  
14 there's a way around 150-mile geographical limitation  
15 merely because you subpoenaed in it.

16 HONORABLE RUSS CASEY: And yet again, the  
17 whole idea of this is the Rules of Evidence is to allow --  
18 you know, we don't necessarily have to have a custodian of  
19 records there to testify that those are good records. The  
20 judge can be able to determine that. You know, like I  
21 said before, I know what a Wal-Mart receipt looks like. I  
22 don't need someone from Wal-Mart to testify that's a  
23 receipt.

24 CHAIRMAN BABCOCK: Richard Munzinger.

25 MR. MUNZINGER: So I'm looking at this rule

1 and I'm the judge and I have Chip's case. The company has  
2 its headquarters and the appropriate person now. X  
3 company has received a subpoena saying "Provide somebody  
4 who will testify to subject Y," and the company has an  
5 office within 150 miles of the justice court, but the  
6 person with knowledge is in Schenectady or wherever, and  
7 there isn't anybody locally. This rule allows the company  
8 to be forced to fly the knowledgeable person from  
9 Schenectady here, and the reason that it does, because it  
10 says a person cannot be commanded to come for 150 miles.  
11 It doesn't say anything about a party or a corporation or  
12 an organization.

13 I'm the judge, I say, "Wait a minute, I'm  
14 not compelling a person to come from Schenectady, Judge."  
15 I'm just reading this rule here, it says "Give me  
16 testimony on subject A," and it is directed to the  
17 corporate witness. Not a party, it's a corporate witness.  
18 That is not a subpoena directed to a, quote, person, close  
19 quote, whose residence is anywhere. It's talking to a  
20 corporation. So I think the problem that Chip mentioned  
21 is real in this rule. That's not to say it may not have  
22 pre-existed --

23 CHAIRMAN BABCOCK: Sure.

24 MR. MUNZINGER: -- your draft of the rule,  
25 but it is a problem.

1                   MR. TUCKER: Yeah, and I think it would be  
2 within what we anticipated how that would be applied to  
3 put on there, "The organization must designate one or more  
4 persons to testify on its behalf as to matters known or  
5 reasonable to its organization," comma, "provided one is  
6 located within 150 miles of the trial court," or something  
7 along those lines just to specify that this 150-mile  
8 provision does apply to these witnesses as well. I mean,  
9 I think the way that this applies together it has to  
10 already -- I mean, it's still a subpoena for a person is  
11 what we're asking for, so I think the 150 miles applies,  
12 but I think it would be perfectly reasonable to include a  
13 provision in that part about corporations that the 150  
14 miles applies to that person as well.

15                   MS. SENNEFF: Judge Wallace.

16                   HONORABLE R. H. WALLACE: The Chair  
17 recognized me.

18                   CHAIRMAN BABCOCK: Richard, go ahead.

19                   MR. ORSINGER: I don't think that this  
20 interpretation that you can specify for a corporation to  
21 send someone from another state applies. This happens in  
22 my practice occasionally as a family lawyer where I have  
23 to get records from third parties, and they typically will  
24 designate representatives who may not have personal  
25 knowledge, but who speak on behalf of the entity, and so I

1 think that there's an assumption being made that a  
2 corporation has to specify someone that has personal  
3 knowledge of a fact, and in reality there's a -- what I  
4 would call institutional knowledge, and they have to send  
5 somebody down that can speak knowledgeably about where the  
6 records are located or how they were generated or how --  
7 you know, how the committee meets that promulgates these  
8 internal rules or whatever.

9                   I don't -- I've never seen, and maybe just  
10 because it's never happened to me personally, someone  
11 argue that I can make an eyewitness come from some other  
12 state in response to a subpoena by that rule. All that  
13 means, though, is that the corporation can't send a  
14 representative to a deposition that you ask them a  
15 question and they say, "Well, I don't know about that,  
16 that's not my department," if you specify they're required  
17 to send somebody that can speak for the entity, but that  
18 doesn't mean they have to speak on personal knowledge. So  
19 I've never seen it used that way. I don't think it can be  
20 used that way.

21                   CHAIRMAN BABCOCK: Yeah. Well, I agree with  
22 you, and I don't think the discovery rules have got this  
23 problem, but I do think that when we cut and paste from  
24 the discovery rules and put them into a trial rule, which  
25 is what this does, then we may have a problem.



1 MR. ORSINGER: But it's a trial rule in the  
2 district court, too. If the problem exists in the JP  
3 court, it exists in the district court.

4 CHAIRMAN BABCOCK: No. Judge Wallace.

5 MR. ORSINGER: Because we only have one  
6 subpoena rule, and it's 176.

7 HONORABLE R. H. WALLACE: Thank you. No,  
8 I've never seen a trial subpoena issued like that.

9 CHAIRMAN BABCOCK: No.

10 HONORABLE R. H. WALLACE: Where you command  
11 somebody --

12 MR. MUNZINGER: But it exists. The  
13 authority exists.

14 HONORABLE R. H. WALLACE: Well, here, to  
15 follow Richard, on what Richard was saying, is I  
16 understand the rule, that rule of discovery came about to  
17 alleviate the problem of me taking Chip's deposition and  
18 asking, "Who made this widget," and he says, "I don't  
19 know."

20 "Well, who would know?"

21 "Well, maybe Richard would know." So I go  
22 depose Richard. Richard says he doesn't know, but maybe  
23 Carl will know.

24 CHAIRMAN BABCOCK: Right.

25 HONORABLE R. H. WALLACE: Okay. So we say

1 we're going to cut through that, and you -- the burden is  
2 on the corporation, as he put it, that has the  
3 institutional knowledge to designate someone to testify.  
4 Don't have to have personal knowledge, but because they  
5 don't have personal knowledge is the reason you don't use  
6 it in a trial, and if you gave the JP court the authority  
7 to use this, you're -- they're doing something you  
8 couldn't do in the district court, I don't think. So I  
9 think it doesn't belong here, that particular provision.

10 CHAIRMAN BABCOCK: Judge Estevez.

11 HONORABLE ANA ESTEVEZ: I just want to spend  
12 a second to clean up the record a little bit. I  
13 apologize. The problem when you're general jurisdiction  
14 is sometimes there's a conflict between criminal law and  
15 civil law, and I just wanted to state that so when the  
16 justices read this that under Texas Code of Criminal  
17 Procedure 24.05 the only thing we can do when someone  
18 violates a subpoena is a fine up to 500 for a felony and a  
19 hundred dollars for a misdemeanor. Apparently you can do  
20 more if you're sitting as a civil judge, so just to clean  
21 up the record so it's not confusing.

22 CHAIRMAN BABCOCK: Robert.

23 MR. LEVY: I did want to echo your point.  
24 Maybe it's already been beaten down enough, but the  
25 putting in the provision here that a party can simply

1 order a corporation just to appear as in the sense of a  
2 30(b)(6) witness would be a problem, and it could be  
3 abused for the trial.

4 CHAIRMAN BABCOCK: Yeah. Okay. Well,  
5 sorry, I didn't mean to get us started on all of that, but  
6 anything else on 506.1? Since Marisa is now sensitized to  
7 this issue. She thinks. Anything else? Okay. Let's go  
8 to 507.

9 MR. TUCKER: Okay. 507, the directive from  
10 the Legislature told us basically to keep it along the  
11 lines of small claims court, and the way small claims  
12 court currently works is discovery is permitted to the  
13 extent that the judge decides that it's necessary and  
14 reasonable, and so we kept that -- that thought there in  
15 pretrial discovery in Rule 507, saying that that must be  
16 presented to the court by written motion before it's being  
17 served on the other party, and then the judge will issue a  
18 signed order approving that if they consider it reasonable  
19 and necessary. The judge controls completely the scope  
20 and timing of discovery. So we're not limited by the  
21 existing discovery rules. The judge is going to be able  
22 to have discretion, and it contains a warning that if you  
23 fail to comply it could result in sanctions, including  
24 sanctions proving fatal to a party's claim. So the idea  
25 there is just to have the party have to come to the judge

1 and have the judge approve discovery.

2           One thing that was discussed in the -- with  
3 the task force was to have requests for disclosure be  
4 prima facie approved just automatically, that that's  
5 something that a party could automatically submit, since  
6 that's a very straightforward and unobjectionable  
7 basically. The majority of the task force didn't want to  
8 include that in there, but that was something that we did  
9 want to have a discussion on, whether a request for  
10 disclosure would really need to be approved by the judge.

11           CHAIRMAN BABCOCK: Okay. Any comments?  
12 Richard.

13           MR. MUNZINGER: Is there a service rule  
14 where somewhere you say these people have to serve the  
15 motions that they file on their adversary? Because this  
16 rule talking about getting discovery, I am assuming the  
17 judge is going to hold some kind of a hearing where the  
18 guy wanting the information makes his case and the guy who  
19 may not want it to get there makes his case and the judge  
20 decides and issues the discovery request. Is that what  
21 the rule contemplates?

22           MR. TUCKER: No. I think the rule  
23 contemplates the judge will make that decision as is  
24 presented ex parte, and that's currently how it's done in  
25 small claims court.

1                   CHAIRMAN BABCOCK: Lisa.

2                   MS. HOBBS: This last line about "sanctions  
3 that may prove fatal to a party's claim," I might be a  
4 little bit more specific there and suggest that you might  
5 get some language in 2015.2 about sanctions that a  
6 district court and county court can order if you don't  
7 follow their orders. Specifically section five, which  
8 talks about striking pleadings or dismissing the claim.

9                   MR. TUCKER: And again, that's another of  
10 those situations where we assumed the judge would be able  
11 to refer back to the other rules and then that kind of  
12 changed.

13                  MS. HOBBS: I just don't know that "prove  
14 fatal to your claims" is -- that might be a little bit too  
15 casual of a word. I think you should say, "Your claim  
16 might be dismissed or you might get a default judgment  
17 rendered against you" or be specific.

18                  CHAIRMAN BABCOCK: Justice Bland.

19                  HONORABLE JANE BLAND: This is one of the  
20 provisions that we had a lot of input from people about in  
21 our letters; and most of the input was -- or some of the  
22 input was to not adopt this provision; and at the other  
23 end of the spectrum we're looking for ways to reduce the  
24 time, cost, and expense of litigation; and one of the ways  
25 to do that is to reduce drastically or perhaps even

1 eliminate discovery, but here in the justice courts we're  
2 contemplating setting up a process for discovery. My  
3 suggestion is that we do not adopt 507 and allow for  
4 pretrial discovery. There is a trial de novo in county  
5 court that will be governed by the rules of procedure and  
6 evidence, and people can, if they need to, conduct  
7 discovery there, but this court it seems to me ought to be  
8 the kind of court where people bring their evidence to  
9 court and put on their trial and call it a day.

10 MR. JEFFERSON: Seconded.

11 HONORABLE KENT SULLIVAN: Yeah.

12 HONORABLE R. H. WALLACE: Yes.

13 CHAIRMAN BABCOCK: Okay. Marisa.

14 MS. SECCO: I'll just note that the statute  
15 authorizing these rules does say that discovery should be  
16 limited to that considered appropriate and permitted by  
17 the judge. So it at least contemplates that there will be  
18 discovery of some sort as permitted by the judge, and I  
19 think that's what influenced the task force's drafting of  
20 this rule.

21 MR. TUCKER: Yeah.

22 MS. SECCO: I just wanted to throw that out  
23 there.

24 MR. TUCKER: Yeah. I agree, and I think the  
25 concept of trying to make it speedy and quick, I agree

1 with that. I think that's part of what this was aimed at  
2 is saying, look, we're not going to allow parties to bog  
3 it down with a whole bunch of discovery, but if there's  
4 something more the judge can look at and say, "Yeah, I can  
5 see where you need to know that before we go to trial"  
6 then that would be appropriate.

7 CHAIRMAN BABCOCK: Peter.

8 MR. KELLY: Just the mechanics of the way  
9 the rule is constructed, I think the first two sentences  
10 are redundant, saying the same thing in a slightly  
11 different way. Conceptually I would think you would want  
12 to start and be more clear, start with, "The judge may  
13 completely control the scope" -- or does, "shall  
14 completely control the scope and timing of discovery."  
15 Next sentence, "The court shall permit such pretrial  
16 discovery that the judge considers reasonable and  
17 necessary for the preparation of trial," and only then go  
18 to the mechanics of "any request for discovery shall be  
19 not served on a party unless the judge issues a signed  
20 order approving a discovery request." So that way it sort  
21 of narrows down from the general proposition of total  
22 control to what the court -- what specifically the court  
23 may authorize.

24 CHAIRMAN BABCOCK: Judge Wallace.

25 HONORABLE R. H. WALLACE: I think what

1 Justice Bland may have been referring to, there was a  
2 letter from a group of the JPs in Tarrant County about  
3 Rule 507, and it said, "This rule implies that the judge  
4 will review and approve all discovery. Some courts have  
5 hundreds and even thousands of filings that currently  
6 include discovery. It will be impractical, if not  
7 impossible, for the judge to accomplish this." I don't  
8 know if that's the case or not, but apparently they are  
9 concerned about it.

10 HONORABLE RUSS CASEY: No, I'm a judge in  
11 Tarrant County, and I am familiar with that letter, and I  
12 do not think that that accurate -- that that letter is  
13 accurate.

14 HONORABLE R. H. WALLACE: You were not a  
15 signatory then?

16 HONORABLE RUSS CASEY: What they're  
17 referring to is credit card cases, which normally the --  
18 especially in a matter of assigned claims, the plaintiff  
19 will serve admissions on a defendant in hopes of using  
20 that to prove up their claim, and that's what the great  
21 number of cases are talking about. I think that we have  
22 discussed those particular issues in our credit card  
23 rules. That doesn't really -- I don't think that it will  
24 be -- I don't think discovery will be an issue under the  
25 rules.



1                   CHAIRMAN BABCOCK: I'm wondering -- could I  
2 jump in, Jane, just for a second? I'm wondering if this  
3 Rule 507 ought not to say that you go to the judge, and,  
4 of course, you've got to serve on the other party whatever  
5 you go to the judge on. This first sentence is misleading  
6 in that regard, but you go to the judge and ask for a  
7 pretrial discovery and then the second sentence could be  
8 lifted right out of the statute to say, "Discovery is  
9 limited to that considered appropriate and permitted by  
10 the judge." Why wouldn't you do that?

11                  MR. TUCKER: I think what we were trying to  
12 do with the two sentences is the first sentence was trying  
13 to say you have to bring it to the court. You can't go to  
14 the other party first, and then the second part says you  
15 can't even serve it on them until the judge issues an  
16 order saying "yes," so if I want to do interrogatories on  
17 Russ, I can't just file it with the court and file it on  
18 Russ at the same time. I have to bring it to the court,  
19 then get a signed order, and then give it to him. That's  
20 what we were trying to communicate.

21                  CHAIRMAN BABCOCK: It's like you want a  
22 motion for leave to conduct discovery, and here is the  
23 discovery we want to do.

24                  HONORABLE RUSS CASEY: Exactly.

25                  CHAIRMAN BABCOCK: Justice Bland. Sorry.

1 HONORABLE JANE BLAND: So if Marisa is  
2 correct that we have to have something about discovery in  
3 these rules then my no discovery at all is not going to  
4 work, but it seems like the way we've drafted this we're  
5 encouraging discovery, because we're requiring the court  
6 to permit discovery. It says, "The court shall permit  
7 such pretrial discovery that the judge considers  
8 reasonable and necessary."

9 CHAIRMAN BABCOCK: An excellent point.  
10 Richard.

11 HONORABLE JANE BLAND: And could we water  
12 that down?

13 CHAIRMAN BABCOCK: Richard.

14 MR. MUNZINGER: If I understood them  
15 correctly, this is supposed to be an ex parte proceeding,  
16 so the party desiring discovery files a motion, asks for  
17 discovery. The court gives them discovery, without  
18 hearing from the other side, and the discovery proceeds.

19 MR. TUCKER: Yes, sir.

20 MR. MUNZINGER: So if I want to object that  
21 it's an invasion of privacy; it's a violation of  
22 attorney-client privilege; it's immoral, ugly, and not  
23 fair, whatever. I don't get any objection, the discovery  
24 comes to me. That doesn't seem to be the way to treat  
25 parties properly.

1                   CHAIRMAN BABCOCK: That outrages you,  
2 doesn't it?

3                   MR. MUNZINGER: Yeah, it does.

4                   MR. TUCKER: I think what we contemplated is  
5 that the party would then object when it's served on them,  
6 just like they would right now. If you serve  
7 interrogatories on me, I'm going to object when you serve  
8 them on me.

9                   MR. MUNZINGER: Well, but the rule doesn't  
10 say that, does it?

11                  MR. TUCKER: No, it doesn't.

12                  MR. MUNZINGER: The rule doesn't say that I  
13 get to object.

14                  MR. TUCKER: The other rules that we  
15 anticipated would apply to this court do say that.

16                  CHAIRMAN BABCOCK: Justice Bland.

17                  HONORABLE JANE BLAND: Well, Richard has a  
18 point because when you look at this rule it contemplates  
19 sanctions based on the judge's order of the discovery that  
20 was ex parte that you haven't had an opportunity to object  
21 to, and at a minimum the statute doesn't require that we  
22 allow discovery sanctions in JP courts, so at a minimum I  
23 think that should come out.

24                  CHAIRMAN BABCOCK: Yeah, wouldn't you want  
25 to set it up so that you file a motion for leave to

1 conduct discovery, and you say, "Here's the discovery I  
2 want." You serve that on the other side, so that they can  
3 come in and say, "No, judge, don't let them do that. This  
4 is a simple case. We're in JP court, for crying out  
5 loud."

6 MR. TUCKER: I think the thought process was  
7 if you serve it on them before giving it to the judge, the  
8 judge may reduce or eliminate a lot of the things that are  
9 then complicating the case by people receiving these  
10 discovery requests and they don't know what to do.

11 CHAIRMAN BABCOCK: No, no, no, but I  
12 understand what you're saying. What you're saying is  
13 you've got to draft 30 interrogatories and 15 requests for  
14 production, and you just send that to the judge and say,  
15 "Judge, here's what I want to do," and you don't, quote,  
16 serve that on the other side so that they -- the clock  
17 starts running on replying in 30 days. What I'm saying is  
18 why don't you simplify it? Why don't you say, "Judge, I  
19 want to send no more than 30 interrogatories and 15  
20 requests for production, please let me do that," serve the  
21 other side with that request, that motion for leave to do  
22 discovery? That way if the opponent wants to object to it  
23 and say, "Judge, don't let him do that" for whatever  
24 reason then they've got the due process rights to come in  
25 and do that and then the judge does whatever he does. He

1 says, "Yeah, go ahead and serve the discovery." Then they  
2 serve the discovery, and then the opposing party would  
3 have all the rights they would have under the rules to  
4 say, "No, that invades attorney-client privilege," or "No,  
5 it's not relevant or reasonably calculated" or whatever  
6 they might say.

7 HONORABLE RUSS CASEY: I like that.

8 MR. TUCKER: Yeah, my -- our only thought  
9 was that the specific requests should go to the judge to  
10 approve rather than a blanket you get 20 interrogatories,  
11 because it's hard to say --

12 CHAIRMAN BABCOCK: Sure.

13 MR. TUCKER: -- that it's reasonable and  
14 necessary without knowing what you're actually asking.

15 CHAIRMAN BABCOCK: Well, and you could do it  
16 that way, but if you do it that way, you darn sure should  
17 send it to the other side because one of your requests  
18 might be "Hey, give me all your attorney-client  
19 communications" and the other side would have the right to  
20 point out to the JP, "Hey, you know, you can't do that  
21 because that's privileged," blah, blah, blah. Marisa.

22 MS. SECCO: Maybe I'm not remembering  
23 correctly, but I think that when this was discussed the  
24 task force at least talked about they didn't want the --  
25 the judges didn't want anyone mini trials on whether or

1 not discovery was allowed, so sort of leaving this as an  
2 ex parte request to the judge to just serve the discovery  
3 and then allowing the opposing party to object in the  
4 normal course would not add this additional contested  
5 hearing about whether or not discovery should be allowed  
6 in the first instance.

7 CHAIRMAN BABCOCK: But you've got a party in  
8 the case and you're going to allow -- the rules are going  
9 to allow an ex parte approach to the judge?

10 MS. SECCO: Well, under the rules in  
11 district and county court, you know, any party can serve  
12 discovery without any -- so it's not less --

13 CHAIRMAN BABCOCK: But, I mean, the only  
14 time we ever allow ex parte is when, you know, it's a TRO  
15 and there's some emergency, and even then most places  
16 you've got to say, "I've tried to approach the other side  
17 and give them notice and everything."

18 MS. SECCO: But that's because you don't  
19 even need leave to serve discovery in district and county  
20 court, so here you're actually adding an additional burden  
21 for the person promulgating the discovery.

22 CHAIRMAN BABCOCK: Okay. Bobby. We haven't  
23 heard from you today.

24 MR. MEADOWS: Yeah, we haven't come to  
25 anything this important. My concern -- the statute

1 requires you to approach the judge about what discovery  
2 would be permitted. My concern is the way the rule is  
3 written is it seems to relax what the statute permits. I  
4 mean, the statute says you can -- that we are not to write  
5 a rule that allows discovery of the type we see in  
6 civil -- our Rules of Civil Procedure, and the only  
7 discovery that can be permitted is that which the judge  
8 determines must be followed to ensure that the proceeding  
9 is fair to all parties, and the way the rule is written is  
10 that the discovery permitted would be that what is  
11 reasonable and necessary to prepare for trial, which is a  
12 much different standard in my view.

13 CHAIRMAN BABCOCK: Yeah. Judge Peeples had  
14 his hand up.

15 HONORABLE DAVID PEEPLES: Yes, yes, I did.  
16 I want to second and support the things that have been  
17 said about these ex parte hearings. I think it's  
18 extraordinary to allow an ex parte approach to a judge.  
19 Yes, we allow it in some circumstances. We should not do  
20 it unless there is very good reason, and I think there's  
21 not good reason here. That's point one.

22 Point two, this seems inefficient because it  
23 will -- there will be two appearances before the judge,  
24 and in criminal cases, I may be wrong about this, but  
25 there's very limited discovery, but you -- you have to get

1 permission from the judge and both people are there and  
2 the judge then decides if there's not an agreement how  
3 much there will be, and so maybe this would make more  
4 sense just to say you've got to, yes, go to the judge  
5 first with the other side there, talk about it and  
6 convince the judge what discovery there should be and  
7 then -- I mean, you would have a chance to make your  
8 objections and so forth. I think two approaches of the  
9 judge is inefficient, and any ex parte approach to the  
10 judge ought to be supported by good reasons, which I don't  
11 think are present here.

12 MR. TUCKER: One possible problem with  
13 requiring them to be there, there is also a situation, for  
14 example, where I want to give request for admissions to  
15 the other side and they aren't responding, they don't want  
16 to show up. So that might be part of what I'm trying to  
17 do is to get them request for admissions, and if they're  
18 not willing to -- if they're not participating in the  
19 proceeding then that's eliminated as something that I can  
20 do.

21 MR. MUNZINGER: Yeah, but your rule doesn't  
22 give them the opportunity to appear and participate, and  
23 therein lies its vice. Due process is to give someone the  
24 opportunity to be heard and present their case. This does  
25 not do so, in all due respect, and, in fact, seems to



1 encourage it not to do so. It provides nothing regarding  
2 an appeal of it, and it is ex parte, and as David says,  
3 it's not, I mean, the American way.

4 CHAIRMAN BABCOCK: Kent. Okay. Judge  
5 Peeples.

6 HONORABLE DAVID PEEPLES: As we try to  
7 simplify, it's a good thing when somebody wants to make it  
8 complicated by getting discovery, either side, to know  
9 they've got to go convince the judge to get it, and that's  
10 a good thing to throw up roadblocks like that as we try to  
11 simplify these cases.

12 CHAIRMAN BABCOCK: Kent.

13 HONORABLE KENT SULLIVAN: I wanted to speak  
14 in favor of the Bland doctrine. I think that we are  
15 opening Pandora's box here, and I think that the extent --  
16 it seems to me the statutory language was clearly designed  
17 to limit discovery, not to facilitate it, and we ought to  
18 say something in the rule to the effect of "Discovery is  
19 disfavored in these cases," and number two, "Discovery is  
20 allowed only to the extent that it is shown to be  
21 essential to the presentation of the party's case at  
22 trial." I mean, I would use that kind of language, and  
23 then I wanted to second Judge Peeples' point, and that is  
24 the notion of ex parte, routine ex parte hearings, is a  
25 complete disaster.

1                   CHAIRMAN BABCOCK: Jane's doctrine is more  
2 colorful than you might imagine. Go ahead, Justice Bland.

3                   HONORABLE JANE BLAND: Okay. So here's what  
4 we could say: "No discovery is allowed," comma, "unless  
5 the judge permits it in a written order. A party seeking  
6 discovery must notify the opposing party, set their  
7 request for a hearing, and obtain the order."

8                   CHAIRMAN BABCOCK: That sounds like a  
9 doctrine to me. Jim.

10                  MR. PERDUE: With the recognition that this  
11 is Justice Bland's second effort at judicial activism to  
12 ignore the language of the statute today, I would like to  
13 fully join that language.

14                  HONORABLE JANE BLAND: You're not helping  
15 me, Jim.

16                  CHAIRMAN BABCOCK: Well, listen, this has  
17 been great fun, but why don't we take a little break  
18 because Dee Dee's fingers are falling off here. Back in  
19 15 minutes.

20                               (Recess from 3:46 p.m. to 4:06 p.m.)

21                  CHAIRMAN BABCOCK: Okay. We're on to 507.1,  
22 post-judgment discovery. Or maybe not. Come on, Lamont,  
23 let's go. Bronson, let's talk about post-judgment  
24 discovery. They'll start listening.

25                  MR. TUCKER: Okay, well, we decided that.

1 CHAIRMAN BABCOCK: And move on.

2 MR. PERDUE: Let's keep going.

3 MR. ORSINGER: You need a spoon and a metal  
4 plate to bang on. Is there an alarm on your phone?

5 MR. TUCKER: Also, just to wrap up 507, I  
6 would just like to just reiterate the way that 507 is laid  
7 out is the way that things are currently in small claims.  
8 It's obviously not the way things are currently in justice  
9 court. In justice court we're under the regular discovery  
10 rules right now. In small claims it's similar to the 507.  
11 My concern with having a hearing for every one of those,  
12 keep in mind we're talking about even things like a  
13 request for disclosure, we're going to have to have notice  
14 and a hearing and bring people in just to say, yeah, you  
15 can do a request for disclosure. I definitely understand  
16 the concern. I would rather than a hearing every time  
17 would much think it would be much better to implement for  
18 courts if we make explicit in there that a party has the  
19 right to object and then will get a hearing if they object  
20 and put that in the rule, but I think having a hearing  
21 every time even on things like request for disclosure is  
22 really going to be burdensome on courts and parties.

23 CHAIRMAN BABCOCK: Okay.

24 MR. HAMILTON: Chip.

25 CHAIRMAN BABCOCK: Justice Bland, and then

1 Carl.

2 HONORABLE JANE BLAND: In my view the  
3 Legislature is trying to strictly limit discovery; and  
4 although its burdensome to go to a judge and request  
5 permission to conduct discovery, that's what the statute  
6 says you must do; and by not having a party who wants to  
7 do discovery have to do that, we place the burden on the  
8 party that's resisting the discovery to object, to I guess  
9 request a hearing, and I think that that's the opposite of  
10 what the Legislature intended; and also it's not what we  
11 really should be fostering in these courts as a matter of  
12 policy. It should be difficult to get discovery in  
13 justice court.

14 MR. TUCKER: No, I agree with that. Maybe I  
15 misspoke. I definitely think the party that wants  
16 discovery should have to go to the court and get  
17 permission for it. I just don't think that we should have  
18 to have a contested hearing with both parties present  
19 every time the judge wants to sign off on it. I think I  
20 as a plaintiff could say, "I want to serve these five  
21 interrogatories on Russ. Judge, will you sign an order  
22 that I can serve these five interrogatories on Russ?"

23 "Yes, I think these are reasonable and  
24 necessary, I'm going to sign them." Now I can make him  
25 answer the question, rather than the judge, say, "Well,

1 okay, let's send a notice here and bring Russ here and  
2 bring you here in 30 days and talk about it," because I  
3 agree it should be less burdensome, and I think having a  
4 contested hearing every time I want to request discovery  
5 is more burdensome.

6 HONORABLE RUSS CASEY: And I think we may  
7 accomplish both by clearing up the language of showing  
8 that the -- that even approved discovery may be contested,  
9 and because I think that that was one of the objections on  
10 that, is that we are implying that it cannot be, and I  
11 think that enforcing it should be, and so we may do that.  
12 Now, the language in small claims court under current  
13 Chapter 28 is basically exactly what the Legislature  
14 wrote. That's what's there. There's not any more or  
15 less, and so we -- you know, I think we were trying to  
16 clarify that a little bit, and maybe we didn't do that the  
17 best way we could.

18 CHAIRMAN BABCOCK: Carl, then Judge Evans,  
19 then Justice Gaultney, then Eduardo.

20 MR. HAMILTON: Well, there's two things in  
21 the statute. One is that discovery is limited to what the  
22 judge considers appropriate and permitted, but then it  
23 also says in the second part is that the Supreme Court  
24 cannot adopt rules requiring the discovery rules or Rules  
25 of Evidence, except to the extent that the JP determines

1 that those rules will be followed. So as I read this, all  
2 the JP has to say is we're either going to follow the  
3 discovery rules or we're not going to follow them. He  
4 doesn't have to decide whether these interrogatories are  
5 good or bad or whatever until the discovery is done. Then  
6 we have the regular -- regular disputes over it if there  
7 is any, but he can say from the outset, "We're not going  
8 to have any discovery."

9 CHAIRMAN BABCOCK: Judge Evans.

10 HONORABLE DAVID EVANS: I'm opposed to ex  
11 parte discovery. I think it places an impression on the  
12 recipient that there's already been a judicial review of  
13 the propriety of the discovery and will chill valid  
14 objections to it and should only be upon leave on good  
15 cause stated as along the terms of what the Legislature  
16 has provided would be, and they have to show that it's  
17 reasonable and needed under the circumstances of that  
18 case.

19 CHAIRMAN BABCOCK: Justice Gaultney.

20 HONORABLE DAVID GAULTNEY: I want to join  
21 the Justice Bland doctrine but with an addition, and that  
22 is that as I understood the doctrine there's no discovery  
23 as a starting point, and then, again, I want to voice  
24 opposition to the concept of an ex parte hearing. I think  
25 that's inappropriate, but it should be on motion, but

1 there should be -- it should be limited to exceptional  
2 circumstances. So on motion, showing exceptional  
3 circumstances, and there shouldn't be a hearing every --  
4 multiple hearings. There should be one hearing, so one  
5 hearing on motion based on exceptional circumstances.

6 CHAIRMAN BABCOCK: Eduardo.

7 MR. RODRIGUEZ: Yeah, is there any way that  
8 we could craft a set of mandatory disclosures like we have  
9 in district courts that if it's appropriate they could be  
10 set? I mean, I think we're making -- trying to make a  
11 mountain out of a mole hill. We're in this court to make  
12 it easy for people to get their day in court, and we're  
13 trying to make it more difficult it seems, so can we not  
14 draft a set of mandatory questions that could go out if  
15 one of the parties wants it? Just a suggestion.

16 CHAIRMAN BABCOCK: Judge Peeples.

17 HONORABLE DAVID PEEPLES: Two things. It  
18 seems to me that if we require these hearings are going to  
19 be adversary, there will be fewer of them. I think if you  
20 invite people to visit with the judge ex parte, there will  
21 be more of them; and second, and more important than that,  
22 it's very tempting when there's an ex parte discussion  
23 with the judge to expand the discussion from discovery to  
24 something else. You're at the bench, maybe nobody else is  
25 there, might be tempting for the judge to ask, "Tell me

1 about this case" or something, tempting for the lawyer to  
2 get in a few digs, and I don't think we ought to lead  
3 either side into temptation in that way.

4 MR. TUCKER: Would it address your concern  
5 if we made it where they could only do it by, say, written  
6 submission so there is not this face-to-face discussion?

7 HONORABLE DAVID PEEPLES: It takes away the  
8 problem I just mentioned about expanding the discussion.  
9 I do think, though -- this is an empirical guess on my  
10 part. If I'm a lawyer and I have an opportunity to see  
11 the judge one-on-one just with me and her, that's not  
12 scary to me. To have to go in there and fight with the  
13 other side and convince the judge, that's not something  
14 I'm looking for nearly as much as the ex parte  
15 opportunity. I think there will be much more of these ex  
16 parte visits than there would be adversary hearings if we  
17 require them.

18 CHAIRMAN BABCOCK: Professor Albright.

19 PROFESSOR ALBRIGHT: This is just kind of an  
20 off the wall idea that popped in my mind when David was  
21 talking, and I don't have the statute in front of me so I  
22 don't know if it would comply with the statute, but a  
23 justice of the peace court hearing is a very different  
24 animal from a district court hearing because you are going  
25 to have that trial de novo. What if you said that the



1 only person who could request an order of discovery is the  
2 judge so then it is the judge that decides? You know,  
3 it's almost like in Europe where the judge is making the  
4 inquiry and the judge needs more information to make the  
5 decision, the judge then orders discovery, but if the  
6 judge says, you know, "We've got a contract here and I  
7 don't see there's any need for anything else," and you  
8 haven't said anything that you need anything else. I  
9 don't know, just throwing that out.

10 CHAIRMAN BABCOCK: Justice Gray.

11 HONORABLE TOM GRAY: I wasn't going to  
12 propose this until Alex suggested that, but what I just  
13 jotted down, it's got too many commas in it right now.  
14 "The trial court must order only that discovery, if any,  
15 limited to that considered appropriate and permitted by  
16 the judge to be exchanged no less than 48 hours before the  
17 trial." And then it's everything from the judge's  
18 perspective, like she says, of it's -- he's got to develop  
19 the trial, the evidence of the case. This is what the  
20 judge orders, and it uses the terminology of the statute,  
21 provides a deadline by which to exchange it.

22 CHAIRMAN BABCOCK: Professor Albright.

23 PROFESSOR ALBRIGHT: But it's almost like --  
24 how's the judge going to really know until you're at the  
25 trial?

1 HONORABLE TOM GRAY: That's the beauty of  
2 it, you don't order anything.

3 PROFESSOR ALBRIGHT: Oh, okay. I was kind  
4 of thinking more like you're in the middle of trial. You  
5 know, there's no discovery until trial, and you're at the  
6 trial and the judge says, "Well, you know, I can't decide  
7 this because I need to know X, so I want y'all to go off  
8 and find X, come back tomorrow." I don't know. The two  
9 days before, I just think it's in -- then it gets more  
10 like discovery, but I guess what you're saying is maybe  
11 the judge would never do it.

12 HONORABLE TOM GRAY: Where I could see there  
13 being something that the judge would have a standing  
14 order, like in the credit collection cases.

15 CHAIRMAN BABCOCK: Yeah.

16 HONORABLE TOM GRAY: You know, any record of  
17 payment that you think you have you've got to produce it  
18 to the other side. Anything that you contend is owed,  
19 documentary evidence, you have to produce it to the other  
20 side. You know, I could see a standing order in a JP  
21 court on something like that.

22 CHAIRMAN BABCOCK: Got it. Peter.

23 MR. KELLY: It seems like we might be going  
24 towards something, which makes more sense to me, is 507,  
25 pretrial discovery, "The discovery shall" -- "The judge

1 shall completely control the scope and timing of  
2 discovery. Any disputes will be handled by motion  
3 pursuant to Rule 508." Get rid of the ex parte problem.  
4 Different JPs can have different rules depending on the  
5 type of cases they're handling. You can have standing  
6 orders for credit card cases and standing orders for other  
7 types of cases. Just say it's under the control of the  
8 judge and that shifts it to the European inquisitorial  
9 system closer than the adversarial system and seems to  
10 solve a lot of these problems.

11 CHAIRMAN BABCOCK: Okay. Let's move on to  
12 507.1, post-judgment discovery.

13 MR. TUCKER: Okay. What we tried to do with  
14 this is two things. Number one, we decided to not have it  
15 be required to be filed with the court because now we have  
16 parties that are in the position of judgment creditor and  
17 judgment debtor, so the judgment creditor we thought had  
18 stronger arguments to be able to get this information, and  
19 we also outlined an objection procedure for the party who  
20 is receiving that, just because, you know, these type of  
21 discovery requests I think your average layperson is going  
22 to be more likely to be uncomfortable with or object to  
23 because often these are financial things. You know, give  
24 us your past three years of tax returns, give us your bank  
25 account information, give us how much money you have

1 there, tell us what stocks you have, things like that.

2           So we laid out the procedure that they can  
3 file an objection. Then the judge would have a hearing to  
4 determine if it's valid, and if it -- if the objection is  
5 overruled then the judge orders them to respond. If it's  
6 upheld the judge can either modify the request or dismiss  
7 it entirely, and the reason that we thought that a hearing  
8 was okay here, this is going to be something that's much  
9 less frequent in our courts. Our busy courts are going to  
10 have a lot of pretrial discovery still filed.  
11 Post-judgment is going to be less frequent and also it's  
12 going to be a little bit more contentious.

13           CHAIRMAN BABCOCK: Justice Bland.

14           HONORABLE JANE BLAND: How is post-judgment  
15 discovery handled right now in justice courts?

16           MR. TUCKER: The same as it is in county and  
17 district court. In justice court. In small claims court  
18 it's silent. The Rules of Civil Procedure don't apply to  
19 small claims court. It says the judgments are enforced as  
20 they are in justice court, and there's some debate over  
21 does that include post-judgment discovery or not. So  
22 small claims courts, vague and amorphous. In justice  
23 court it's under the regular rules right now.

24           CHAIRMAN BABCOCK: Okay. Richard.

25           MR. ORSINGER: I might be fitting things

1 together that don't belong, but under section 5.02 of  
2 House Bill 79 it says that the Supreme Court may not adopt  
3 rules that require that discovery rules be adopted, except  
4 to the extent the JP hearing the case determines that they  
5 must be followed to ensure that the proceeding is fair to  
6 all parties. Now, the proceeding may be over. I mean,  
7 someone might argue the proceeding is the trial, but what  
8 bothers me generally is that there's a specific preclusion  
9 of rule-making authority to require any discovery, and yet  
10 we're allowing one party to issue discovery on the other  
11 side and then it's up to them to object before they come  
12 to court and we find out whether the JP allows it or not,  
13 and are we going too far? Should we not require the JP to  
14 allow the discovery before it's sent rather than just rule  
15 on an objection afterwards?

16 MR. TUCKER: Yeah, and that's a possibility.  
17 As far as the policy that's certainly debatable. We  
18 thought it didn't violate the statute because the statute  
19 says you can't require the specific Rules of Civil  
20 Procedure that deal with the discovery to be followed, and  
21 we're not. We created a separate standalone post-judgment  
22 discovery proceeding, so that's not -- it's not like we  
23 said, "Follow Rules 194.5" or whatever it is. We said  
24 these are the things that you -- you know, you file it, so  
25 we don't think it violates the statute. Obviously if it's

1 the best solution is up for debate.

2 MR. ORSINGER: Well, what discovery is  
3 allowed under this rule? You have to go back to the  
4 regular civil rules to find out you can send  
5 interrogatories. You certainly can't set a request for  
6 disclosure post-judgment, right, but you could send a  
7 request for production, but all of that is in the rules of  
8 procedure, so if you have a rule that's saying the  
9 plaintiff can just issue this discovery against the  
10 defendant and it's up to the defendant to come in and  
11 object and then the judge decides what's allowable, aren't  
12 you -- aren't you putting a discovery mechanism in place  
13 in contrary to the -- before the judge has said it's okay  
14 and isn't that what's banned?

15 CHAIRMAN BABCOCK: Justice Bland, then  
16 Bobby.

17 HONORABLE JANE BLAND: I agree with Richard.  
18 I understand why you split out post-judgment discovery and  
19 made it separate, but it seems like you ought to have one  
20 discovery rule, and that discovery rule ought to require  
21 discovery only when ordered by the judge. Because the  
22 only discovery allowed is that considered appropriate and  
23 permitted by the judge, and since -- since that's what the  
24 statute says, this post-judgment discovery scheme really  
25 does allow for discovery that hasn't been approved by the

1 judge.

2 MR. TUCKER: You know, I think that's a  
3 valid and fair point. I think the task force, you know,  
4 made a distinction at least in part, again, because you  
5 know, you're really in a bad spot if you get this judgment  
6 and the judge has said, "Well, no, I'm not -- I'm just not  
7 going to forward this on, I think that's oppressive."  
8 When I'm in a different position now, plaintiff versus  
9 defendant versus judgment creditor versus judgment debtor,  
10 but, I mean, it certainly is a very, very valid argument  
11 that it could be read as violating what the Legislature  
12 requested.

13 HONORABLE RUSS CASEY: I think that the task  
14 force interpreted it -- right now we have different rules  
15 for pre- and different rules for post-, and so I think  
16 that we interpreted -- and in small claims court.

17 CHAIRMAN BABCOCK: Bobby. I'm sorry, Judge.  
18 Bobby.

19 MR. MEADOWS: The point I want to make is  
20 that I don't believe the statute permits a license to  
21 write new rules. I mean, the way I read it, it says  
22 there's a prohibition against requiring the discovery  
23 rules adopted under the Rules of Civil Procedure and  
24 Evidence, unless the judge determines otherwise, in which  
25 case the rules, he determines the rules must be applied.

1 So we can't require them. Discovery can only be permitted  
2 if the judge makes a determination that it's required  
3 to -- so that the proceedings will be fair to both  
4 parties, in which case, the rules -- he has to grab from  
5 the rules that we can't require for the -- to ensure that  
6 the proceeding is fair. So I don't think it's a license  
7 to just write something new. I think it's a require --  
8 you can reach up and grab a discovery rule if the judge  
9 determines that rule is necessary.

10 CHAIRMAN BABCOCK: Okay. Any other comments  
11 on 507.1? Moving right along. 508, pleadings and  
12 motions.

13 MR. TUCKER: Okay. The current rule allows  
14 for oral pleadings and motions in justice court. That's  
15 kind of an antiquated procedure. It's pretty difficult to  
16 kind of notate these things in the docket, write someone's  
17 answer down verbally and things like that, so what the  
18 task force did is said, no, everything needs to be written  
19 and signed other than oral motions during trial or when  
20 all parties are present. So if we're at a hearing and one  
21 side wants to make an oral motion and the other side is  
22 there to understand what they're saying, we thought that  
23 was fine, but otherwise any submissions need to be in  
24 writing.

25 CHAIRMAN BABCOCK: Okay. Any comments about



1 this? Carl.

2 MR. HAMILTON: So this is in conflict with  
3 Rule 525, and which one controls?

4 MR. TUCKER: Current Rule 525 or proposed  
5 Rule 525?

6 MR. HAMILTON: Current Rule 525.

7 MR. TUCKER: Yeah. We scrapped that.

8 MR. HAMILTON: And that will be deleted?

9 MR. TUCKER: Yeah.

10 CHAIRMAN BABCOCK: All right. Any other  
11 comments? Okay. Let's go to 509, petition.

12 MR. TUCKER: Okay. Again, to try to make  
13 things very simple for pro se litigants, try to kind of  
14 expand this out and give them a walk through of what  
15 they're supposed to be doing, lay out what has to be in  
16 the petition. Notice here -- that's where we have e-mail  
17 contact information where the plaintiff consents to accept  
18 service of the answer and any other motions or pleadings,  
19 not required to accept it. Then (b) we talk about paying  
20 filing fees and service fees and what has to be in the  
21 statement of inability to pay, so on and so forth, and  
22 then provide a mechanism where the defendant can contest  
23 the affidavit of inability to pay within 20 days of the  
24 day your answer is due.

25 CHAIRMAN BABCOCK: Okay. Comments?

1 Richard.

2 MR. ORSINGER: Is this a pre-existing list  
3 that already is out there, or did y'all write it?

4 MR. TUCKER: No. We created it.

5 MR. ORSINGER: I would suggest that you  
6 consider adding that if the lawsuit is based on a contract  
7 that a copy of the contract be attached to the petition,  
8 whether it's a lease or --

9 HONORABLE RUSS CASEY: I think we have a lot  
10 of objection to that.

11 MR. ORSINGER: You would, why?

12 HONORABLE RUSS CASEY: Okay, back to the  
13 credit card cases, a lot of times they have absolutely no  
14 copy of that.

15 MR. ORSINGER: I see what you're saying. So  
16 a lot of these plaintiffs can't produce an original  
17 document.

18 MR. TUCKER: Right. Or we could be under a  
19 verbal contract.

20 CHAIRMAN BABCOCK: Speak up, guys, because  
21 nobody down there could hear that. There would be  
22 objection to attaching a contract to the pleading because  
23 a lot of times people don't have the contracts. Is that a  
24 fair summary of what you just said?

25 MR. TUCKER: Yeah, or it would be verbal,

1 verbal contract.

2 CHAIRMAN BABCOCK: Okay. Any other comments  
3 about the petition? Going once, going twice. 510, venue.

4 MR. TUCKER: Okay. There was a lot of  
5 discussion in the task force about how we wanted this to  
6 look. There was a partial feeling of, look, we don't need  
7 to reproduce things that are elsewhere. There was also a  
8 feeling that this doesn't reach every possible scenario,  
9 and there was also the thought of, well, these are  
10 supposed to be a play book for someone that has no legal  
11 training, shouldn't we include in the play book where you  
12 should file your suit, and so what we have here was kind  
13 of a compromise between that.

14 We have a general statement of what venue is  
15 proper, and that's (a), (b), (c), (d) there, and then we  
16 have the disclaimer that comprehensive laws regarding that  
17 are found in Chapter 15 of the Civil Practice and Remedies  
18 Code, which is available for examination, a clause on  
19 whether they're a nonresident or an unknown resident, and  
20 also a notice if the plaintiff files in an improper venue  
21 that a motion to transfer may be filed, and if that  
22 happens, you're going to have to pay filing fees in the  
23 new court and not get a refund of what you already paid,  
24 just as kind of a heads up, you need to pay attention to  
25 what you're doing, these are the consequences if you

1 don't.

2 CHAIRMAN BABCOCK: Okay. Comments?

3 Richard? Carl? Justice Gray.

4 HONORABLE TOM GRAY: I need to back up to  
5 (b)(1) -- 509(b)(1). I just noticed that it had a form of  
6 the jurat for the statement of inability to pay, and there  
7 is the new statute that authorizes a sworn statement  
8 without a notary, and that just needs to be harmonized  
9 with that new statute, that you can make a statement on  
10 oath and not be before a notary, it would seem to me.  
11 Unless you -- unless you expressly intend to require it  
12 not to be under that new statute.

13 MR. TUCKER: Yeah, in the second paragraph  
14 there it says "shall be sworn before a notary or other  
15 officer or signed under penalty of perjury."

16 HONORABLE TOM GRAY: Oh, I'm sorry. I  
17 missed that part. Apologies.

18 CHAIRMAN BABCOCK: Okay. Any other  
19 comments? Okay. Let's move on to 522, motion to transfer  
20 venue.

21 MR. TUCKER: Okay. This one may also be  
22 controversial here. We have a lot of parties that end up  
23 falling in the trap door as far as venue because they  
24 don't know when I file a general denial I just accepted  
25 the plaintiff's venue if I don't object right now. You

1 know, that's something that happens a frequent amount. So  
2 what we decided to do was expand the time frame where a  
3 defendant can file a motion to transfer venue, and so we  
4 give the defendant 20 days after they file their answer to  
5 contest venue, contain a sworn statement that the venue  
6 chosen by the plaintiff is improper, and say what county  
7 and precinct it should be transferred to. Current JP  
8 rules say the defendant has to specify the county and  
9 precinct or the motion is defective. What we put in this  
10 is they have to specify that, but if they fail to do so  
11 the court has to give the defendant -- to inform them and  
12 give the defendant the 10 days to cure that defect. Then  
13 if they fail to cure, we're going to go ahead and deny  
14 their motion.

15           We then outline the procedure for a hearing  
16 on the motion to transfer venue and that they can present  
17 evidence and legal arguments at the hearing. We also  
18 allow appearance by telephone or electronic communication  
19 system by permission of the court, and no interlocutory  
20 appeal for that, and that no trial can be held until at  
21 least 15 days after the judge has ruled. Once it's  
22 granted the court should transfer it and then the  
23 plaintiff gets notified that they have 10 days to pay the  
24 filing fee in the new court or they get their case  
25 dismissed without prejudice.

1 CHAIRMAN BABCOCK: Robert.

2 MR. LEVY: Questions, one, could you seek to  
3 transfer venue from within a county to another precinct?

4 MR. TUCKER: Yes, sir.

5 MR. LEVY: So is that clear in this? I  
6 think you might be able to spell that out that that's an  
7 option, and then is it a defect if you're not sure which  
8 precinct it is if you don't include that? That would seem  
9 to be a little onerous.

10 MR. TUCKER: Yeah, and that's why we tried  
11 to -- tried to make it less Draconian. Like I said, right  
12 now if you did that and you filed it and you just didn't  
13 know the way the rule is right now, too bad, so sad, you  
14 just accepted venue. That's why we wanted to at least  
15 give the defendant time to cure that and, you know, have a  
16 chance to get it to the proper venue.

17 MR. LEVY: But it's the court -- you know,  
18 it puts a lot of burden on the court to figure that out.  
19 Shouldn't that be the opposing party to raise that issue?

20 MR. TUCKER: Well, but the problem is if no  
21 one opposes it, where does the court transfer it to?

22 HONORABLE R. H. WALLACE: He doesn't.

23 MR. TUCKER: If he doesn't specify what  
24 court to transfer it to where is the court supposed to  
25 send it? If they say it should be Harris County, there's

1 16 JPs in Harris County. Which one are we supposed to  
2 give it to? So that's the issue of why we really need a  
3 precinct specified, but at least now we're giving them a  
4 chance, and we'll warn you, hey, you have to give us a  
5 precinct, and if you can't do that -- basically if they  
6 really can't argue what precinct is correct then it kind  
7 of defeats their argument that -- you know, you're not  
8 telling us where it should be.

9 MR. LEVY: Well, you might know it needs to  
10 go to Lubbock County but how would you know what precinct,  
11 and I guess you could figure it out by going to a precinct  
12 map.

13 MR. TUCKER: Right. Yeah.

14 CHAIRMAN BABCOCK: Justice Hecht.

15 HONORABLE NATHAN HECHT: This doesn't apply  
16 in eviction cases?

17 MR. TUCKER: Right. No, it's not going to  
18 apply in eviction cases because there's -- right, the  
19 Property Code statutorily sets jurisdiction in eviction  
20 suits where they have to be in the precinct where the  
21 property is located, and so if your argument as a  
22 defendant was, look, the property is not in this precinct,  
23 it wouldn't be a motion to transfer venue. It would be a  
24 plea to the jurisdiction saying, "Court, you have to  
25 dismiss this."

1 HONORABLE NATHAN HECHT: And how many  
2 motions to transfer venue -- how common are they?

3 MR. TUCKER: Not hugely common, frankly. I  
4 think a lot of people are unaware. I would anticipate it  
5 would be slightly more common under this proposal because  
6 it's more clearly laid out and we're giving the defendant  
7 the chance to do it after their -- for a brief period  
8 after their answer. I think sometimes people answer and  
9 then they don't realize and so now they can't make a  
10 motion.

11 HONORABLE NATHAN HECHT: But is encouraging  
12 more of them a good thing? Are defendants being taken  
13 advantage of here?

14 MR. TUCKER: On occasion. I don't think  
15 it's a widespread problem, but I don't think -- I think  
16 it's a good thing to have more of the cases heard in what  
17 the proper venue would be, yes.

18 HONORABLE RUSS CASEY: I think one of the --  
19 I would say that the plurality at least of motions to  
20 transfer venue I receive are prepared by attorneys, and a  
21 good portion of those do not have a precinct named because  
22 they're unfamiliar with the JP rules, and it really  
23 embarrasses an attorney when you tell him that his motion  
24 has failed.

25 MR. TUCKER: Have to polish up the old



1 malpractice insurance.

2 CHAIRMAN BABCOCK: Maybe, maybe not.

3 MR. TUCKER: One other thing why this is  
4 important in our courts, too, is we have a lot of lay  
5 plaintiffs. A lot of lay plaintiffs just go file it in  
6 the JP court where they live, and so there's a lot of time  
7 where it's not just I live in Harris County, but I'm in  
8 precinct seven and they're suing me in precinct six. It's  
9 I live in Houston, and they live Midland, and they just  
10 sued me in Midland. Yeah, so, yeah, I think it's the  
11 precinct.

12 CHAIRMAN BABCOCK: Judge Wallace, and then  
13 Elaine.

14 HONORABLE R. H. WALLACE: It seems to me it  
15 should be clear. If we're going to say that the court  
16 must inform the defendant of the defect, as I understand  
17 what you're saying is the court needs to tell him, "You  
18 need to name a specific precinct and county," period.

19 MR. TUCKER: Yes, sir.

20 HONORABLE R. H. WALLACE: The court is not  
21 going to get into deciding which precinct and county, all  
22 that it might be.

23 MR. TUCKER: Absolutely.

24 HONORABLE R. H. WALLACE: I think that -- I  
25 think it should state something that if the motion fails

1 to specify the county and precinct the court must inform  
2 the defendant to specify the precinct and county and give  
3 him 10 days to do so, so that it's clear that the judge is  
4 not giving him legal advice.

5 MR. TUCKER: Yeah, no, I think that's a very  
6 good point. Any language that we can put in to clarify.  
7 The judge should absolutely not say, "Oh, you need to put  
8 precinct four on there" or anything like that. It's "You  
9 need to tell us what precinct you want to send it to."  
10 Absolutely.

11 CHAIRMAN BABCOCK: Professor Carlson.

12 PROFESSOR CARLSON: So a defendant, let's  
13 say you've got a defendant represented by counsel, could  
14 get some rulings by the court and then if we're not happy  
15 with the rulings we could still move to transfer venue,  
16 and would those rulings made by the first court be binding  
17 on the subsequent court? Would it maybe be better to put  
18 more notice on the citation to the defendant if you think  
19 that the place where the suit has been brought is improper  
20 you must raise that along with your answer?

21 MR. TUCKER: Yeah, you know, that's a valid  
22 point and something that could be considered. I think  
23 what frequently happens is people just will kind of do a  
24 little bit of homemade legal research or they know  
25 somebody who knows a lawyer and they'll just say, "All you

1 need to do is file a general denial" and then that's done  
2 and then it's oops, but --

3 PROFESSOR CARLSON: I understand the  
4 problem, but I just think that it's subject to abuse. I  
5 mean, that's why we have the due order of pleadings, I  
6 guess, so you can't get rulings and say, "Well, I don't  
7 like this court, but I've got this ace in the hole venue  
8 change."

9 CHAIRMAN BABCOCK: Judge Peeples.

10 HONORABLE DAVID PEEPLES: Rule 522, your  
11 motion to transfer venue is made because the venue you've  
12 chosen is improper, and 510 gives a list of where proper  
13 venue would be. 509, the petition, as I read it, does not  
14 require the plaintiff to say why venue is proper, so I  
15 guess the defendant would have to just say, "Well, I don't  
16 live here" or "The accident didn't happen," just refute  
17 all the listed proper places of venue.

18 MR. TUCKER: Yeah, or, you know, yeah, the  
19 defendant could say, "This is not where I live or where  
20 the accident happened, and it needs to be in Harris County  
21 precinct five."

22 HONORABLE DAVID PEEPLES: Well, but there  
23 are four -- in 510 there are four different bases for  
24 venue. I guess you would have to deny all four of them,  
25 but I guess my question really is we don't want the

1 plaintiff to have to say in the petition why venue is  
2 proper in the precinct. That might be a lot, but since  
3 the plaintiff doesn't have to say that, the defendant will  
4 have to refute everything in 510?

5 MR. TUCKER: I wouldn't think so, but, I  
6 mean, that's possible. I mean, like (c) is -- only  
7 applies to contract case.

8 HONORABLE DAVID PEEPLES: Yeah.

9 MR. TUCKER: So if this is a tort, I don't  
10 think I have to say, well, there's not a contract.

11 HONORABLE DAVID PEEPLES: "I don't live  
12 here, and this didn't happen here, and the contract is  
13 proper."

14 CHAIRMAN BABCOCK: Lisa.

15 MS. HOBBS: I like the idea of having the  
16 venue required in the petition, but that's not actually  
17 why I raised my hand, and now I'm forgetting why. Oh,  
18 when you do your JP education I assume you educate them on  
19 venue, like that's something you might cover.

20 MR. TUCKER: Yeah.

21 MS. HOBBS: Do you have a list of -- that's  
22 more exhaustive than these four, or is this basically what  
23 you teach them, these four things?

24 MR. TUCKER: Well, we teach them where they  
25 can find that. There are some of the things that are

1 mentioned, but, I mean, we don't -- we don't generally  
2 have a four-hour -- because a lot of the venue things are  
3 very nuanced and specific, and when we have limited  
4 classroom time, you know, that's not always the best use  
5 of that time is to address things that are literally a one  
6 in 500,000 case thing.

7 MS. HOBBS: Yeah, and I didn't mean to  
8 challenge your --

9 MR. TUCKER: No, no, no.

10 MS. HOBBS: Really, what I was getting at,  
11 do you have like a cheat sheet that you use that has a  
12 more exhaustive list than these four things?

13 MR. TUCKER: No, I would say those four  
14 pretty much cover what we teach as the basics, yes.

15 CHAIRMAN BABCOCK: What -- you say you don't  
16 think there is much abuse, but how would the abuse occur?  
17 If a plaintiff was trying to gain an edge in the case,  
18 how -- what would be some of the factors they would be  
19 thinking about in filing in the wrong venue?

20 MR. TUCKER: I, frankly, don't think it's  
21 generally done for abuse. I think it's generally done as  
22 just a lack of knowledge. I think someone says, "This guy  
23 owes me money, I'm going to go to the JP court and file a  
24 lawsuit and get my money," and they go to the one where  
25 the plaintiff lives rather than the one where the

1 defendant lives because that's what's convenient for them.

2 CHAIRMAN BABCOCK: But you could file in,  
3 you know, south of the Trinity River in Dallas as opposed  
4 to Plano, and if you're going to have a jury you would  
5 have a much demographically different jury.

6 MR. TUCKER: And I think that occurs from  
7 time to time, but I honestly think it's generally when the  
8 plaintiff files something that it's generally done out of  
9 just this is what's closest to me, this is what's  
10 convenient, I don't understand that's not where I'm  
11 supposed to file it.

12 CHAIRMAN BABCOCK: Okay. Anything more on  
13 522? We good? Lisa, your hand down? All right. Let's  
14 move to the next rule, which is 523, fair trial venue.

15 MR. TUCKER: Okay. And this is a tricky  
16 one. The Supreme Court has recently said that the recusal  
17 rules don't apply to justice of the peace court, Rule 19  
18 doesn't apply to JP court, so that means a party can't go  
19 to the JP under the recusal rules and say, "Recuse  
20 yourself under Rule 19. Instead what we have to follow is  
21 Rule 528, which is in our current rules. Rule 528 has  
22 several things that we feel are problematic with it.  
23 Number one, how -- current Rule 528 says if a party feels  
24 that they can't get a fair trial before a judge or in a  
25 precinct, they file an affidavit with the court along with

1 the affidavit of two credible persons, and then the court  
2 will automatically move it to the nearest justice of the  
3 peace in the county.

4           Okay. Well, that creates several problems.  
5 Number one, sometimes there's not a nearest justice of the  
6 peace in the county. We have several counties where  
7 there's only one justice of the peace in the entire  
8 county, so what happens then? Another issue is eviction  
9 suits. What happens when I file this motion in an  
10 eviction suit and the rule says "shall transfer to the  
11 nearest justice of the peace in the county," and guess  
12 what? Now that court has no jurisdiction over that  
13 eviction case because the eviction jurisdiction is only  
14 for that specific precinct. So we tried to modify that to  
15 address those problems.

16           The first thing we did, we took away the two  
17 credible persons requirement. I think that's pretty much  
18 just perfunctory. They have to file a sworn statement  
19 stating they can't get a fair trial, and we added a  
20 requirement that they specify if they're objecting to the  
21 location or the judge, and they have to file that at least  
22 seven days before trial unless the sworn statement shows  
23 good cause why they didn't file it seven days before  
24 trial. So maybe they're driving in for their trial that  
25 morning and they cut off the judge in traffic and flip him

1 off, and now they're like "Uh-oh, I need to transfer this  
2 because this guy hates me now."

3           So if they're seeking a change in the judge  
4 the process is the judge shall exchange benches with  
5 another qualified justice, or if one's not available, the  
6 county judge shall appoint a visiting judge to hear the  
7 case. Exchange of benches is already authorized under the  
8 Government Code, so that's just -- I don't want this judge  
9 -- we don't need to move the case. I'm not objecting to  
10 the precinct. We just need to exchange benches and have a  
11 different judge come hear the case. If the party seeks a  
12 change in location, the case shall be transferred to any  
13 other precinct in the county requested. If no specific  
14 precinct requested, to the nearest justice. If there's  
15 only one justice then the judge shall exchange benches or  
16 the county judge shall appoint a visiting judge, and then  
17 we have add the caveat, "Where exclusive jurisdiction is  
18 within a specific precinct the only remedy available is a  
19 change in presiding judge."

20           We're not going to move it out of that  
21 precinct because it can't be moved, and we say you can  
22 only do this one time in any given lawsuit because what's  
23 been hypothesized before is you could just file one of  
24 these with every judge in the county, and in the current  
25 rules it's just automatic that it has to keep being moved.



1                   CHAIRMAN BABCOCK: So you can just file a  
2 sworn statement and say that, you know, I don't -- "I  
3 don't get along well with Martians and the judge is from  
4 Mars and he's got to transfer it"?

5                   MR. TUCKER: Under the current rule if you  
6 do that and have the affidavit of two credible persons,  
7 then yes.

8                   CHAIRMAN BABCOCK: Well, I get Hecht for one  
9 and Marisa would be the other. Justice Bland.

10                  HONORABLE JANE BLAND: It looks like all a  
11 party has to say is "I believe I cannot get a fair  
12 trial. Signed, the party." And it seems like this would  
13 really be used for forum shopping by parties that in  
14 particular appear in justice courts all the time.

15                  MR. TUCKER: Yeah.

16                  HONORABLE JANE BLAND: And I'm wondering if  
17 the solution does more harm than any one particular case  
18 staying right where it is and the parties exercising their  
19 right on appeal.

20                  MR. TUCKER: Yeah. I mean, I, frankly --  
21 and I'm not really speaking for the task force now, just  
22 I'm speaking personally as trainer for the -- I mean, I  
23 would have no real problem eliminating this as a remedy or  
24 having some sort of review of the statement, but yet  
25 it's -- and that's how it is right now. There's no review

1 of the statement. There's no test of the credibility.  
2 There's nothing. It's just an automatic transfer. So we  
3 tried to -- we tried to preserve that right to a fair  
4 trial while trying to eliminate some of that, but I would  
5 agree that that's a fair statement that it does -- it does  
6 open up an avenue for forum or judge shopping.

7 CHAIRMAN BABCOCK: Richard.

8 MR. ORSINGER: Yes, the way this is written,  
9 I mean, the judge doesn't dispose of the case on the first  
10 day it comes before him, if it's reset or if there's delay  
11 for discovery or whatever. As long as it's seven days  
12 before trial you can just basically peremptorily strike  
13 the judge. I think that's the way this works, and so  
14 we -- I don't think that that's a responsible way to run a  
15 judicial system if the people that are elected to perform  
16 this judicial function just are going to be knocked out  
17 for any reason. Either we ought to get rid of it or we  
18 ought to have someone else decide whether the judge should  
19 be recused, but allowing pro se litigants to get rid of a  
20 judge before they meet him or after a hearing if the trial  
21 is reset, to me that's an intolerable way to run it when  
22 these people are elected to do this job by the people.

23 CHAIRMAN BABCOCK: Buddy, and then Judge  
24 Casey.

25 MR. LOW: And the thing that bothers me the

1 most is on the venue that you can't get -- you could just  
2 file an affidavit and say, "The service station manager  
3 there has been badmouthing me, and I don't think I can get  
4 a fair trial there," and that's all he has to do. That  
5 might be true, and are you saying by statute that he has  
6 to transfer it then or get another judge?

7 MR. TUCKER: Yeah, that's how the rule is  
8 right now, and if you look at the recusal rule -- it  
9 doesn't apply to us, but the recusal rule, they can file  
10 that up to 10 days before the trial, so we thought if it's  
11 10 days for these courts, 7 days for us is pretty  
12 reasonable as far as the time frame. I mean, we would  
13 also be amenable to being able to utilize that recusal  
14 rule, but we didn't think that was an option.

15 CHAIRMAN BABCOCK: Judge Casey, and Justice  
16 Bland.

17 HONORABLE RUSS CASEY: Just personally, I  
18 would not have a problem if you decided to change Rule 18  
19 where it did include justice of the peace.

20 CHAIRMAN BABCOCK: Justice Bland.

21 HONORABLE JANE BLAND: Was there a perceived  
22 problem with Rule 528?

23 MR. TUCKER: Yes. Two major problems.  
24 Number one, it says "the nearest precinct in the county or  
25 the nearest justice." Sometimes there's only one, and

1 also when you -- you mandate transfer out of that  
2 precinct, you could lose jurisdiction for eviction suits.  
3 So if I'm a tenant being evicted, I'm just going to file a  
4 Rule 528 motion. Nobody gets to deny it, and now my  
5 eviction suit gets moved to a court that has no  
6 jurisdiction and must be dismissed.

7 HONORABLE JANE BLAND: I meant with respect  
8 to the requirements for seeking --

9 MR. TUCKER: Ah.

10 HONORABLE JANE BLAND: -- the transfer, not  
11 with the kind of effect of the transfer. In other words,  
12 were people saying too difficult to get two credible  
13 witnesses, or were JPs saying, I'm -- too difficult to  
14 determine when I need to recuse? In other words, why are  
15 we making it very easy to transfer a case out when it  
16 doesn't look like there were a lot of complaints about the  
17 process up until now?

18 MR. TUCKER: Right. The thought process  
19 when we discussed it in the meeting was if this is  
20 automatic then really, I mean, what is the benefit of  
21 having these other two statements when it's just an  
22 automatic rubberstamp thing. If there was some sort of  
23 review process where someone is -- another judge, for  
24 example, is going to review this then it makes sense to  
25 have these other affidavits, but when these other

1 affidavits are basically fodder, I mean, you know, it's  
2 just not very -- we didn't feel it was very helpful, but I  
3 mean, we have no objection to adding that back in if that  
4 would somehow chill frivolous motions under this rule.

5 CHAIRMAN BABCOCK: Judge Casey.

6 HONORABLE RUSS CASEY: Well, I mean, just  
7 personally, if someone gave me a motion to recuse myself  
8 and only had one credible person, I'm still going to  
9 recuse myself. You know, it was one of those things that  
10 if that motion is valid then by all means let's get them a  
11 new judge. Let's not try to make it any difficult --  
12 let's not try to make it meet some specific criteria. Get  
13 a new judge. Make it as simple as possibly can be. "I  
14 can't get a fair trial here, I want a new trial," okay,  
15 get a new trial.

16 MR. LOW: But that assumes the motion is  
17 valid.

18 CHAIRMAN BABCOCK: Yeah.

19 MR. LOW: You don't even know the person and  
20 he files it, does that make it valid?

21 HONORABLE RUSS CASEY: Under the current  
22 rule I can't question it.

23 MR. ORSINGER: What happens if they file a  
24 motion against the replacement judge and then the one  
25 after that?

1 MR. TUCKER: In the existing rule that's a  
2 current problem, and that's why we added that they can  
3 apply for this relief under this rule only one time in a  
4 given lawsuit, because that's another method that has been  
5 used, is to transfer from every court in a county. Now  
6 they're all barred and disqualified, and every time it's  
7 just a mandatory transfer, so that's why we tried to cap  
8 that at once.

9 CHAIRMAN BABCOCK: Richard.

10 MR. ORSINGER: Okay. I think I made my  
11 point -- I made my position clear earlier. I am totally  
12 against this automatic recusal. I think it's an awful  
13 idea, and it may be not as bad in practice as it is in my  
14 imagination. The other problem is you can't get a fair  
15 trial in a specific precinct means to me you can't get an  
16 unbiased jury. Is that what that is supposed to be?

17 MR. TUCKER: Sure. Yeah.

18 MR. ORSINGER: And are the jurors from just  
19 the precinct, or are they from the county?

20 MR. TUCKER: Precinct.

21 MR. ORSINGER: So if you go out and grab six  
22 guys that are out in front of the vehicle -- you know,  
23 Department of Motor Vehicles trying to get their licenses  
24 how do you know what precinct they're from? Do you look  
25 at their voting card, or how do you know that you're

1 pulling a panel from the precinct?

2 MR. TUCKER: Yeah, county level  
3 electronically that's how it's done. It's a valid point  
4 when you have to just go and do the juror round-up.  
5 That's pretty rare, the juror round-up.

6 MR. ORSINGER: It is? Man.

7 CHAIRMAN BABCOCK: Justice Gray.

8 HONORABLE TOM GRAY: It also seems a little  
9 bit odd that if the defendant wants to do this very easy  
10 procedure he gets transferred to the precinct requested by  
11 the defendant, and it just seems like there should be a  
12 straight default to the closest precinct, which is the  
13 default if no specific precinct is requested.

14 MR. TUCKER: Yeah, and I think that makes  
15 sense. The reason we didn't do it that way, the thought  
16 process was there is that there could be some other issue  
17 explicitly with the nearest judge and then when it gets  
18 moved to that court I'm barred because I can only do this  
19 once. So I can't move it out of that court, and you know,  
20 if the committee and the Court wanted to say, well, too  
21 bad, you didn't decide which poison is worse, that's fine,  
22 too, but that was the thought process in not just doing  
23 the closest, is that the closest judge may also have some  
24 recusal grounds to -- for that defendant.

25 CHAIRMAN BABCOCK: Okay. Yeah, Professor

1 Carlson.

2 PROFESSOR CARLSON: I don't recall whether  
3 the constitutional disqualification of judges is limited  
4 to district courts, or is that applied to all judges?

5 MR. TUCKER: It applies -- disqualification  
6 applies to our folks, just not the recusal process.

7 PROFESSOR CARLSON: Okay. Thank you.

8 HONORABLE ANA ESTEVEZ: I just agree with  
9 Richard and Justice Bland. I don't see any need to make  
10 it so easy to get rid of a judge and forum shop.

11 CHAIRMAN BABCOCK: Could you talk up just a  
12 little bit, please?

13 HONORABLE ANA ESTEVEZ: I agree with Richard  
14 and Justice Bland. I don't believe there's any reason to  
15 make it this easy for people to forum shop. I think  
16 it's -- I think it's a bad rule.

17 MR. TUCKER: What hurdles would be good to  
18 impose?

19 HONORABLE ANA ESTEVEZ: I don't know. Let  
20 me think about that for a few minutes.

21 MR. ORSINGER: See, the problem is if you  
22 have a presiding judge like Judge Peeples, we've now just  
23 added God knows how many of these recusals for him to have  
24 to do in his daily work, and so rather than put in an  
25 elaborate due process structure on this I would rather



1 just give this up, and if somebody doesn't get a fair  
2 judge then they can appeal it to the county court and  
3 start all over again. Admittedly maybe the first trial  
4 wasn't totally fair, but how often is a justice of the  
5 peace going to even know his litigants and --

6 CHAIRMAN BABCOCK: That depends on the  
7 county.

8 MR. ORSINGER: -- are you going to be able  
9 to prove that if you can go across one precinct line that  
10 you're going to get a fair jury, but if you're like -- if  
11 you're one house this side of it you can't get a fair  
12 jury. That's not making much sense to me, none of this.

13 MR. TUCKER: The JPs are very familiar with  
14 their litigants in a huge majority of the counties  
15 actually.

16 MR. ORSINGER: Oh, really?

17 MR. TUCKER: You think about it, you have  
18 some counties that may have 30,000 people, and they've got  
19 four precincts, so your precinct has 7,000 people. The  
20 judges are active in the community. They're elected.

21 MR. ORSINGER: I don't know my JP. I don't  
22 even know what precinct I'm in.

23 MR. TUCKER: What county you live in?

24 MR. ORSINGER: Bexar County.

25 CHAIRMAN BABCOCK: Well --

1                   MR. TUCKER: If you lived in Kerr County you  
2 probably would, or if you lived in Culberson County you  
3 certainly would.

4                   MR. ORSINGER: So that means anybody that  
5 lives in that county can just get rid of their elected  
6 justice of the peace just because they filed this piece of  
7 paper? I'm not getting that.

8                   CHAIRMAN BABCOCK: Justice Bland.

9                   HONORABLE JANE BLAND: How about something  
10 like if the judge believes -- I like Richard's idea about  
11 let's not have an elaborate recusal procedure for these  
12 cases, but Judge Casey makes the point that, look, I'm  
13 going to get off cases where I have a conflict or I think  
14 I can't be fair, and I think that most judges in the  
15 justice courts will do that, so if we want to have a  
16 statement in the rule that says something like "The judge  
17 can transfer the case," fine, but we shouldn't -- we  
18 shouldn't invent an elaborate -- or really it's not  
19 elaborate at all. All it is is somebody filing in the  
20 court that they want to be somewhere else.

21                  MR. TUCKER: Right, and --

22                  HONORABLE JANE BLAND: Go somewhere else,  
23 and so to me that causes more harm than it -- because I  
24 think it's probably the exception that a judge would stay  
25 on a case when he or she could not be fair.

1                   MR. TUCKER: Yeah, I think it's generally  
2 the exception also, but, I mean, the situation certainly  
3 exists. There could be a situation, for example, say  
4 Judge Casey and I -- or Judge Casey is going to recuse  
5 because he's a very good judge, but I have a personal  
6 dispute with a judge and then get sued in his court and  
7 they're not going to transfer it because this is my chance  
8 to get back at this person. I mean, to say you have no  
9 way at all of at least raising the issue and having it  
10 evaluated by somebody is somewhat troublesome. I mean,  
11 I'm not completely opposed to it by any means, but those  
12 are just things to consider.

13                  CHAIRMAN BABCOCK: Munzinger, and then  
14 Buddy.

15                  MR. MUNZINGER: Just if you put a limitation  
16 on it you can do this one time, each party gets to do this  
17 one time, one time only, that at least is some limitation  
18 on it and does account for the situation where someone is  
19 -- knows that they can't or believes sincerely that they  
20 can't get a fair trial; and if you're a plaintiff and  
21 you're in the justice court all the time, it seems to me  
22 the way this rule is drafted you could file in there and  
23 then file a motion asking to be transferred; and if the  
24 transfer is automatic then you know you're going to go to  
25 the guy, whoever it is, which creates a problem as well

1 because that may be your cousin or your best friend or  
2 whatever it might be. So you could manipulate the system  
3 that way as well, but I don't know that there's a perfect  
4 cure to it, but at least one simple one is to say  
5 everybody gets to do this once. We have similar  
6 limitations on recusals.

7 CHAIRMAN BABCOCK: Which have their own  
8 problems, but Buddy.

9 MR. LOW: My question is, if the statute, if  
10 this follows the statute, how do we get around the  
11 statute? I don't like it, but how do we get around it?  
12 If the statute says that --

13 MR. TUCKER: It's just a rule. It's not  
14 something statutory.

15 CHAIRMAN BABCOCK: It's derived from a  
16 statute, but I don't think the statute exists anymore.

17 MR. LOW: Oh, okay. All right.

18 CHAIRMAN BABCOCK: Judge Peeples.

19 HONORABLE DAVID PEEPLES: This is an  
20 automatic objection to either the judge or the precinct or  
21 both. Automatic. All you've got to do is say, "I believe  
22 I can't get a fair trial." And remember, there's trial de  
23 novo. We're talking about cases where there's trial de  
24 novo, and I will just say to exchange benches or appoint a  
25 visiting judge is a cumbersome procedure. It's much more

1 work than you think to actually get to exchange benches.  
2 You're talking about going from, you know, this is my  
3 courtroom, I go to work there. Well, today I'm going to  
4 go sit for someone else. That's got all kinds of  
5 problems. This is just horrible.

6 MR. TUCKER: I agree with the trial de novo  
7 idea, but just bear that in mind, if I get sued in a  
8 precinct where I really do have a judge who's not going to  
9 be fair with me, and I get a 10,000-dollar judgment  
10 against me, I'm going to have to put up \$20,000 for that  
11 trial de novo.

12 HONORABLE DAVID PEEPLES: But don't we have  
13 Rule 528 right now? It's automatic. It goes to the  
14 nearest justice. You've got to have two people join you,  
15 which sounds okay to me.

16 MR. TUCKER: But when it goes to the nearest  
17 justice that can cost our court the jurisdiction because  
18 of eviction suits, and there's sometimes not a nearest  
19 justice. There's sometimes only one judge in the county.

20 MR. ORSINGER: What do you do, you go to  
21 another county?

22 MR. TUCKER: I don't know. That's why we  
23 tried to change the rule.

24 CHAIRMAN BABCOCK: Justice Gaultney.

25 HONORABLE DAVID GAULTNEY: The rule provides

1 for the county judge appointing a visiting judge under  
2 some circumstances. Did you consider the possibility of  
3 having a recusal motion go to the county judge for  
4 decision?

5 MR. TUCKER: Yeah, our thought was that the  
6 county judges would be very angry with us for doing that.  
7 But, I mean, that may ultimately be what needs to happen.

8 MR. MEADOWS: We appreciate that kind of  
9 candor.

10 CHAIRMAN BABCOCK: We like to end these  
11 meetings on a high note, so we'll be in recess until  
12 tomorrow morning at 9:00, and charge your batteries  
13 tonight because we've got, by my count, 50 rules to get  
14 through tomorrow.

15 (Recessed at 5:02 p.m., until the following  
16 day as reflected in the next volume.)  
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2 **REPORTER'S CERTIFICATION**  
 3 MEETING OF THE  
 4 SUPREME COURT ADVISORY COMMITTEE

5 \* \* \* \* \*

6

7

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 28th day of September, 2012, 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 \$\_\_\_\_\_.

15 Charged to: The State Bar of Texas.

16 Given under my hand and seal of office on  
 17 this the \_\_\_\_\_ day of \_\_\_\_\_, 2012.

18

19

**D'LOIS L. JONES, CSR**  
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 Certificate Expires 12/31/2012  
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 Kingsbury, Texas 78638  
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24 #DJ-334

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