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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

June 16, 2001

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 16th day of June, 2001, between the hours of 8:38 a.m. and 11:33 a.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

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CHAIRMAN BABCOCK: Thanks for being here, everybody. First order of business is on Rule 20 of the TRAP rules there was going to be some language developed over the evening.

HONORABLE DAVID PEEPLES: We're working on it right now.

CHAIRMAN BABCOCK: So we'll defer that 'til later in the morning, so then we are back to -- David, I guess this is one of yours too. There was the sense last night I thought that maybe we had finally grappled with finality and had no appetite to go forward with your proposed 306a, but maybe people have slept on it, eaten on it, and feel otherwise. So why don't we talk about whether or not we want to go forward and try to deal with the issue that Judge Peeples raised in his proposed Rule 306a?

HONORABLE DAVID PEEPLES: Chip, for starters on that, I do think that it would be helpful to require that the notice that goes out be a beefed-up notice that says something about "final and appealable" and maybe "all claims, all parties," or something like that.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: Right now a lot of notices go out that are only postcard notices, but you

don't have very much information on the notice.

CHAIRMAN BABCOCK: And that is something that is accomplished by your proposal.

HONORABLE DAVID PEEPLES: Well, I've got some suggested language on that.

CHAIRMAN BABCOCK: How does everybody else feel about that? Bonnie.

MS. WOLBRUECK: I would have a concern then that the clerk has to determine if it's appealable and final, right?

HONORABLE DAVID PEEPLES: Don't you already have to do that?

MS. WOLBRUECK: No. Truthfully, judge, the way I try to train my staff right now, we send out notice of judgments on most orders that are signed because it's very hard for the clerk to determine if it's actually final or appealable. So to -- in order to make sure that everyone gets notice that an order has been signed, we make sure to send them on almost every order. I mean, you know, not an order of continuance or something, but many of the orders we do, because it's hard for the clerk to determine if it's appealable or if it's final.

CHAIRMAN BABCOCK: Frank, did you have your hand up?

MR. GILSTRAP: No, no.

CHAIRMAN BABCOCK: Somebody else did over there. Who was it? Ralph?

MR. DUGGINS: No, sir.

CHAIRMAN BABCOCK: What's your reaction to that, David?

HONORABLE DAVID PEEPLES: Well, I'm sympathetic to the problem that clerks have. I think a lot of times it is hard to know. I was just trying to do something about the problem of the litigant or the lawyer who doesn't know that the judge has signed something. Maybe it's been submitted and they have either forgotten about it or they think there is going to be a hearing or something, and the judge signs it. That starts things running.

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID PEEPLES: And they get some generic notice that says an order was signed, even if it says "final order." I don't know. I just was thinking that if when something final has been signed a stronger notice goes out, that might help; and I don't think there ought to be drastic consequences if the notice doesn't go out or isn't received, unless we are going to do some of this extension business that I have got in here.

PROFESSOR DORSANEO: The thing that troubles me about this notice of judgment is that the document

itself doesn't get sent routinely, as I understand it. Just some sort of a postcard, which is almost as good as nothing in terms of being able to evaluate whether something is final.

I don't know whether it would be an impossibility, because some judgments are long and like in family law cases, to send them, send the order itself. That would be -- I realize opposing counsel is supposed to have done that. Maybe just requiring this kind of language that you have if the judgment itself contains that language.

HONORABLE DAVID PEEPLES: Good. I think what I hear Bonnie saying is --

PROFESSOR DORSANEO: And then all the clerk would have to do would be to see whether the judgment contains that language or has that language stamped on it and then send that notice out.

HONORABLE DAVID PEEPLES: Yeah.

PROFESSOR DORSANEO: And then I guess it would be hard for people to learn that if you get one kind of notice, you are put on more inquiry than if you get a different kind of notice.

And I agree with you. I don't like the notice provision the way it reads or the way it operates, but I don't think it's fair to put on the clerk the idea

of evaluating if there isn't that special language on there whether this is the latest of a series of orders or that kind of matter.

MS. WOLBRUECK: We have tried with our computer systems to at least identify whenever we send out the notice what the title of the order of judgment was. If the title of it was "final judgment" then the notice will say, "Final judgment was signed on this date." If the title of it is just "order" then it says, "Order was signed on this date," and so that there's some determination of what type of document. If it's a divorce decree, it says, "Divorce decree was signed on this date," and so we do try to at least on the notice -- and, you know, our computer systems are set up like that.

You know, I understand the issue with mailing out the orders, but that would be a very, very costly matter for counties to be able to do that.

CHAIRMAN BABCOCK: Richard and then Stephen.

MR. ORSINGER: Could we have the notice more conditional? I know this sounds wimpy, but something like, "The order or judgment may be a final, appealable judgment; and if you did not receive a copy, you should come to" -- you know, "come to the courthouse"; and then even for a layperson who got that card they would say, "Oh, my gosh, something has happened here that might make

a difference. I better get down there and get a copy."

I don't see what's wrong with telling somebody, "You're on notice that something has happened and you need to inquire further" without us actually sending them a copy of what it is.

PROFESSOR DORSANEO: You know, it's weird to me that we send people a copy of the petition and --

JUSTICE HECHT: But not of the order.

PROFESSOR DORSANEO: But not of the judgment that nails them. Isn't that strange?

MR. ORSINGER: In principle, anybody who has a lawyer should be aware of the fact that a judgment is signed; whereas when a lawsuit is initiated they have no idea.

HONORABLE SARAH DUNCAN: Right.

MS. WOLBRUECK: And, of course, the default judgment rule is different. It says "default judgment," so, you know, anyone that does not have an attorney, has not responded, gets the notice regarding default judgment.

MR. ORSINGER: And they file a certificate of address.

MS. WOLBRUECK: That's right.

MR. ORSINGER: Because if the card doesn't get sent out then that delays some response times.

CHAIRMAN BABCOCK: Well, basically what

we're doing is requiring every clerk to come up with a different form.

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN BABCOCK: Change their form basically to send out and have some -- have magic language in it.

MS. WOLBRUECK: That probably would not be that difficult just as long as there was a determination of exactly what the notice should state.

MR. DUGGINS: That's the bigger issue. Every clerk has got to determine when a non-final judgment -- I mean, an order that doesn't say "final judgment," is it one of these in a series of orders that --

CHAIRMAN BABCOCK: Well, that's the thing, because the other change that Judge Peeples has made is that he's added the word "final order." The current rule has "other appealable order," so I guess Judge Peeples' point is that this is going on today anyway. You've got a clerk who's got to figure out when it's final and so --

HONORABLE SARAH DUNCAN: But, Chip, they don't, because they can't, so what they do is they send out a postcard notice on every --

MS. WOLBRUECK: That's correct.

HONORABLE SARAH DUNCAN: -- order or

judgment.

MR. ORSINGER: Or they don't send them at all.

HONORABLE SARAH DUNCAN: Right.

MR. ORSINGER: I don't get very many of these.

HONORABLE SARAH DUNCAN: Well, we didn't start sending those on any cases in Bexar County until last year.

HONORABLE DAVID PEEPLES: Wait a minute. How do you know that?

HONORABLE SARAH DUNCAN: From talking with our clerk.

HONORABLE DAVID PEEPLES: I'm not sure that's an accurate statement.

HONORABLE SARAH DUNCAN: It may not be. That's hearsay information.

MR. ORSINGER: They certainly don't send them out -- I don't get them from every final judgment, but I never get them on anything but a final judgment, and only some of those.

HONORABLE DAVID PEEPLES: I would think agreed judgments, you don't send them out on those, do you?

MS. WOLBRUECK: We do.

HONORABLE DAVID PEEPLES: Do you really?

MS. WOLBRUECK: And only, again, because it's very hard to -- it's easier with our computer systems, the way mine is set up, to go ahead and send out the notice because it's, you know, on any type of judgment.

CHAIRMAN BABCOCK: Well, what happens when there's a final order that's one of these series and the clerk that -- and we have amended subsection (3) to say what you want and the clerk sees the order but either doesn't figure out or figures wrong that it's final and then so it doesn't include the magic language that you have in this section and the person misses their appeal? And they say, "Wait a minute, it was mandatory that the clerk tell me that this order that you now say is the final order has disposed of all claims between all parties and the judgment or order is final or appealable, so I've got some remedy." Maybe I go back against the clerk, maybe I get my time limits extended because of this failure.

What's the consequence of the clerk messing up because it seems to me the clerk is going to mess up a lot? Not mess up in the sense that they are not going to be able to follow this.

HONORABLE DAVID PEEPLES: Doesn't the last

sentence in subparagraph (3) take care of that, "Failure to comply"?

CHAIRMAN BABCOCK: Okay. You're right.

HONORABLE DAVID PEEPLES: And that's a problem that we have right now.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: And I think it's just true that sometimes that happens. I don't know statistically how often or in terms of, you know, percentage terms how often.

CHAIRMAN BABCOCK: The question I have is everybody pretty much knows it's happening now, but we're now telling them, "Hey, you can have more comfort now with the postcard because if it is a final order the postcard is going to say so." Does that lull people into a false sense of security if the language is not there because the clerk didn't understand that it was a final order? Let me go to Elaine and then Steve.

PROFESSOR CARLSON: Would the failure of the clerk to give that notice or giving defective notice potentially support a bill of review?

MR. ORSINGER: Sure. It does right now.

PROFESSOR CARLSON: SO there is -- that leaves the window open for a pretty long period of time if you don't respond.

CHAIRMAN BABCOCK: That's a good point. Stephen.

MR. TIPPS: I think we're putting too much on the clerks. It seems to me that as between the clerks on the one hand and the litigants on the other, and arguably this even extends to pro se litigants, but certainly it extends to litigants who are represented by counsel, the litigants ought to be able to -- ought to have the responsibility of figuring out what the effect of an order that the clerk has said in a postcard or otherwise is some kind of final judgment is; and so long as the clerk is obligated to send out some kind of notice that the court has taken some action, it seems to me that we're expecting too little of litigants if we say, "Well, then we don't expect them then to go look at the order and see what the order says and figure out whether or not it contains this magic language."

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: That's similar to what I was saying. I think probably rather than telling everybody it's final we ought to tell them that it might be final or that an order has been signed, and a not infrequent occurrence is that a summary judgment is granted against a party and that's not final but then there's an order of severance and then all of the sudden that does become

final.

Well, the summary judgment itself isn't going to be final, but it may get a postcard notice like this. Or you may have what looks like a final judgment as to a couple of parties, but it's still interlocutory because it hadn't been severed from some others. Finality actually occurs when the order of severance is signed. The chances of a clerk figuring that out are nil. So probably what we ought to do is we ought to have just an array of awareness on the clerks that any time something that might be dispositive happens, let's send out a postcard saying, "This might be dispositive. You're on notice. Check it out."

CHAIRMAN BABCOCK: Bonnie, what's your reaction to that?

MS. WOLBRUECK: I appreciate these comments because I think that as long as we give us some specific language to put in a notice -- my concern is that the way paragraph (3) says here, that I would change my notice of judgment form. Mine actually says "notice of court order" because that's just the way we have titled it so that it's in the appealable order or something; and I would like to have some language in that notice, specific language, that maybe the rule states "The notice shall state this specific language" instead of something -- you know, I'm

not sure that this statement is correct.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: My understanding from the district clerk in Bexar County is that, for instance, that clerk has been sending out for many years notices of default judgment, but not notices of any other type of judgment or appealable order, and my understanding may be incorrect, but that's my understanding. When the clerk and I discussed sending out notices of judgment he was, of course, concerned that they hadn't been doing something that the rule required them to do. He was also very concerned because none of the money for that was budgeted, and it is a considerable expense, even to send out postcard notices of final judgments, and what we're -- and, Bonnie, you may send out postcard notices of all orders, but I think there are probably a considerable number of the clerks who do not do so.

MS. WOLBRUECK: I fear that that may be true.

HONORABLE SARAH DUNCAN: And do not do so in part because they are not required to do so and in part because even if they wanted to do what they're not required to do, it would be incredibly expensive, in Harris County, for instance, to send out notices of every single -- every time an order was signed.

MS. WOLBRUECK: It's a major expense in my county. You know, the rule previously had talked about a postcard. We do not do the postcards. We have a computer-generated form that just automatically prints it and we can stuff it in an envelope and mail it, which is a rather simple process, except for it is a costly process just because of the postage.

CHAIRMAN BABCOCK: Frank then Stephen.

MR. GILSTRAP: The reality is that we can't count on the clerk to know when the judgment is final because we often can't count on lawyers to know when the judgment is final, and any system that makes the litigants' rights depend on that kind of determination by the clerk is going to fail, and that's what's wrong with this proposal that we extend, you know, the time limits by 90 days, depending on this notice sent by the clerk.

We can either just have the clerk regularly send out notices, some type of warning notice like Richard proposes or -- and the only other way to do this would be to have something that the litigant sends out and make the litigant responsible for serving that notice of final judgment on the opponent; and maybe if you don't do that, you get more time; but I think the notion of actually making the rights depend on the notice sent by the clerk based on the clerk's determination is not going to work.

CHAIRMAN BABCOCK: Stephen, then Bill.

MR. TIPPS: I was just going to add in response to Sarah's comment, I think that at least in the civil courts in Harris County a postcard notice is sent out of every order.

CHAIRMAN BABCOCK: Yeah. That's right.

MR. TIPPS: Isn't that your sense?

CHAIRMAN BABCOCK: Yeah.

HONORABLE SARAH DUNCAN: So they are already bearing that expense.

MR. TIPPS: I mean, I am not saying that everybody does that, but that's desirable.

PROFESSOR CARLSON: But if you put the warning language on every one of those it makes it --

JUSTICE HECHT: Yeah. And that was one of the arguments in Lehmann by the parties was that we got -- "Sure, we got the notice. We knew what the motion was, and we assumed we knew what the order would be, so we didn't pay any attention to it," which is not obviously a good practice, but it shows that the notice is not worded very well.

HONORABLE DAVID PEEPLES: Well, the truth of the matter is the system works well in most cases because judges rely upon lawyers to -- for it to be an accurate order and for the lawyers to -- usually it's approved as

to form, most of the important things, and so there's just a lot of trust, but there are a small percentage of cases in which that's not justified and there are consequences.

Back to what Sarah said, you know, in Bexar County, I'm sure that not every final judgment a notice goes out. I know they do on defaults. I know they don't on agreed judgments and so forth. And then you've got the issue of somebody comes in and nonsuits the last part of the case and there's a severance. I don't think notice of those goes out.

MR. ORSINGER: I think the triggering event in Bexar County traditionally has been the certificate of address.

HONORABLE DAVID PEEPLES: On a default?

MR. ORSINGER: Yeah. When a clerk gets a certificate of address they know to send the notice, and the rest it's kind of loose.

HONORABLE SARAH DUNCAN: And, as you say, Richard, in your hypothetical, if you don't get notice of the order of severance, you don't get notice. Right? You don't get notice of --

MR. ORSINGER: Well, you might get notice when the interlocutory judgment is signed, which then is inaccurate, and not get notice when the order of severance is signed, which is --

HONORABLE SARAH DUNCAN: That's what I'm saying. If you don't get the notice of severance, you're sort of SOL.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, this system as devised still contemplates that the lawyers will have the primary responsibility or the parties and their lawyers will have the primary responsibility to keep track of how the case is being processed in the trial courts, which, of course, was the original idea some, I guess, maybe more than 50 years ago now, or approaching that. And this 306a as drafted, our current one, really kind of -- it doesn't indicate to lawyers that they can rely on clerks, but maybe some clerks will send out a notice that will be of some help, and I wonder if lawyers generally think about the process, you know, that way.

And what I'm leading to is will most clerks send out notices, postcard notices, of all orders if they're told to do so by the Rules of Civil Procedure, and I'm hearing different things from different people about, you know, what actually happens across the state. It doesn't make any sense to have a rule to order rocks to fly if they're not gonna. Especially, if it's, you know, expensive and there are other difficulties, and the notice isn't all that great, etc.

But assuming, assuming that the clerks will do it and that it makes sense to send out these notices, that it's not too costly in light of the overall objective and that we don't want to send out the whole order, I guess I would be in favor of making the notice in the postcard a little more informative, somewhat like the language on citation. You know, "You better go check because you may be in big trouble otherwise." At least that would help the lawyers who don't know that they're supposed to be checking to check, and I think that's a slight improvement anyway, but, again, if the clerks aren't going to send these notices out then it's just -- or if they're going to send them out sometimes but not other times, then it's just a trap.

CHAIRMAN BABCOCK: But -- Justice Hecht, then Bonnie.

JUSTICE HECHT: We've talked about this before, but I was under the impression in Dallas County that you can't get an order signed, that the clerk won't present it to the judge, if you don't have copies and envelopes prepaid for the clerk to send to everybody, and the reason that the party doesn't do it himself is you don't want that important job left to the party. The clerk does it, but all the clerk does is stuff it in the envelope, I think, and mail it.

MR. MARTIN: Yeah. That's correct. And I've never gotten a postcard notice or computer notice or any kind of notice in Dallas County, and I think it's a problem that's different in different counties. If you're not used to practicing in Harris County and you're used to the Dallas County system and you suddenly get one of these postcards in the mail, and the first time I ever got one of those I said, "What's this? Why don't we have the order?" and checked into it.

But the problem with that -- and I've seen this come up, Judge -- is that there's nothing in the record a lot of times that reflects that this happened. They're supposed to make a docket entry, I think, but a lot of times that doesn't happen. So a lot of times there's no evidence whatsoever in the record as to whether these orders ever got sent out or not. So that's not a perfect solution either.

JUSTICE HECHT: Yeah.

CHAIRMAN BABCOCK: Bonnie had her hand up before and then David.

MS. WOLBRUECK: It's very difficult for me to know exactly how all clerks operate, but it goes to say that most district clerks offices or county clerks offices are, number one, understaffed and underfunded. So I know that most clerks will take upon their main and first

duties, are the ones that carry the most ramifications and the most liability, so those are the things that are priorities for always the clerk to do.

This type of notice of judgment, whenever there is in the rule that says, "Well, if you don't receive the notice, you know, there are other issues that can resolve it," I know that that's a concern. I know that it's a concern for clerks. We have talked about these issues. We try to train clerks that the rule is there, this is one of your duties to perform; but, again, just because of understaffing and the budget issue of mailing it, the postage issue, it is always a concern.

But I do believe that if we can come up with some type of language or something -- I guess it surprises me that litigants are required to serve all pleadings on each other but not copies of orders. I mean, that has always surprised me.

CHAIRMAN BABCOCK: Judge Peeples had his hand up first.

HONORABLE DAVID PEEPLES: A couple of observations. One issue is what kind of language ought to be in the form; and number two, a second issue, is when should these cards or forms be sent; and on the second question, I'm just trying to think of the different kinds of final or appealable orders and judgments that get

signed.

First of all, defaults, that's already dealt with by Rule 239a, and I, frankly, think that most offices are pretty good about sending those out, and they should be. Okay. And then at the opposite end of the spectrum are the agreed judgments and decrees that, frankly, don't need to be sent out. I mean, they have agreed to it, and there's not going to be an appeal, and the only question is when does the judge sign it, but you've agreed to it and you can keep abreast.

And then there are the ones that are simply approved as to form, not agreed, but approved as to form; and I think that, frankly, when that happens, I question whether we ought to require notice to go out that those get signed. The problem is that, okay, you get some lawyer who won't return an approved as to form and the lawyer sends it over to the judge and says, "Judge, this accurately sets forth what you did three weeks ago. The other side won't even return my phone calls. Will you go ahead and sign it?" Well, I think we can go ahead and sign those a lot of times if they're accurate, and probably a notice ought to go out on those.

And then there are the ones that are approved as to form but it's not everybody. In other words, maybe there were Defendants A, B, and C and the

hearing only concerned A, and so the plaintiff and A approved it as to form, but if it affects B and C and they didn't even know about the hearing, that's a problem.

So what I'm saying is the default judgments, I don't think there's a problem because there already are notices, and then all these -- so many cases it's approved as to form or agreed and there's no controversy, and I question whether it's worth sending notice on those out, but I think that this rule does require it.

But the area of problem is where it's not approved as to form by everybody, and there can be some problems there, and I don't know how we handle it.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: You know, we have Rule 305, which we changed sometime back to deal with the related problem, saying, "Any party may prepare and submit a proposed judgment to the court for signature. Each party who submits a proposed judgment for signature shall serve the proposed judgment on all other parties to the suit who have appeared and remain in the case." We don't have a rule that says that the judgment itself is supposed to be provided, do we, by parties? That's 306a. That's the provision we're talking about, and that really does put the burden in the wrong place, and it's established that it doesn't work.

And, David, there's a third issue on this notice thing. If the notice is sent out by the clerk that complies with the notice provision of 306a then you lose your extended time period or your date of clock starting for all purposes. You know, it begins when that notice is received, even if the notice is not helpful. I mean, in some ways you would be better off not to get a notice that's not helpful because you might -- you know, you might find out what's going on and acquire knowledge in some other manner.

I think our system -- listening to Justice Hecht, I think our system puts the burden in the wrong place, kind of on the assumption that the problem will be solved, and isn't that a relief that we don't have to do anything more about it than leave it up to the clerks?

CHAIRMAN BABCOCK: Richard had his hand up a minute ago and then Sarah.

MR. ORSINGER: I was going to say that one of the virtues of requiring notice of the judgment being signed as compared to requiring the party who won the case or submitted the proposed judgment to send it out is that if you just mail your judgment to the court or if you leave it for the judge to sign after they get off the bench, you don't know for sure when the judgment is signed even if it's your judgment, but the clerk will always know

when the judgment is signed because within a day or two it's going to circulate through them to go into the minute books.

So the notice of signing has validity independent from a duty that the litigant has to advise the other side that a judgment has been signed. I am not opposed to having Rule 305 require us to tell the other side you've solicited a signature. No one says that you have notice -- you have a duty to give notice when the judge actually signs, but unless you walk in there and get it signed in front of you, you yourself don't know other than just by checking over and over and over.

PROFESSOR DORSANEO: Well, aren't you going to check if you're the one who wants the order to be signed?

MR. ORSINGER: Well, I always hand-carry my judgments. They are important enough to me that I hand-carry them to the judge and then after they're signed I take them to the fifth floor and photocopy them so that I have a copy of the signed judgment in my file, but tons of lawyers don't do that.

PROFESSOR DORSANEO: I know lawyers who would like to keep the signed copy in their file and then wait until time runs out and then send it to the other side and ask for payment.

MR. ORSINGER: I don't have a problem requiring somebody to give notice, but, I mean, all that's at stake here, if I understand it, is when nonappealability and plenary power expires. Isn't that all this rule does, is that in certain situations where somebody didn't receive official notice of the judgment they have a little extra time to do what they need to do?

HONORABLE DAVID PEEPLES: Well, what I proposed right here, number one, is the totally severable issue of should the notice say a little bit more than they say right now. Okay. And then in addition to that, just to throw out an intermediate position, I allowed them to extend the timetables if they didn't get the notice, but that's already there. 306a(4) says if you don't get actual notice within 20 days and so forth, if you go into court and prove it, you can get it extended up to 90 days. I'm not changing that.

MR. GILSTRAP: You're just adding more.

HONORABLE DAVID PEEPLES: Yeah. Now, paragraph (1) has this other thing that if the language isn't in there it gets extended. I just threw that out just to soften the whole system for people that don't know that they are facing a final judgment, but I'm not advocating --

CHAIRMAN BABCOCK: Justice Duncan and then

Stephen.

HONORABLE SARAH DUNCAN: But my comment was basically what Richard said. I think the reason the system is designed the way it is is because the lawyers and the litigants don't necessarily know when the judgment was signed; and when the whole system keys off of the date the judgment was signed, somebody has got to be responsible for getting that information and distributing it; and it logically should be the clerk, who receives a copy of the judgment to be filed. The problem is that our rules of finality are so complicated that the clerk is not able to determine what is a final judgment or appealable order. That's just the situation we've created by necessity.

CHAIRMAN BABCOCK: Yeah. Justice Hecht, is there a perceived -- or perception on the part of the Court that lots of people are not getting notice and are getting hurt by the rules that we have?

JUSTICE HECHT: Well, I remember that when Lehmann first came up and several other cases, some members of the Court were surprised to know that you didn't get a copy of the judgment in due course; and, really, it took our Harris County brethren to verify that it really could happen the way the parties in Lehmann said, that they got a notice and it said what it said and

that's all they got and they didn't know by getting that that they should do something else.

So I think there was some concern along the lines of what Bill has said, that what kind of sense does it make that you get copies of everything in the case except the one thing that does you in. But, I mean, we were not aware of a rule, and I don't think there is one, that requires the parties to give notice of a judgment. It's not in Rule 21, and so there was some concern about that.

PROFESSOR DORSANEO: It must be that historically we didn't have judgments until after there were trials and people knew that they had been to trial and that there was a verdict or, you know, something equivalent, and that is just not our reality anymore.

JUSTICE HECHT: No. And I think, you know, certainly these rules were written before summary judgment, and so to some extent back then you either got judgment after trial or judgment on the pleadings, and that was about all there was, or dismissal because the plaintiff didn't want to proceed or default, and there's so many different kinds of judgments, like Richard says, I mean, who would know that an order of severance was a final judgment? But it's going to have that effect.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: What would be wrong with having the -- requiring the prevailing party to serve notice of the final judgment? I mean, who is better in the know than a prevailing party that gets the severance order? Why would that be -- why couldn't you have the clerk send the notice as well as the prevailing party?

CHAIRMAN BABCOCK: Yeah, Bonnie.

MS. WOLBRUECK: Many attorneys do send copies of -- you know, if they mail in a judgment or an order, many attorneys will send in a self-addressed stamped envelope with an additional copy asking the clerk to return a conformed copy. That's very common practice that attorneys do that, and, you know, that's a simple process for the clerk to do. They conform the copy, showing the judge's signature and the date of signing and put it in the envelope and mail it.

JUSTICE HECHT: The problem with putting the burden on the parties is which party?

CHAIRMAN BABCOCK: Ralph says prevailing party.

MR. ORSINGER: How about the party who submitted the judgment for signature?

CHAIRMAN BABCOCK: Huh?

MR. ORSINGER: How about the party who submitted the judgment for signature?

PROFESSOR DORSANEO: Rule 21a doesn't require orders and judgments to be served unless it -- except to the extent that 21 is cross-referred to in 305, and I think it would be a good idea to require the prevailing party or the party who submitted the order to serve it on all other parties.

CHAIRMAN BABCOCK: And by "serve it," you mean the signed order?

PROFESSOR DORSANEO: Yes, the document itself.

MR. ORSINGER: Well, is that the document after it's been signed or the document before it's been signed?

MR. GILSTRAP: After.

PROFESSOR DORSANEO: After. Before and after. See, the before idea is that's a request for relief.

MR. DUGGINS: It's required under 21.

PROFESSOR DORSANEO: Huh?

MR. DUGGINS: Rule 21 requires it before.

PROFESSOR DORSANEO: Well, 305 does, and I would agree with you that probably this proposed judgment is in effect an application for --

MR. DUGGINS: Right.

PROFESSOR DORSANEO: -- you know, a motion,

or even though it's not styled as such, but 305 clearly requires -- but it talks about proposed judgment, you see, with this other problem as to whether that would cover all orders. The contemplation is, our normal one, that judgment means final judgment; and I don't think 21a -- maybe 21 and 21a together kind of really do require you to submit all orders, etc., but it's not written very clearly. It's terrible. I'm sure it's much better in the recodification draft.

I'm sorry. I had to say that.

MR. ORSINGER: I kind of lost why we're having this discussion, but it seems to me that David's proposal is -- dovetails with the idea that you're going to have a lot of judgments that have finality in the last sentence right next to the judge's signature and that if you don't and it is final despite that fact, then everybody has some extra time to react, and I am not offended by that, and if you don't want other people to have extra time then just put that sentence in at the end.

CHAIRMAN BABCOCK: Well, but, Richard, that's different than what we're talking about right now, is whether we're going to require the clerk to put some magic language in the --

MR. ORSINGER: Well, I was leading to that, because you could say that the clerk has a duty to send

the notice only when that sentence is the last sentence in the judgment.

PROFESSOR DORSANEO: Or at least that kind of a notice. There may be a duty to send notices generally and then a duty to send that kind of a notice when that kind of a notice is appropriate because of the language of the judgment or order. That gets back to my other thing as to whether it's a good idea to require the clerks to do it all the time, given the expense, you know.

MR. ORSINGER: Of trying to segregate. I mean, there's a lot of times when it's cheaper to just cover everything than it is to selectively cover something. That's what Bonnie has done. It's impractical for her people to selectively do it, so she blankets everything. Maybe not all district clerks have done that. Apparently they have done that in Harris County, but you could say that the clerk's duty is only triggered by such a sentence; and if the party who submits the judgment fails to put the sentence in there then the other side has extra time.

I am not in favor of that. I would rather have a generic mail-out whenever there is an order that's signed that says, "An order has been signed. It may affect your rights. Go read it."

MR. TIPPS: Uh-huh.

MR. ORSINGER: And then just send it out every time an order is signed.

PROFESSOR DORSANEO: Would you want the 306a to say then that when you receive that notice that your time is triggered? What does it say now in terms of beginning of periods?

MR. ORSINGER: Well, your time is triggered normally by when the judgment is signed --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- unless you don't find out about it within --

MR. TIPPS: 20.

MR. ORSINGER: -- 20 days, in which event you have this sliding timetable, assuming you file a motion supported by an affidavit and secure a hearing in front of the judge and get a ruling as to the day you actually received notice.

PROFESSOR DORSANEO: It's not quite if you don't find out about it. It's if you have neither received the notice --

HONORABLE DAVID PEEPLES: Nor actual knowledge.

PROFESSOR DORSANEO: -- nor acquired actual knowledge.

MR. ORSINGER: Bill, that's finding out

about it.

PROFESSOR DORSANEO: Not if the notice doesn't tell you more than "Come look."

MR. ORSINGER: I disagree. I think that if we try to say that the notice is going to differentiate those situations from when the judgment is final from when it's not and the whole reason we're doing this is because lawyers can't figure it out, then how do we expect the assistant clerks, who probably don't have four-year degrees and everything else, how do we expect them to figure it out?

PROFESSOR DORSANEO: No, I'm not making myself clear. Right now if you receive the notice, the clerk's notice that doesn't tell you very much, that some order has been signed on the 19th day, okay, you get 11 days to do whatever you need to do. Only. Okay. That would include going down, checking, finding out, figuring out that it's final, filing your motion for new trial or other document to get on an extended tract.

And, now, 306a has been around for awhile. It was drafted by a subcommittee of this committee. Maybe it needs a more comprehensive look to see what kind of notices should clerks send out. Maybe we should talk to clerks to see whether they want to have two different kinds or do they want this idea of just sending out one

kind because two kinds are impossible to administer or even more expensive than sending out notices of all kinds.

And right this second, thinking about it, really, you know, for the first time in years yesterday and today, it seems to me that the notice, the postcard notice, does too much in terms of cutting back the opportunity to have extended time; and David's proposal is trying to kind of work against that. But it isn't -- I don't know. Maybe you have it drafted completely well to handle that. I don't know. I'll let you say. But right now it is the case that you might be better off getting no postcard notice than getting a postcard notice that is inadequate, which they mostly are, you're telling me.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I would like to not abandon the idea of requiring the clerk to send copies of all orders and judgments to counsel or pro se litigants, if they're not represented; and it seems to me that is a small price that the prevailing party could pay, that you simply have to make a deposit or that you are charged in some way for the cost of the clerk to send out copies of the actual orders and judgments that are signed. I don't see any reason a prevailing party shouldn't shoulder that cost. All we're doing is saying --

PROFESSOR DORSANEO: That's Dallas County.

MR. MARTIN: That's the Dallas County rule.

HONORABLE SARAH DUNCAN: Well, except that we would codify it and we would require a docket notation.

MR. MARTIN: I think there is a written Dallas County rule on that. The local rules are not in this book, but I think there is a Dallas County local rule that's pretty well drafted, as I recall. But if we're going to do that, there needs to be some provision that's not in there now for requiring that there be some record that this is happening.

HONORABLE SARAH DUNCAN: Right.

MR. MARTIN: A docket entry or --

HONORABLE SARAH DUNCAN: That's what I'm saying, is that we require -- we write a rule to require that the prevailing party make a payment for this service that the clerk will perform and have that rule say that there has to be a docket entry made when the clerk performs this function.

MR. MARTIN: Right.

HONORABLE SARAH DUNCAN: Bonnie, does that --

CHAIRMAN BABCOCK: Stephen and then Frank.

MS. WOLBRUECK: I'm sure that would be fine. I would prefer not to use the word "docket entry," but "The clerk shall document some notice or something in the

file."

HONORABLE SARAH DUNCAN: Yeah, just do a certificate of mailing.

MR. TIPPS: Well, my question of Sarah is, does that -- would that rule then apply to every order that the judge signs in the case?

HONORABLE SARAH DUNCAN: Uh-huh.

MR. TIPPS: Every order?

HONORABLE SARAH DUNCAN: Every order.

MR. TIPPS: Order granting motion for continuance?

HONORABLE SARAH DUNCAN: Uh-huh.

MR. TIPPS: Order compelling answers to interrogatories? Because the problem is that unless it applies to every order then you run back into the problem of the clerks having to figure out whether this is one of the ones that I need to require that a copy of the order be sent out.

HONORABLE SARAH DUNCAN: There may be a few routine orders that we could say the clerk doesn't have to do this for in the rule, but my preference would be for every order, because I don't think it's fair to the clerks or to the parties or their lawyers to require the clerks to make these types of finality determinations that we can't make.

MR. TIPPS: Nor do you apparently think that it's fair or sufficient for the clerk simply to give notice to the parties that something has happened and thereby put the parties -- put on the parties the burden of going down and seeing what it is, because that's what happened in Harris County; and, I mean, I don't consider that to be a problem because I don't think it's all that -- it's asking too much of the lawyers to when they're notified that the court has signed an order to figure out what that order is and get a copy and make sure that it's what they think it is. But maybe I'm wrong.

CHAIRMAN BABCOCK: John.

MR. MARTIN: I think it's a problem putting the burden on the prevailing party. Number one, sometimes it's hard to figure out who that is on a pretrial motion, discovery motion that there's rulings both ways, but sometimes on pretrial motions like discovery motions it's the nonprevailing party that wants the order entered to preserve it for appeal, so it probably ought to be the party that submits the order to the court.

CHAIRMAN BABCOCK: John, would you describe more fully how the Dallas County procedure works?

MR. MARTIN: One party is usually told by the judge to draft the order if there's a hearing, and that party drafts the order, circulates it. Hopefully

it's approved as to form, but if it's not after so many days, you can send it to the judge with a letter that says, "X number of days has passed and opposing counsel refuses to sign the order," and they will -- I think the local rule specifies a period of time that they hold it before the judge signs it.

CHAIRMAN BABCOCK: Yeah, but now once the judge signs it how does it --

MR. MARTIN: You send addressed/stamped envelopes for every party, but they have -- they typically have your law firm return address on it, so, you know, that's the point I was trying to say earlier. There's no physical proof in some cases that the clerk actually mailed that order to the opposing party.

CHAIRMAN BABCOCK: So when you submit the proposed order, sometimes it's agreed or approved as to form, sometimes it's not.

MR. MARTIN: Right.

CHAIRMAN BABCOCK: You give to the clerk of that court envelopes that have Thompson Knight on --

MR. MARTIN: Right.

CHAIRMAN BABCOCK: -- the top, and it's addressed to all the parties.

MR. MARTIN: Right.

CHAIRMAN BABCOCK: And the clerk, once the

order is signed, makes copies, stuffs it in the envelopes.

MR. MARTIN: You're supposed to send sufficient copies for all parties.

MR. ORSINGER: They send conformed copies. John, it's a conformed copy rather than a photocopy, right?

MR. MARTIN: Right. Usually it's a rubber stamp judge's signature, is the way most of them do it.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: You know, I think it would be nice if we could formulate a system that would require everyone to get copies of all orders that have been signed, and we might want to do that. I think you might have a cost benefit problem there.

So what? We've got a procedure now, 306a(4), where if you don't get notice you've got a 90-day -- you can get -- you've got a grace period, and you can come in up to 90 days late. The problem is not getting copies of the orders to people or letting them know that an order has been signed. The problem is helping them understand what the order means. I mean, you could beef this up, and you're still going to send out notice that a severance has been signed or that a nonsuit has been taken, and you're still going to have the problem of people not realizing that's a final judgment, and we're

talking about two different things here. I don't see how sending out, you know, ensuring they get notice really advances the ball in the other area.

CHAIRMAN BABCOCK: John.

MR. MARTIN: Another thing that happens is you'll send an order in, the judge will say to himself or herself, "This isn't quite what I meant," and they will change it, and if you don't actually get what they signed, they may not have signed what you thought they signed.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, I think it does advance the ball for people to get copies of what they need to read in order to try to evaluate where things stand, and I think the proposed Rule 306 helps to explain to people what they need to be considering in order to see whether there's finality or not. And I would, you know, propose -- I don't know whether I would put it in the form of a motion -- that we seriously consider amending 305 or other related rules to incorporate the Dallas local rule, without looking at it, because that's at least a procedure that appears to work --

CHAIRMAN BABCOCK: Chris is on his way to get it.

PROFESSOR DORSANEO: -- and it has been used in one major metropolitan area. And I don't think it's a

complete solution, but, you know, some progress is better than no progress.

Right now we have a series of different rules. Ralph pointed out that there is a rule -- what is it, 119a?

MR. DUGGINS: Yeah.

PROFESSOR DORSANEO: That does provide for a copy of the decree to be sent by the district clerk in a case when there's been a memorandum waiving issuance of service of process. You know, so we have rules, and then the default judgment rule, 239a, is kind of over there. I mean, the system is --

MR. ORSINGER: You've got another one for decrees of divorce, I think.

PROFESSOR DORSANEO: The system is not, you know, very well organized, and, really, it ought to be. Whether we amend 21 and 21a at the same time to talk about orders, not just applications and motions and pleadings, all of these issues are related. I don't think they are insurmountable problems.

What we seem to be saying is that we're going to completely get away from the old idea that lawyers need to go be checking the file all the time and that we're going to expect notice to come, you know, primarily from the opponent or under the clerk's aegis at

the expense of the one who obtains the order and then go from there. I think that's an improvement, so that would be my general proposal.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I do think it advances the ball if you codify basic rules of finality and require the clerk to send copies of orders and judgments, even if, Frank, a particular lawyer or litigant does not understand the cumulative effect of orders. We've at least satisfied the system's need for fairness.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: Let me respond.

HONORABLE SARAH DUNCAN: And I think that is advancing the ball quite a bit.

MR. GILSTRAP: I understand. I think it would be a helpful project if we could maybe go through the rules and find out, you know, all the notice requirements and have some uniform, simplified notice requirement that wouldn't cost the clerk an arm and a leg to do, and I think it would help, but I don't want to be under any illusions that we're going to be solving the series of orders problem, what Bill calls the Runnymeade problem. That's not going to solve that problem.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: The only way we're going to

do that is have some type of notice that's sent to the people that, "In case you don't know it, now you have a final judgment," and no one has been able to figure out how to do that.

CHAIRMAN BABCOCK: Bonnie.

MS. WOLBRUECK: Bill, didn't we do that in the recodification draft?

PROFESSOR DORSANEO: Yes. There's separate rules for the clerks when clerks send out notice and --

MS. WOLBRUECK: One place for notice. We have done that in the recodification.

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN BABCOCK: Bobby, in Houston what do you do when you get a postcard, as we do frequently, about all orders when it says, "Okay, an order has been signed granting the discovery relief on motion of plaintiff"? Typically do you go down and get a copy of the order?

MR. MEADOWS: No. But we generally -- I mean, I have not had this problem in my practice. I mean, I exchange and receive the documents that I think are at issue. As Steve says, the orders -- I mean, the postcards are very little help, because it just simply says "Order entered on" --

CHAIRMAN BABCOCK: Right.

MR. MEADOWS: -- whatever was submitted. I

could easily see how people would just think that the order that was exchanged was the order that was signed, and so you would just rely on that.

In some ways I think what Richard said is really more appealing to me because it sort of heightens the notice or the warning, which is, "An order has been signed, and it could do something, you know, significant to your rights," and as opposed to what we get now which is just sort of -- and I think people just kind of ignore and file them. I've never heard of anyone going to the courthouse and looking into the file. There's just a practice --

MR. TIPPS: I do it every time. I get one of those things, and I give it to my secretary or legal assistant and say, "We need a copy of this order." But, I mean, if you don't and I do then that shows that there is no uniform reaction to the notice.

But, I mean, hearing John talk, the Dallas system seems flawed to me as well, if all that happens is that a stamp is put on a copy of the order that was submitted, because it's not infrequent that the judge is going to interlineate something and then people are affirmatively misled, it sounds like to me, as to what it is the judge has signed.

MR. MARTIN: Well, if the judge changes

something, they will change it on the --

MR. TIPPS: Then the clerk will change that?

MR. MARTIN: Right.

MR. TIPPS: Okay. Then that's a safeguard.

JUSTICE HECHT: Now, you're at the mercy of the clerk, but if the judge goes through and interlines something then the clerk makes the interlineation herself or if it's too extensive, just makes a copy of it.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: But for what that's worth, the two cases I've had going, one of which is with one of John's partners, they're not following that, we're not following it, the court's not following that practice, at all and never has. I mean, nobody submits orders like that. Just you submit an order and you copy the other side per Rule 21, and that's the last you see of it unless you ask for a copy of it. So, I mean, sometimes the judge is ruling by e-mail. So...

MR. ORSINGER: You know, that brings up a point, is that if we do adopt a system to replace the notice of the clerk by some action of the parties and the parties don't comply then our new system is worse than our present system because at least under our present system you get notice of something, but under the new system if there's no stamp on the envelope, if there's six envelopes

there, but one fell out on the floor and didn't get notice, there's -- you know, I think there's some potential risk in saying you're going to have multiple envelopes every time you submit an order and then if it's more than three pages it requires more than first class postage. I mean, you know, and then it's going to be delivered postage due and then some offices pay postage due and others say, "To hell with them. They can put the right amount of postage on there."

CHAIRMAN BABCOCK: Your head is about to explode, isn't it?

MR. ORSINGER: I mean, right now all we have to do is count on Bonnie to have her employees say, "When you see an order, you send a postcard."

MR. MEADOWS: But I can't imagine anyone relying on the kind of notice that we receive from the clerk, and I haven't heard any kind of notice being issued by any clerk that would be the sort of thing you would rely on. I mean, having this obligation imposed on the person that obtains the relief seems to me to be the way it ought to work. If you submitted an order and got it signed, why wouldn't you -- I mean, I kind of agree with the thought of why wouldn't you impose an obligation on that party to send it out with a copy of what was signed? I mean, that seems to me in my practice what happens

anyway.

JUSTICE HECHT: Here's the Dallas rule: "Curtailment of funds available to the court and clerk necessitates a like curtailment of services. Henceforth, all parties desiring mail notice of any setting by the court or receipt of any correspondence from the clerk or court shall furnish the court clerk return envelopes properly addressed and stamped. Counsel desiring conformed copies shall conform same and only ask the clerk to affix the judges' facsimile stamp.

"Except as provided elsewhere in these rules, no conformed copies shall be made or furnished or shall searches or research be performed for counsel or the public free of charge. All mail received with postage due will be returned to sender.

"Counsel seeking entry of an interlocutory judgment, judgment, or order involving final disposition shall furnish the court clerk a stamped envelope addressed to all other parties or counsel. Immediately upon the signing of such an order the clerk shall mail a conformed copy thereof to the party against whom the order was rendered. Failure to comply with the provisions of this rule shall not affect finality of the order or judgment."

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I think that's patterned on

the requirement in Rule 239a. Remember in there, when you get a default judgment you're supposed to provide a certificate of last known address, and the clerk is supposed to send it out, and that's what we're talking about here.

You might look at that. We all know situations in which people haven't provided certificate of last known address and it hadn't been sent out, but in the end you have that same sentence. "Failure to comply doesn't affect the finality of the judgment." Failure to comply doesn't have any consequence other than they don't get notice. Now, maybe the way they apply it in Dallas is they don't sign it unless you provide it, but that's what I'm hearing.

CHAIRMAN BABCOCK: Yeah. In Dallas you can't get a default unless you have got a certificate of last known address. Isn't that right, John?

MR. MARTIN: I think.

MR. DUGGINS: Same in Tarrant County.

MR. ORSINGER: Judge, when you were reading that rule, was there a requirement that you submit multiple copies of your order? I didn't hear that.

JUSTICE HECHT: It doesn't say that.

MR. ORSINGER: It just says "envelopes, postage prepaid," so that would mean that the clerk would

have to --

JUSTICE HECHT: That's what they do as a practical matter.

Here's Rule 77d of the Federal rules: "Immediately upon the entry of an order or judgment, the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear and shall make a note in the docket of the mailing."

MR. MARTIN: Of course, they draft their own orders. Most Federal judges prepare the order, so it's not --

MR. ORSINGER: I tell you, I think they send them by fax to me, not by mail in Federal court. Do you have that same experience?

MR. MARTIN: Well, in most districts now if you send them a form they will fax you the orders in Federal court.

CHAIRMAN BABCOCK: Yeah. You've got to consent to that, though.

MR. ORSINGER: Okay.

MR. MARTIN: You have to fill out a form and sign and say that's how you want to get them and get them by fax.

MR. GILSTRAP: I think we're talking that

there's a safeguard in that the clerk won't send it out unless you provide the postage or the envelope. In fact, where that doesn't work is where you get the order signed in open court. If you go in and get a default judgment signed, the judge is not going to say, "Wait a minute. Do you have an envelope?" He's going to sign it and then you're going to go to the clerk, and the clerk may ask you for certificate of last known address, but if you don't provide it, they're not going to change the order. I mean, I don't know how real a safeguard that is to rely on here.

CHAIRMAN BABCOCK: Well, typically if you go in, the judge will look at the file and he will say, "Where's your certificate of last known address," and if you don't have it in there, he won't sign it.

MR. GILSTRAP: Really?

MR. ORSINGER: Well, what's going to happen now is that when you take an order in to be signed the judge is going to say, "Let me see your envelopes," right, and you're going to show him three envelopes --

CHAIRMAN BABCOCK: Sounds dirty the way you say it.

MR. ORSINGER: So here's -- in Bexar County David Peeples is presiding. He's got three stacks this high of stuff he's got to sign, and every one of them is

going to have envelopes paper-clipped onto it. So that's going to be about twelve stacks now, and you're going to check and be sure? I wonder.

Well, David, is it practical?

HONORABLE DAVID PEEPLES: You'll have my resignation on Monday.

PROFESSOR DORSANEO: Good thing Scott McCown's not here.

CHAIRMAN BABCOCK: Okay. Well, where are we? Bill.

PROFESSOR DORSANEO: Well, I continue to think that it would be better if people got the orders. Now, maybe I'm thinking as a solo practitioner. I don't really have anybody to send to the post office or to the courthouse or whatever. I certainly don't have a staff of people. It just really seems odd that you don't get the final order. I agree that the burden shouldn't be placed on the clerks to figure that out and to bear the expense and all the rest of it.

The Dallas rule seems -- at least the sentence that talked about how that works seemed better than what is in 306a. And, you know, I at least tentatively would be in favor of pursuing that approach. The difficulty is that -- maybe it's not a difficulty, that there are so many orders.

CHAIRMAN BABCOCK: So many orders, so little time. Skip.

MR. WATSON: What would be wrong with doing it just like any other pleading of having the person who submits the order responsible for the envelope back to that person; and once that person, the prevailing party or whoever it is, the submitter, gets it back then it's just like serving interrogatories or serving a new pleading. They send that back, send that to all counsel with a certificate of service on it showing that "On the 1st day of September 2001 I served this conformed copy of this order on all counsel of record by certified mail" and then send that back to the clerk who files it, just like a pleading.

So there's something in the record showing that the burden has been shifted over to this person to do it. All the clerk has done is handled one envelope with one thing of postage getting it to the lawyer that's submitted it and then that lawyer shows of record that it has, in fact, been distributed.

CHAIRMAN BABCOCK: You would have to obligate the order to do that within a short period of time because there could be mischief there in some of these cases.

MR. WATSON: Well, of course, I mean, you

know, there would be a time limit like on all other service of pleadings, that it's the day of receipt --

CHAIRMAN BABCOCK: Right.

MR. WATSON: -- it will go out.

CHAIRMAN BABCOCK: Right. Right.

MR. GILSTRAP: The problem with that is in ongoing litigation you've always got a remedy. "I didn't get notice of the hearing." "I didn't get the interrogatories." You can always go to the trial judge and say, "Judge, I didn't get notice," and he can fix it, but when you're talking about finality of judgment and you don't get notice and the time runs, the judge can't fix it, and so you would have to have some way to extend the timetable if something like that would work.

MR. WATSON: Well, I don't say that you shouldn't have a way to extend the timetable, but it's just like pleadings. If you've sent it by certified mail, you have a green card. If you've sent it by fax, you have the return fax receipt. If you send it by FedEx, you have the tracking stuff. I mean, I don't see it being any different than the system that now works. The only thing I'm suggesting is just instead of having Judge Peeples or the clerk having the burden to handle all the envelopes, we treat it like an amended petition, and then the last thing on the end is, is that we send a copy of it with the

certificate of service attached showing that on such-and-such a date the prevailing lawyer certifies that the conformed copy was sent by these means to these people, and that then is filed of record.

CHAIRMAN BABCOCK: Judge Peeples, what's your reaction to that, what Skip Watson just said?

Teach you to go fooling around the food.

PROFESSOR DORSANEO: Thinking about brunch.

MR. WATSON: I am not going through it again.

CHAIRMAN BABCOCK: It's a modified Dallas system is what he's proposing.

HONORABLE DAVID PEEPLES: Well, just generally on this whole discussion, what we ought to be concerned with is the situations where there are finality consequences. I mean, but if once we do that then somebody has got to distinguish between those orders and so forth that don't have finality consequences and which you can get corrected by telling the judge, "I didn't get notice."

And even orders that are final, ninety-nine and a half percent of them are the ones where everybody has already signed off on it, if you take away defaults, and you're just sending them something they've already got, and so -- but we do want to catch the .5 percent

where somebody is getting ready to lose their appellate rights. I mean, I wish that there was some way that we could not require all this paperwork, and cost benefit is an inquiry here of sending people things that they've already got and they have settled the case or they've approved.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: It's not necessary there, but you may have to do it in all of those in order to catch the few.

CHAIRMAN BABCOCK: What's everybody else think about Skip's idea? How about down here in the peanut gallery?

PROFESSOR CARLSON: What about an order of appealability?

CHAIRMAN BABCOCK: Now, now.

HONORABLE SARAH DUNCAN: This does sound a lot like our subcommittee discussions.

MR. WATSON: Now, don't kill it by saying that, Sarah.

HONORABLE SARAH DUNCAN: Just thinking about your proposal --

MR. WATSON: Say something nice.

HONORABLE SARAH DUNCAN: I like your proposal. I have the -- I do have a question. What

happens to the bill of review because of the clerk's failure to send out notice of the final judgment or appealable order?

MR. WATSON: You've got your bill of review, I would hope.

JUSTICE HECHT: Yeah.

HONORABLE SARAH DUNCAN: Well, you don't have official mistake.

JUSTICE HECHT: Why not, the clerk?

PROFESSOR DORSANEO: You do have in that situation.

HONORABLE SARAH DUNCAN: What's the --

MR. WATSON: The clerk kicks off by having an obligation to send a conformed or signed copy.

HONORABLE SARAH DUNCAN: And the clerk fulfills that duty and opposing counsel simply doesn't distribute.

MR. WATSON: Oh, I see.

MR. ORSINGER: Oh, under Skip's system?

HONORABLE SARAH DUNCAN: Yeah.

MR. ORSINGER: Well, don't you have wrongful act of the opposing party? A lot of people think that it requires fraud on the other party, but it's fraud or wrongful act.

HONORABLE SARAH DUNCAN: But it's extrinsic.

Wrongful act extrinsic to the litigation.

MR. ORSINGER: Yeah, but failure -- well, first of all, this judgment is going to be signed after there's been something. I mean, the judgment isn't signed like a default judgment. This is after someone has already made an appearance and there's been a hearing or summary judgment, there's been a trial or something like that. All you've really been cheated out of is your opportunity to file a motion for new trial and to take an ordinary appeal.

HONORABLE SARAH DUNCAN: Well, if it's just that, Richard, why are we worried about it?

MR. ORSINGER: So the bill of review, the bill of review is filed to set aside the final judgment, but that doesn't necessarily -- if you're post-jury trial at that time that doesn't necessarily get you a new jury trial.

MR. WATSON: I thought that was the reason for sending back -- you know, for the sending party, the prevailing party, to send back the conformed copy with a certificate of service attached. At that point for bill of review purposes it's going to be mighty tough, you know, for that person to come in and say, "I didn't get notice" when the person who sent in the certificate of service says, "Here's the green card" or "Here's the fax

transmission." To me it's self-limiting by the very certificate of service that goes back to the clerk.

CHAIRMAN BABCOCK: Here's what I think the committee ought to think about doing: Number one, it sounds like we are talking about something that is a problem and something the Court could benefit from some advice from us, so it's a worthy topic to continue to study.

Secondly, I think maybe between Skip and Judge Peeples and Richard and John Martin maybe there's a germ of an idea we can turn into some language that we can put in a rule. So could I suggest that those people, under Sarah's able leadership, since it's her subcommittee, try to put together some language articulating, Skip, principally what you've said and then what others have said in refining it and talk about that next time? Is that acceptable to you, Sarah?

HONORABLE SARAH DUNCAN: Sure. Thank you.

MR. GILSTRAP: You're talking about some kind of new and improved actual notice mechanism?

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: Well, no, actually sending a copy of the damn order.

MR. GILSTRAP: Right, but it's -- okay.

CHAIRMAN BABCOCK: All right. Well, let's

do that. Let's talk for like five or ten minutes about Judge Peeples' concept of the free 90 days, 90 days free if the final judgment or final order doesn't have with unmistakable clarity the language immediately above or next to the judge's signature.

PROFESSOR DORSANEO: This raises the issue as to whether the 90 days in 306a is a long enough period, the right period, to begin with, it seems to me.

CHAIRMAN BABCOCK: How about without regard to the details, conceptually is this something that we think we ought to do? Does it require further discussion or should we just put a stake in its heart right now?

PROFESSOR DORSANEO: Initially there was a lot of hostility to 306a because it extends things.

CHAIRMAN BABCOCK: Uh-huh.

PROFESSOR DORSANEO: I remember the debate the first time around, there were a number of people who just didn't like 306a. I don't know whether that's so now. There are a number of 306a cases, and the 306a jurisprudence is extremely complicated, and the rule hasn't really withstood the test of time all that well. So I think it needs -- it may need to be reworked in light of a number of different problems.

CHAIRMAN BABCOCK: But what about the concept of extending it for some period of time if the

final judgment or order doesn't have this unmistakablely clear language in a particular place?

PROFESSOR DORSANEO: To me it seems like -- I don't like having two different times. Okay. If it has this language, it's this number that's extended. You can find out about it, and if it doesn't have this language, you have more time. I would like to just pick a time and have that be the right amount of time to deal with the problems of not knowing that you need to do something.

MR. GILSTRAP: Bill, could you kind of acquaint me with some of the problems under 306a? The cases I've had that involved 306a, it actually seems to work.

PROFESSOR DORSANEO: Well, there are a number of cases about when do you need to file the motion, the 306a motion, and the courts are split as to whether you need to file it 30 days after you find out, you know, get notice, or acquire knowledge. The rule just doesn't speak to that.

MR. GILSTRAP: Okay.

PROFESSOR DORSANEO: There's a discrepancy between 306a and the companion appellate rule.

HONORABLE SARAH DUNCAN: 4.

PROFESSOR DORSANEO: 4. The appellate rule I think now says that the court must make a ruling as to

the date that the person first acquired knowledge or received the notice. We recommended that that be put in 306a, but that hasn't happened because a lot of things haven't happened because it's in the recodification draft, which is on the shelf somewhere, at least for the time being.

To me today, you know, looking at this clerk's notice and reading the Lehmann case, the clerk's notice is not really adequate. When the rule was drafted, you know, Clarence and I thought -- were thinking about a final judgment, you know, like a judgment that looks like a judgment and you could tell by looking at it that it's a judgment and not some sort of a mess that you would need to evaluate, and it's written, you know, with that frame of mind, and we know a lot more about it now, and the problems are larger.

MR. GILSTRAP: Yeah, and I --

PROFESSOR DORSANEO: And then we had the -- what's the name of the case, Sarah, Elaine, the goofy case out of the -- the Levitt vs. Adams case that said if you acquire knowledge on the 91st day that the rule is cancelled, you know, and that that's somehow beneficial to the person who can't take the benefit of the rule because they get the wonderful opportunity to use a bill of review to, you know, protect themselves. I think that's nuts and

needs to be re-evaluated.

So I think there are a lot of problems with the rule, and the rule was very controversial to begin with. And, you know, maybe it's not satisfactory to say we need to look at this whole thing and come up with a comprehensive solution, but, you know, that would be my attitude, and the idea that 90 days may not be long enough, you know, is probably okay with me. I mean, we still have restricted appeals, which, you know, is more than double that. Okay. No, it's double that. Okay. Six months. Okay.

And you know, why, you know, 90 days was selected is a debatable point, maybe too little, maybe too short. If it's too short for some purposes, okay, then maybe it ought to be uniformly longer for all purposes. Of course, we're not talking about a large number of cases here, either, I don't think, but a significant number.

MR. GILSTRAP: I like the idea of maybe trying to tinker with 306a and making it work better. You're not going to solve the problem with people not knowing that it's not a judgment -- that it's a judgment, except that you give them a longer time to wake up, but it seems to me that would work better than engrafting another tolling period on top of that, which seems to me to be real troublesome.

PROFESSOR DORSANEO: That's my main point.

MR. GILSTRAP: Causes some real problems.

HONORABLE SARAH DUNCAN: To respond to Frank's question, before you were appointed to the committee and the subcommittee we were asked to address all of the problems with 306a, and I did a memo on all of the problems that we were able to identify, and we have a redraft of 306a that we've just never gotten to.

CHAIRMAN BABCOCK: Okay. And how does it differ from what Judge Peeples proposed in kind of this free 90-day period?

HONORABLE SARAH DUNCAN: It doesn't incorporate any additional 90-day period because that was just put on the table this week.

PROFESSOR DORSANEO: Does it do anything with the notice?

HONORABLE SARAH DUNCAN: It specifies that it's the clerk's notice we're talking about rather than constructive notice. It doesn't try to resolve the problem of when the notice should go out or what the notice should state because the subcommittee was of the view that there should be magic language or an order of appealability, so we didn't address that problem.

PROFESSOR DORSANEO: Now, I would repeat again -- and I think this is worth noting -- the general

philosophy of these rules, at least with respect to the notice of judgment that we don't have specific rules covering, is that lawyers and parties are meant to keep track of the cases and then these other things are helpers that might work.

And maybe we want to go to a system that says that it's the system's responsibility to provide, you know, what will be more normally thought of as modern due process notice rather than to just say, "Well, you're bent to go to the courthouse every week and look at the file," which was apparently the game plan during the earlier part of the last century. If that's what your rule does --

HONORABLE SARAH DUNCAN: And that game plan probably made sense when lawyers had 50 cases on their docket and they practiced --

PROFESSOR DORSANEO: In this county.

HONORABLE SARAH DUNCAN: And they practiced in this county, and now that we have statewide litigation practices with a couple of hundred cases on the docket, it may not make so much sense.

PROFESSOR DORSANEO: See, we have these Rules 305, 306a, 21, 21a, which generally are requiring notice; but even 306a says, "Well, if you didn't get it, that doesn't mean that you're not responsible for keeping track of your case and acquiring knowledge, keeping up

with the case." If you go to a system that the clerk or somebody is meant to provide this -- some kind of notice or the order itself, then logically you would trigger, logically you would trigger action from service of notice rather than from signing of an order.

That may be a better -- that may be a better system. I would be inclined to seriously consider voting in favor of that, but that's not our -- that's not the approach. We're approaching that approach, but that's not the approach of this rule book at this point in time.

CHAIRMAN BABCOCK: Sarah, the work that your subcommittee did on 306a --

HONORABLE SARAH DUNCAN: Did we pass that? Did we consider that?

CHAIRMAN BABCOCK: I don't think we did. It was presented at the -- I've got it, and it's got a March '01 Bates number on it. Is that the meeting we cancelled, isn't it, or not?

MR. WATSON: No, May.

MR. GRIESEL: Actually, we did discuss this after my time here began, which would be September.

HONORABLE SARAH DUNCAN: I think so, too.

MR. GRIESEL: I believe 306 and the recodification with 300, those issues were deferred.

MR. WATSON: That came up.

HONORABLE SARAH DUNCAN: It was deferred?

MR. GRIESEL: I believe. Let's go back and check.

CHAIRMAN BABCOCK: Well, in any event, in light of the fact that we have identified some serious problems in 306a, in light of the fact that Skip, et al, are going to try to work under Sarah's direction on the getting notice to people, in light of the other problems that are outlined in the memo that was given to us in March, and in light of what Bill Dorsaneo says, Sarah, could you and your merry band of people and whoever else, Judge Peeples, obviously, come back to us next meeting?

HONORABLE DAVID PEEPLES: Chip, I want to say something before we go further on that.

I want to disagree respectfully with the notion that there are widespread problems under 306a. I've probably had 15 or 20 hearings to extend the deadline under 306a(4), and I don't think that's a whole lot. This has been in effect since 1984. I may be wrong, but it's not that many. And, bills of review, we've had a few of those, but I just think before we go off on some project to rewrite a bunch of things, we need to know exactly what problems we're trying to fix.

Now, one problem I think is clear, which is that clerks are not sending notice of every final judgment

or appealable order under subparagraph (3). I think that's just factually true.

CHAIRMAN BABCOCK: That's where --

HONORABLE DAVID PEEPLES: But that it's a flawed rule is something I don't accept right now.

HONORABLE SARAH DUNCAN: Oh, we've --

CHAIRMAN BABCOCK: And what Sarah said in her report to us was that there has been a lot of litigation and in a case called Grondoma vs. Sutton, one of our own members, Pam Baron, filed an amicus that said Rule 306a is functioning as one big "gotcha" and the courts of appeals differ on when a Rule 306a motion must be filed and its effect. So I don't know if there's a problem or not. Some people seem to think there is.

HONORABLE DAVID PEEPLES: My point is this. Before we redraft rules we ought to know exactly what the problem is. Now, this finality of judgments all came up because some people were getting into the appellate courts with summary judgments and there were Mother Hubbard clauses marking them out and so forth, and we dealt with that in a cumulative order. Those things do happen, but at least we know on finality what problems we're dealing with, and I am not convinced that 306a is --

HONORABLE SARAH DUNCAN: Well, I've distributed --

HONORABLE DAVID PEEPLES: -- numerically causing a lot of problems.

HONORABLE SARAH DUNCAN: Excuse me. I distributed a memo to the subcommittee and later to this committee on 306a. It has been a big troublemaker. The courts of appeals do not agree on even the most fundamental aspect of what must be filed or when or when a ruling has to be made. The Supreme Court, I think I've had -- me, myself, and I have had three mandamus opinions on 306a in a two-year period, roundabout. The Supreme Court was ready to grant one of them, and it was settled.

It is a continuing source of many problems for a lot of lawyers and litigants. It really is, and I'd be happy to send you another copy of the memo that shows that there is very little agreement on any particular issue related to 306a.

HONORABLE DAVID PEEPLES: Okay.

PROFESSOR DORSANEO: It's not like the Middle East, but it's a problem, you know.

CHAIRMAN BABCOCK: I think we all ought to be guided by Judge Peeples' comments that we darn sure should not be screwing with rules that don't need to be fixed and where there's no problem and that we ought to identify exactly what the problem is, and if we are convinced that there is a problem then we fix it, try to

fix it. That ought to be our standard.

But, given that, if you-all would continue to look at that and report back to us at the next meeting, that would be great, and let's take a little ten-minute break and then get to what I know everybody has been waiting for. FED.

(Recess from 10:06 a.m. to 10:16 a.m.)

CHAIRMAN BABCOCK: Judge Peeples has got the revision to the Rule 20 of the TRAP rules.

HONORABLE DAVID PEEPLES: Why don't you call on them the way you did me when I went back there?

CHAIRMAN BABCOCK: Hey, Chris, what do you think about this Rule 20 thing?

MR. GRIESEL: Pardon me, sir?

CHAIRMAN BABCOCK: Man, he jumped, didn't he?

MR. GRIESEL: That's not good.

CHAIRMAN BABCOCK: Judge Peeples has got the new language on Rule 20 of the TRAP rules.

HONORABLE DAVID PEEPLES: I've shopped this around to about five or six people. This is on the issue of court reporters not getting notice that an affidavit of inability to pay costs has been filed.

CHAIRMAN BABCOCK: Richard.

HONORABLE DAVID PEEPLES: And so the

proposal is in TRAP Rule 20(d) -- excuse me, 20(e), to insert the following language at the end of the penultimate sentence. If you want to follow along you may need this. "The contest must be filed on or before the date set by the clerk if the affidavit was filed in the appellate court, or within ten days after the date when the affidavit was filed in trial court," comma, insert this language, "except that the reporter may file a contest to the affidavit within ten days from the date the reporter received actual knowledge that the affidavit was filed," period.

MR. DUGGINS: Read it again, will you, please?

HONORABLE DAVID PEEPLES: "Except that the reporter may file a contest to the affidavit within ten days from the date the reporter received actual knowledge that the affidavit was filed." And so the clerk doesn't tell the court reporter, and the appellant comes in and says, "Where's that record I've been waiting for?" And the reporter says, "I don't know what you're talking about." There will be a hearing; and if the judge believes the court reporter didn't have actual knowledge and filed the contest within ten days, it will be sustained; and if not, there will be a free record; but at least the court reporter will have the right to know if

somebody is trying to have a free appeal.

PROFESSOR DORSANEO: I hate to quibble here, and I know I looked at that language. Do we want to say "actual knowledge," or do we want to say "the clerk's notice" or "notice"?

HONORABLE DAVID PEEPLES: Well, I suggested "actual notice" and Sarah says "knowledge" would be a better word than "notice."

HONORABLE SARAH DUNCAN: No. What I objected to was the term objected "actual notice." Because it means different things in different appellate contexts.

MR. ORSINGER: And, Bill, I don't think you want to make it just the clerk's notice, because what if the litigant hand-delivers the notice to the court reporter and the clerk doesn't mail one? All we want is notice. We don't care who it came from.

PROFESSOR DORSANEO: Right. But now by implication the rule requires or suggests that the person who files the affidavit of indigence should serve it on the court reporter, but it doesn't say that.

MR. ORSINGER: Well, the rule right now assumes that the trial court clerk will serve it on the court reporter.

PROFESSOR DORSANEO: And it says in an

earlier provision that it will be filed with the court.

MR. ORSINGER: Right. So I think that we don't require the litigant to serve the court reporter right now.

PROFESSOR DORSANEO: Except we do if you want the ten days to run and you don't think the clerk is going to do the notice.

That's fine with me.

HONORABLE DAVID PEEPLES: Somebody needs to tell the reporter, the clerk or the appellant or someone, and if it doesn't happen, the reporter gets to file a contest within ten days.

HONORABLE SARAH DUNCAN: If I can just back up, I was not saying that I thought "actual knowledge" was better. What I was asking was that -- is that we differentiate between a notice, constructive notice, and actual knowledge. If any of those is sufficient to trigger, that's fine with me. If only one of them is sufficient to trigger, that's fine with me. My problem was "actual notice" not saying what I thought it ought to be.

CHAIRMAN BABCOCK: Okay. Ralph.

MR. DUGGINS: What happens if the party doesn't receive a copy? Since the party can challenge, too, is there any reason to limit this contest to the

court reporter? I'm just asking.

PROFESSOR DORSANEO: I thought the same thing, but I didn't say it.

MR. ORSINGER: Not really.

HONORABLE DAVID PEEPLES: If the court reporter is not going to contest it, in other words, is willing to work for free and give a free appeal, why should the appellee care?

MR. DUGGINS: Well, I'm just looking at (e), and it says, "The clerk, the court reporter, or any party may challenge a claim of indigence," and if they have that right and don't get notice --

HONORABLE DAVID PEEPLES: Yeah.

MR. DUGGINS: I don't feel strongly about it. I'm merely asking.

HONORABLE DAVID PEEPLES: Well, the old rule did require the appellant to give notice of the filing of the affidavit to the opposing party or his attorney and to the court reporter. That was changed recently, you know, a few years ago, to file with the clerk and the clerk tells the court reporter. This doesn't say the clerk tells the parties, the appellee.

MR. DUGGINS: What if you took (d)(1), existing (d)(1) where you talk about "file with the trial clerk with notice to" and added something like -- added an

insert there, "with notice to the reporter and all other parties in accordance with Rule 21"?

PROFESSOR DORSANEO: Well, you're talking appellate rules, so I think that really the appellate rules do provide for notice to -- I am not completely confident about that on the affidavit of indigence, notice to the other parties. Maybe not.

MR. ORSINGER: No, it doesn't appear to explicitly say that. It's right here on this same page.

PROFESSOR DORSANEO: But I mean 9.2.

MR. ORSINGER: Oh, up front. But let me say, Bill, that the affidavit of indigency may be filed in the trial court rather than the appellate court. Does that make any difference?

CHAIRMAN BABCOCK: Are we trying to fix too much?

HONORABLE DAVID PEEPLES: I think it's an easy fix. You know, the problem is court reporters don't get notice now someplaces, and I think we can count on court reporters if they want to do work for free, fine, I think that's fine; and if they don't, they will either contest it themselves or call the appellee and say, "Are you aware that they're trying to appeal that four-week trial for free? Are you going to get involved in this?" And they either will or they won't.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: I think this is enough of a fix, but it doesn't bother me if we try to require notice to the parties.

CHAIRMAN BABCOCK: Bonnie.

MS. WOLBRUECK: I was just going to say, one of the issues that I know that clerks have sometime with this rule as stated now is that it says "the appropriate court reporter," and oftentimes we have visiting court reporters and not the -- if the official court reporter of that court has two or three other court reporters working in a lengthy trial or something, it's sometimes difficult for the clerk to find out exactly who that court reporter was, and that has become, I know, the issue in some courts, but just to throw that out.

PROFESSOR DORSANEO: Richard, do you have your language?

MR. ORSINGER: I agree with that because I frequently myself have to chase down three or four court reporters, especially in Bexar County where we have revolving docket, but this is fair if you can only -- if you have, say, somebody, you know, was sick or on a trip or pregnant or whatever, you have part of the record is by one and part is by another; and if one of those court reporters doesn't get notice until three weeks later, we

finally figure out who she was, and we finally get through to her, her clock for her part of the record is running a little bit later than the others.

CHAIRMAN BABCOCK: Here's what I think we ought to do. Let's take this language. We'll put it into a document and circulate that to everybody.

HONORABLE DAVID PEEPLES: Okay.

CHAIRMAN BABCOCK: And if people want to make more of a fix than what this is then let Judge Peeples and myself know.

MR. ORSINGER: I'm happy with it as it is.

HONORABLE DAVID PEEPLES: I think it does it as it is, but Ralph has a point. Why not say in (d)(1), "Clerk must promptly send a copy of the affidavit to the appropriate court reporter and opposing parties"?

MR. DUGGINS: That's fine.

HONORABLE DAVID PEEPLES: I so move.

CHAIRMAN BABCOCK: All right. Everybody okay with that? No, Sarah?

HONORABLE SARAH DUNCAN: But why isn't it covered, as Bill said, by 9.5? Why are we imposing a duty on the clerk to serve copies on opposing counsel when the filer is already required to serve copies on opposing counsel or parties?

HONORABLE DAVID PEEPLES: Ralph, is 9.5 good

enough for you?

MR. DUGGINS: I don't -- I think your original proposal was fine. I was just --

MR. ORSINGER: Well, the way I interpret Ralph's comment is, is that if we're going to give somebody an actual notice of delay why is it only the court reporter and not the party? And that amendment ought to occur at the end of the new sentence.

In other words, we are not changing anybody's notice obligations, but we're just saying if the indigent did not give notice to the other party, the other party has -- gets the delay until they receive actual notice.

HONORABLE DAVID PEEPLES: You said that "the reporter and opposing parties may file a contest"?

MR. ORSINGER: That's what I interpreted the comment to be. I don't care. I don't know that they really have a stake in it.

HONORABLE DAVID PEEPLES: Yeah.

MR. ORSINGER: I mean, the only time I've ever done it was when I was trying to gyp the other guy out of their appeal.

HONORABLE SARAH DUNCAN: Richard Orsinger.

HONORABLE DAVID PEEPLES: I think we ought to make a limited fix, which is the one I originally said

that says "the reporter may file a contest within ten days of the date the reporter receives actual knowledge the affidavit was filed."

CHAIRMAN BABCOCK: Everybody okay with that? Ralph, you okay with that?

MR. DUGGINS: Sure.

CHAIRMAN BABCOCK: Okay. All right. That will pass, and Carrie will type it up, and we will submit that to the Court.

Jurisdictional motion filed by the Rule 300 subcommittee, the Fulton vs. Finch problem that was referred to us by Justice Hecht on May 26th should have properly gone to Justice Duncan's subcommittee and not to Professor Dorsaneo's subcommittee, so it is hereby ordered that that problem is re-assigned from Professor Dorsaneo to Justice Duncan. So you've got that one on your plate, Sarah. Your motion is granted.

HONORABLE SARAH DUNCAN: And is my motion also granted to associate the prime need to get that done?

CHAIRMAN BABCOCK: And Skip Watson's motion to be added to the Rule 300 through 330 subcommittee is granted.

So now onto FED, Elaine.

PROFESSOR CARLSON: Motion to withdraw.

CHAIRMAN BABCOCK: That will be denied.

PROFESSOR CARLSON: Our subcommittee was asked to look at two complaints that were raised by the State Bar of Texas Court Rules Committee, which is in your packet which is dated June 15th, a fairly large packet, on page 52.

The two problems that were identified for our subcommittee were, one, that service of process in a forcible entry and detainer case is currently limited to certain officials, and there were problems with that; and, two, that the appeal process de novo from justice court to county court is creating some problems. Our subcommittee sat down to look at those two discrete problems and determined that there were more than those problems, and we have spent really much of the last year looking through the forcible entry and detainer rules and are bringing to the full committee a number of recommendations.

I'd like to kind of approach this in three ways; first, to look at the easy problems, dealing with our service of citation rule; secondly, looking at some proposed changes to the actual trial process of the forcible entry and detainers in the JP court, which I don't think will be controversial, but who knows; and then third, and the most problematic, is the appeal process that we have from a JP to county court and then county to court of appeals potentially.

So if we could look at page 18 of your packet, Rule 742, the suggestion was made by our court rules committee that we enlarge the class of persons who can serve process in a forcible entry and detainer action to correspond with what we've done with Rule 103 and I guess Rule 536. As you know, both of those rules allow persons other than the sheriff or constable to effectuate service. The committee was apprised of some problems in counties where, for whatever reasons, the constable might be hesitant to go and serve a forcible complaint or papers on a tenant who was a friend or whatever, or there were some political instances that were reported to our committee where the constables just refused on an unstated basis to serve these cases, leaving the landlord without the ability to go forward on the forcible entry.

Those are very isolateed instances, I believe, but the larger question is do we wish to modernize the practice of service and citation in these types of actions to correspond with what we've done with the ability to use private process servers in civil actions generally, and so we propose in Rule 742, as you see, to enlarge the persons -- and this is dovetailing, I believe, the language in 103, to allow not only a sheriff or constable but to allow a person authorized by the law, and we track the language of 103.

I'll give you a second to look at that and just take feedback if anyone has concerns about that. Really the issue is do you think only an elected or appointed position like a constable or sheriff should be serving forcible entry and detainer actions, or do we trust private process servers to get the job done?

MR. DUGGINS: Why do we use the word "rental" in front of "premises" instead of just "premises"?

PROFESSOR CARLSON: It's not necessary.

MR. DUGGINS: I'm not -- again, I don't feel strongly about it. I was just curious. I think it's a good change.

HONORABLE TOM LAWRENCE: We're using "rental premises" in other places, just to be consistent.

PROFESSOR DORSANEO: Well, but forcible detainer doesn't necessarily restrict itself to rental.

MR. ORSINGER: Yeah. You might have acquired title from the previous owner or something like that. It may not be a rental.

PROFESSOR CARLSON: That's a good point.

CHAIRMAN BABCOCK: Lose "rental." Everybody have time to read it?

Any problem with the basic concept? Justice Hecht, I know of nothing that we --

MR. ORSINGER: We're not talking about eviction day. We're talking about notice of the FE&D suit, right?

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: Because eviction day, when you're actually moving the stuff out on the street, that's a different policy.

HONORABLE TOM LAWRENCE: That's governed by the Property Code and that would remain constant.

MR. ORSINGER: Okay. Good.

CHAIRMAN BABCOCK: All right. Any other comments that are problems with this fix? I hear none, so I assume that it passes by acclimation.

PROFESSOR CARLSON: I'm going to ask Judge Lawrence to -- Judge Lawrence has been -- I just want to go on the record -- a tremendous asset to this committee. We have not had the wealth of knowledge and experience, being on the bench 18 years in this area, heretofore; and Judge Lawrence has been the principal scrivener and identifier of problems and fixes; and I'm going to turn 742 over to you.

HONORABLE TOM LAWRENCE: Well, I thought we would start on 738, which is page 15.

CHAIRMAN BABCOCK: Wait a second. What did we just do? I thought we were talking about 742 on page

18.

HONORABLE TOM LAWRENCE: We can do 742 if you'd like to do that first and go back.

CHAIRMAN BABCOCK: Well, I don't see anybody has got any problems with it.

PROFESSOR CARLSON: 742a.

CHAIRMAN BABCOCK: We're on 742a. Okay. No, you go in whatever order you want, but this committee has approved your work on Rule 742.

PROFESSOR CARLSON: Great.

HONORABLE TOM LAWRENCE: Okay. Then we'll go to 742a, which is the next rule, and then we're going to skip back and start at 738 and go forward after that.

As a practical matter, any deleted portions that the subcommittee recommends are struck through. Any new provisions are underlined. Any notes and comments that we recommend be included in the rule are underlined. There are some places where it says "comment to committee" in bracket, and that's just for the committee's use, would not be in the rule.

To give you a perspective, there were 118,557 forcible entry detainer cases last fiscal year. That's about half of the JP's docket, so it's a pretty substantial number of cases it involves.

JUSTICE HECHT: 118?

HONORABLE TOM LAWRENCE: 118,557 in fiscal year 2000.

MR. ORSINGER: Wow.

HONORABLE TOM LAWRENCE: 742a is the alternate method of serving if you can't serve somebody under 742, which is to personally serve or serve someone over the age of 16 at the premises; and 742a currently requires the plaintiff to put all known addresses of the defendant in the complaint as well as the address of the premises, the rental premises or the premises in question, make two attempts at service at each of those listed in the complaint, and then, and only after that, go back to the court, ask the court for permission to serve it under alternate method; and the alternate method is to place it inside the premises through a door mail chute or slip it under the main entry door to the premises or affix it to the inside of the main entry door if you can.

If there's a dangerous dog or locks on the door that you can't get in then it would be affixed to the outside, and this would only be done by court order under Rule 742a. The one change that we proposed in the first paragraph, although the rule requires and has required for sometime that you -- that the plaintiff put all known addresses of the defendant, which would include presumably work addresses, and most tenants would have a work address

on the rental application. I have seen tenants put work addresses on the citation -- it happens about four or five times a year as a rule. They just almost never do it in practice.

Generally they just put it on the rental premises, and if you think about it, it doesn't really make much sense to try to serve them at the rental premises because the likelihood is that, one, they may not be at that rental -- or at that business, not the rental premises, the business premise, they may not be at that business premise any longer. They may have moved. It doesn't make much sense to try to serve it if someone works at Exxon Baytown refinery to try to serve it on a security guard or someone there.

The most likely place for them to get their service of citation is going to be at the premises itself. Now, if they want to put another premises for service of citation, they can do that in the lease agreement. There's a provision in the lease agreement that allows them to put other locations if they want to do that. But, otherwise, we would propose if the plaintiff wants to put other locations in the complaint where they can be served, the plaintiff can do that. Otherwise, it would go to the premises, and that's where the 742a would be served.

The other part that we are changing or

recommending a change to is we are asking that the officer when they return the citation to be verified, return of citation to be verified, the officer when they make the 742a service, currently they have until the next day to place that in the mail. In other words, you attach it to the door, presumably, and then you mail it also, a copy of that, to the tenant; and we're requiring that that be mailed the same day, not the next day. That solves a problem with trying to calculate the date that you can set the trial because it's six days, currently six days, from the date of service or mailing. Well, that could be -- it could be Tuesday or it could be Wednesday, depending on whether it was served or mailed. So we want to make mailing the same day as the actual attaching to the door, so it's to calculate that.

We also want to require that -- currently the officer can make the return of citation on the day of trial. Well, if I set my docket at 8:30 and the officer comes in at 3:00 o'clock, that doesn't help much, getting the citation afterwards, because we have already rescheduled that, so we're asking that it be returned one day prior to trial so we have got the citation in hand so we know we have jurisdiction over the tenant prior to going forward with the trial.

And those are the significant rules.

Otherwise there are a few gender changes in there.

CHAIRMAN BABCOCK: Okay. Anybody have any comments on Rule 742a as outlined by Judge Lawrence? Ralph.

MR. DUGGINS: I'm not sure I understand this second sentence, "as well as any other alternate addresses of the defendant or defendants." Why is that essential?

HONORABLE TOM LAWRENCE: Well, are you talking about the sentence where it says "as contained in a written lease agreement"?

MR. DUGGINS: Yes.

HONORABLE TOM LAWRENCE: Because in some lease agreements, for example, it may be they put in the lease agreement that there is an alternate place for service. That's not done as much in residential, but it's done quite frequently in commercial. They will put an alternate place for all notices that you give them.

PROFESSOR DORSANEO: Uh-huh. That's a good idea.

MR. DUGGINS: But I don't understand why it's necessary to the rule.

HONORABLE TOM LAWRENCE: Because you want to give the plaintiff the option. The plaintiff may want to get service -- the plaintiff may want to get service on the tenant quicker, and he knows that there is an address

other than the premises that he might be able to get service quicker and move the process along. A 742a takes more time, so it's to the plaintiff's interest to have addresses on the original petition that would be served faster. So you're giving the plaintiff the option to put additional addresses on it.

MR. DUGGINS: Well, this is picky, but I think you need to take the apostrophe out of the "defendants," the second "defendants," and then "rental" at the end of the first paragraph.

HONORABLE TOM LAWRENCE: Yeah. Okay.

CHAIRMAN BABCOCK: Take the apostrophe out of "defendants"?

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN BABCOCK: And do we also want to lose the word "rental"?

HONORABLE TOM LAWRENCE: That's fine.

CHAIRMAN BABCOCK: Any other comments about Rule 742a? Yeah, Bill.

PROFESSOR DORSANEO: This is picky, too, but why don't you move it into 742 and just make it a subdivision of 742, just have one service of citation rule? Or do you like it -- everybody thinks of it as 742a, so you like it there?

HONORABLE TOM LAWRENCE: It's easier to

identify the method of service as 742a. That connotation means something to the people doing the service and the courts and the plaintiffs.

PROFESSOR DORSANEO: Okay.

HONORABLE TOM LAWRENCE: It's the way the rules have always been constructed. I guess we could change it, but there's no real reason to.

CHAIRMAN BABCOCK: Particularly if there's a culture where it means something to say, "We've got 742a process."

MR. GILSTRAP: Let me comment. One of the problems we faced on the subcommittee was that, you know, there is some substantial changes in here; and, you know, you've got all these people that are used to working with the old law; and, you know, how much are you going to change it. You want to make the substantive changes, but you don't want to go further and make it neater and yet change something that they are familiar with. It might be a better fix, but in some ways it may increase the problem by giving them more new material to deal with, and I think that was one of the guiding principles we followed in this thing is a lot of the stuff we kept the same just so people would continue to understand in the old context.

CHAIRMAN BABCOCK: Yeah. And to re-emphasize, that ought to be one of our guiding

principles in everything. We shouldn't try to fix things just for the sake of changing them if there's not a problem; and this work product, I'll say it again, is outstanding. But, anyway, any other comments on Rule 742a?

All right. Then do I hear a motion to approve this?

MR. ORSINGER: When you say "this," what's "this"?

CHAIRMAN BABCOCK: 742a.

MR. ORSINGER: Okay.

HONORABLE SARAH DUNCAN: So moved.

CHAIRMAN BABCOCK: Second? Ralph seconds it. Any further discussion?

Anybody opposed? Then it will pass unanimously. So let's go to the next one, 738.

HONORABLE TOM LAWRENCE: I would point out -- yeah. 738 on page 15, but I would point out page 8 through 14 is an index of the rule changes which tells you what's been moved where, what's been deleted, what's kind of a different rule, so if you can kind of also follow that it might be easier.

738 on page 15, it looks as though we've completely rewritten it, but actually it's easier to rewrite it. There are no substantial changes in it, other

than we are now adding contractual late charges as something that you can sue for in the action. A forcible action is primarily about possession, but also the rules have provided that you can also sue for rent, attorneys fees, and court costs as a part of the lawsuit.

Now, in the standard lease agreements, particularly the Texas Apartment Association lease, which is in use probably predominantly among apartment users, and the Texas Board of Realtors lease, in the section talking about rent they also talk at the same time about contractual late charges. Late charges are based on the nonpayment of rent or when the rent is paid late when it was paid, so it makes sense to me to put late charges in 738 as something that you can sue for, so we're expanding what you can sue for a little.

I would point out that there are 13 different provisions in the standard lease, some of which have multiple causes of action where a landlord can sue a tenant. All we want to do is in the one cause of action is add what is a part of rent now, late charges, to 738. And we also are making it clear that -- and, frankly, some justice courts now grant late charges believing that it is part of rent. Some do not because the rule says "rent" and doesn't say "late charges," so this will end a little bit of confusion.

We're also clarifying in the comment that we're proposing -- we're clarifying what the court may consider in terms of what type of relief that they can grant. We're making that clearer. There's a little bit of confusion now.

CHAIRMAN BABCOCK: Go ahead, Bill.

PROFESSOR DORSANEO: Well, this may fit within you don't want to change it because you don't want to change it, but "May Sue for Rent," that's a stupid heading. We have stupid headings many other places, so I could tolerate it, but better language might be "Joinder of Claims," "Joinder of Additional Claims." It's not just about rent anyway.

I'm not making a big point here, but --

PROFESSOR CARLSON: I think that's a good suggestion.

HONORABLE TOM LAWRENCE: That's fine.

CHAIRMAN BABCOCK: What do you want to change it to, Bill?

PROFESSOR CARLSON: Say "Joinder of Additional Claims," and that's what it's about, what else can you bring.

HONORABLE TOM LAWRENCE: Yeah. That's fine.

MR. WATSON: He wants to say "May Joinder or Additional Claims."

PROFESSOR DORSANEO: Yeah. Or "April."

CHAIRMAN BABCOCK: "Joinder of Additional Claims." Anybody have a problem with that?

JUSTICE HECHT: The question about the court's jurisdiction has changed a little bit. I just don't know the law in this area. Is it true that the judgment that's ultimately rendered has to be within the --

PROFESSOR DORSANEO: Probably not.

HONORABLE TOM LAWRENCE: No. No.

JUSTICE HECHT: Just the pleadings, I assume.

HONORABLE TOM LAWRENCE: The pleadings.

JUSTICE HECHT: So if you sue for rent within the court's jurisdiction and in the meantime it goes up --

HONORABLE TOM LAWRENCE: Yeah, you can render judgment more than 5,000 if that's the case.

PROFESSOR DORSANEO: I would recommend -- we don't normally put jurisdictional issues in the pleading rules or joinder rules. We let the jurisdictional rules take care of that. I didn't say that because if you take it out and don't put something in the comment, somebody is going to think that something has changed other than what it says.

JUSTICE HECHT: But the way it's been rewritten with the proviso, that's just not right. The amount there ought to be within the jurisdiction.

MR. ORSINGER: Yeah. The proviso keys off the amount of the judgment, whereas we've all just agreed that jurisdiction keys off the amount of the pleadings.

HONORABLE TOM LAWRENCE: You're right.

HONORABLE SARAH DUNCAN: The rule as currently written is incorrect.

MR. ORSINGER: Well, it's misleading as written. We probably ought to delete --

PROFESSOR DORSANEO: I would just say take the proviso out. It's not necessary to be talking about jurisdictional limits in the rules that aren't the jurisdictional rules.

HONORABLE TOM LAWRENCE: You want to strike "provided the amount that" --

MR. WATSON: Correct.

PROFESSOR DORSANEO: Yeah.

MR. DUGGINS: So the justice court can render a one million-dollar judgment?

PROFESSOR DORSANEO: No, not anymore than any other court.

MR. ORSINGER: It has to accrue on a claim that stared out being within the jurisdictional limits.

MR. DUGGINS: I'm saying suppose it started out being $5,000. How high can it go?

HONORABLE TOM LAWRENCE: Well, there is no theoretical limit, but as a practical matter it --

CHAIRMAN BABCOCK: If the rent is $300 a month and it takes two months...

MR. ORSINGER: It would never get to a million dollars unless it was like a really big office building.

CHAIRMAN BABCOCK: Or some sort of god or something.

MR. ORSINGER: Or the Dallas/Fort Worth International Airport.

JUSTICE HECHT: But as long as jurisdiction is invoked by the pleadings then that's that, whether the amount goes over or under unless it was invoked falsely.

PROFESSOR CARLSON: Yeah. That's Flint vs. Garcia.

HONORABLE TOM LAWRENCE: That's right. What about the second sentence in the comment? Is that okay, because we talk about "sought"? Or should we take that out?

PROFESSOR DORSANEO: That's fine. It's all right.

PROFESSOR CARLSON: I think that's actually

correct.

PROFESSOR DORSANEO: And I think just the comment makes it clear that there is a jurisdictional limit, and it doesn't need to be in the --

CHAIRMAN BABCOCK: Yeah. I think that's fine.

PROFESSOR DORSANEO: And there may or may not be a jurisdictional limit somewhere.

HONORABLE TOM LAWRENCE: Also, in the first sentence of the comment, adding the sentence, "Whenever the term 'forcible entry and detainer' is used in this section it is intended to also include forcible detainer." Actually, about 98 percent of the cases filed are really forcible detainers, but the nomenclature has always been "forcible entry and detainer." Sometimes that's a little confusing.

PROFESSOR DORSANEO: I almost would say are you going to use the term "forcible entry detainer"? I mean, starting over, I would rather use the term --

MR. ORSINGER: "Eviction."

PROFESSOR DORSANEO: -- "forcible detainer."

MR. ORSINGER: What about "eviction"?

PROFESSOR DORSANEO: Well, I wouldn't --

CHAIRMAN BABCOCK: Don't go messing with that.

HONORABLE TOM LAWRENCE: Well, we talked about using the term "eviction" because the Property Code has gone to that now, but then we decided because all the jurisprudence talks about "forcible entry and detainer" and even the courts use that term.

MR. ORSINGER: I know that, but it's an archaic term, and it's not meaningful to anybody except those who are familiar with the --

MR. GILSTRAP: It's not meaningful to anybody but to those who practice in this area regularly.

PROFESSOR DORSANEO: And there are statutes that talk about it. Really "forcible detainer" is better than "forcible entry" because --

MR. ORSINGER: That means at the beginning of the next millenium we'll still be using this term because it's always familiar to us.

MR. GILSTRAP: That's right. That's right.

HONORABLE TOM LAWRENCE: And the Property Code currently defines "forcible entry and detainer" and "forcible detainer." So that's currently in the statutes.

PROFESSOR CARLSON: Yeah. 24.001.

MR. ORSINGER: Okay.

PROFESSOR DORSANEO: Tom, why not just say "forcible detainer" and then say in a comment "forcible detainer means forcible entry and detainer"?

MR. ORSINGER: Well, what's the difference between "detainer" and "entry and detainer"?

HONORABLE TOM LAWRENCE: A forcible entry and detainer is basically a trespasser, someone who goes on without any color of law. A forcible detainer is somebody that either there is an oral or a written lease agreement --

PROFESSOR DORSANEO: Right.

HONORABLE TOM LAWRENCE: -- or there is a tenancy at will or tenancy at sufferance or a foreclosure.

PROFESSOR DORSANEO: Forcible entry is squatters.

MR. ORSINGER: All I can say is I hope that we never show this to Brian Garner. He's going to have a stroke.

CHAIRMAN BABCOCK: Take a pill, Richard.

MR. GILSTRAP: The problem is there is so much archaic law and so much -- so many layers of old law that have been built up in this area that once you go in there and start sweeping with a new broom there's no place to stop, and that was something we struggled with all the way through.

CHAIRMAN BABCOCK: Yeah. And that's absolutely right.

PROFESSOR DORSANEO: But I recommend using

the term "forcible detainer" and if we need to, say in a comment that that means "forcible entry and detainer," too.

HONORABLE TOM LAWRENCE: Well, the only thing is that we are going to have to go through and make a lot of changes throughout the text of all of this because the "forcible entry and detainer" is a word that is -- is a phrase that is used by plaintiffs, by defendants, by the justice courts, by attorneys. It's just a -- it's a common term.

PROFESSOR DORSANEO: Did you ever have a forcible entry case?

HONORABLE TOM LAWRENCE: I've had a few.

PROFESSOR DORSANEO: Not many.

HONORABLE TOM LAWRENCE: No, I get one about every three or four years.

CHAIRMAN BABCOCK: The only thing we're trying to do here is add a provision for contractual late charges.

MR. ORSINGER: No, I don't agree with that. I think when you put this before us it's in full play.

CHAIRMAN BABCOCK: Justice Duncan.

PROFESSOR CARLSON: We can do this all of September.

MR. ORSINGER: You did that on the recusal

rule.

HONORABLE SARAH DUNCAN: I understand that there is a lot of culture built up around FED actions, and there are a lot of the same people, at least on one side, involved repeatedly. Correct me if I'm wrong, Tom and Elaine, but aren't most tenants not represented by counsel?

HONORABLE TOM LAWRENCE: Probably the greater majority are not. That's correct.

HONORABLE SARAH DUNCAN: My question is why do we continue the archaic language for the benefit of the people who know the most about the system and not use terms like "eviction" for the people who are actually most affected by the system?

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I'm sorry. I still don't understand which of these terms is talking about eviction. Is that detainer?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: No, they are all evictions. If you evict a trespasser, it's an eviction; and if you evict a tenant, it's an eviction. It's just that one is a detainer and one is a forcible entry and detainer.

MR. WATSON: Well, how is evicting a trespasser a forcible entry?

HONORABLE TOM LAWRENCE: Because that's -- the Property Code defines what a forcible entry and detainer is, and basically it's someone that enters property without legal right to do so.

MR. WATSON: So the forcible entry is what has occurred by the wrongdoer, and the forcible detention of the property is also being done by the wrongdoer, right?

PROFESSOR DORSANEO: Yes. But the action is --

MR. ORSINGER: The entry was consensual for the tenant but not for the trespasser, so the forcible detainer is for the consensual entry.

MR. WATSON: I just couldn't even pick up who was doing the detaining and the entry.

MR. ORSINGER: But, I mean, honestly, we shouldn't be using these terms. They come to us from the 1800's and this is now the year 2001.

MR. GILSTRAP: Let me add one thing on this. If you guys will just wait a few minutes, I promise you if you want significant change, you're about to see it because this is --

HONORABLE TOM LAWRENCE: This is the easy stuff, guys.

MR. GILSTRAP: I mean, there's almost a

revolutionary change in the whole concept of these appeals; and, you know, the question is, you know, you can't do it all at once.

MR. ORSINGER: As long as we can read Latin we can understand the changes, right?

MR. GILSTRAP: You've just got to understand what an FED is. It's simple.

PROFESSOR CARLSON: Look at page 43. This is what the Legislature has called these actions. We were trying to work with the legislative scheme. I mean, there is a fair amount of legislation that governs these actions, but if we want to tell the Legislature to work on them, I guess we can.

JUSTICE HECHT: When it says in Section 24.004 of the statute, "Eviction suits include forcible entry and detainer and forcible detainer suits," are there other kinds of eviction suits that are not forcible entry and detainer or forcible --

HONORABLE TOM LAWRENCE: That's the only two categories.

PROFESSOR DORSANEO: Well, no, it could be an eviction suit in district court, which is an eviction suit, but it wouldn't have all the forcible -- I mean, I would think we wouldn't necessarily call it an eviction suit, but that would be the remedy you would be seeking.

District courts have jurisdiction. They just don't have jurisdiction to do the forcible detainer.

HONORABLE TOM LAWRENCE: They can issue writs of possession, but eviction suits have original jurisdiction in justice court.

PROFESSOR DORSANEO: You think so?

HONORABLE TOM LAWRENCE: Yeah. A district court would issue a writ of possession on other causes of actions, but not an eviction.

PROFESSOR CARLSON: You could do a trespass to try title in district court.

HONORABLE TOM LAWRENCE: Yeah, and do a writ of possession based on that, but the original jurisdiction is justice court.

PROFESSOR DORSANEO: Where does it say that?

HONORABLE TOM LAWRENCE: Well, the regional jurisdiction in justice court is -- cases too numerous to even mention. I can find them.

PROFESSOR DORSANEO: Well, I know the Constitution says forcible entry and detainer, exclusive jurisdiction, and I don't know of any statute even in the Property Code that says eviction suits are in JP court. Forcible detainers --

HONORABLE TOM LAWRENCE: Oh, no, you're right. Okay. That's part of the problem. Everybody

mixes the terms a little bit.

PROFESSOR DORSANEO: The point is on the rule you were talking about, 738, that's not ever going to be a forcible entry rule, is it? That's always going to be forcible detainer, "May Sue for Rent," what it used to be called. Isn't that always going to be just forcible detainer?

HONORABLE TOM LAWRENCE: No. You could sue for -- on a forcible entry detainer you wouldn't be suing for rent, but you could sue for attorneys fees and court costs. Just not for rent. You can sue for the other things.

PROFESSOR DORSANEO: Well, I'm not trying to substitute all new words, but I think it's profitable to use the term "forcible detainer" as the common term rather than "forcible entry and detainer," because you're almost always talking about forcible detainer.

CHAIRMAN BABCOCK: Any other comments?

We've made two changes. One in Rule 738, we're switching the title to say "Joinder of Additional Claims," and we are deleting the phrase in the fourth line that says "provided the amount thereof is within the jurisdiction of the justice court." We're striking that language. Do I hear a motion to approve this rule?

PROFESSOR DORSANEO: So moved.

CHAIRMAN BABCOCK: Anybody second?

HONORABLE SARAH DUNCAN: Second.

CHAIRMAN BABCOCK: All right. All in favor raise your hand.

It's unanimous, so it will be approved.

HONORABLE TOM LAWRENCE: Okay. Rule 739 is just really we're switching "an aggrieved" for "the party aggrieved" and a gender change, not "his" but "the party's authorized." Otherwise no changes.

PROFESSOR DORSANEO: So moved.

MR. DUGGINS: Second.

HONORABLE TOM LAWRENCE: All right.

C-H-A-I-R-M-A-N BABCOCK: Anybody -- hold on. Let's take a vote. Anybody opposed?

It will be passed -- it will be approved unanimously.

HONORABLE TOM LAWRENCE: Okay. Rule 740 on page 16, this is a little more complex. This deals with a possession bond. When a landlord has a tenant that is destroying the place or dealing drugs or doing some illegal activity or doing something that is injurious to the health of the surrounding tenants, sometimes they want to try to get them out faster than a normal eviction process, so they can do what is called a possession bond.

Now, possession bond in Rule 740, there are

a number of different problems with this. The way that a possession bond works is the landlord goes in. He files his normal forcible, and he gets service of citation on that, and the service goes out, the tenant is served with a citation on the normal suit itself. Then any time after the filing of the complaint or when he files a complaint they can also ask for a possession bond. The judge sets the amount of the possession bond and then the tenant is given another citation on the possession bond, after which he then has the option of either posting a counterbond set by the judge or asking for a trial within six days.

If he files the counterbond or asks for the trial within six days then he can remain in possession. If he doesn't file the counterbond but requests a trial within six days from service, the court holds a trial. There is a judgment for the plaintiff. Defendant then has five days to appeal. If the defendant doesn't file a counterbond or request trial then he gets evicted.

Now, the way that that works is in part (c) -- and it says that "The constable of the precinct or the sheriff of the county where the property is situated places the plaintiff in possession of the property."

Now, it doesn't say anything about going back to the court for writ of possession. It just says that they place the plaintiff in possession. As a

practical matter, it's my understanding -- and I have done a few possession bonds. I issue a writ of possession when it's done, although the rule doesn't authorize me to issue a writ of possession. I am not aware of any time where the plaintiff just says "Sheriff or constable, they didn't respond. Put me in possession," but that's the way the rule reads.

Also unanswered by this is what happens if the tenant does not file a counterbond or ask for a trial within six days, then the JP presumably issues a writ of possession. What happens then to the trial on the original citation? Let's say he doesn't do anything within the six days and the seventh day there is a writ of possession, and he comes in on Day 9 ready for his trial under the original citation. It doesn't talk about that at all. I recommend just taking Rule 740 as it exists now and just deleting the whole thing.

Now, I've got an option two.

HONORABLE SARAH DUNCAN: If you deleted the whole thing, you'd have no such thing as a possession bond and a counterbond?

HONORABLE TOM LAWRENCE: Well, I've got an option two, which is --

HONORABLE SARAH DUNCAN: My question is if you delete the whole thing then we will have no

mechanism --

HONORABLE TOM LAWRENCE: That's correct.

HONORABLE SARAH DUNCAN: -- for immediate possession or counterbond --

HONORABLE TOM LAWRENCE: That's correct.

HONORABLE SARAH DUNCAN: -- to prevent --

HONORABLE TOM LAWRENCE: And I --

HONORABLE SARAH DUNCAN: That's not good.

HONORABLE TOM LAWRENCE: Very few JP's in Harris County do these. I don't think they are done at all in Dallas County from what I can determine just anecdotally. I talked to -- and through the process of this I've talked to a number of other people, including attorneys that represent some of the large tenant groups; and one tells me that, yes, they do use it from time to time.

But as a practical matter, if a tenant posted counterbond then the trial is going to occur at the same time as it would under the original citation. If the defendant asks for a trial within six days then you've got to have the trial within six days, and that really speeds the process up by a maximum of four days. So the possession bond really speeds the process up by a maximum of four days. If the tenant does nothing then it speeds up the writ of possession being issued by maximum of

probably nine days or maybe in all likelihood less than that. So the possession bond speeds it up a little bit, but it's not generally a tremendous amount of time.

HONORABLE SARAH DUNCAN: But what is the landlord's -- if we delete the rule and the landlord has a tenant who is performing some action that truly does endanger the health and safety of other tenants in the area, what is the -- how does the landlord get an immediate right to posses the property and get the tenant with the tenant's dangerous activity --

CHAIRMAN BABCOCK: What sort of dangerous activity is the tenant doing?

MR. ORSINGER: What about prostitution? What about drug usage? What about --

HONORABLE TOM LAWRENCE: Well, these are all -- you don't have to have a justification to ask for a possession bond. Now, if they are doing something illegal then presumably you can go to the police and have the person arrested, but 740 is the only way to get possession faster than a normal eviction process.

HONORABLE SARAH DUNCAN: What if they are not doing something illegal, but it's just dangerous? They are mixing -- they have got a kids chemistry lab in the living room and they're mixing chemicals and fumes are escaping and endangering other residents. It just seems

to me that's not at all impossible, and there ought to be some way for the landlord to get that tenant out and prevent incurring liability from the other tenants.

CHAIRMAN BABCOCK: Sarah, what you're saying is there are some circumstances where the four days could matter?

HONORABLE SARAH DUNCAN: Yeah.

HONORABLE TOM LAWRENCE: Well, then we go to option two.

PROFESSOR CARLSON: And that's why we have a second option. The subcommittee was divided on this, and the Legislature, it refers in Property Code 24.0061 on page 45 to a possession bond, so the Legislature is envisioning the existence of something here.

CHAIRMAN BABCOCK: Well, if the Legislature refers to it and is envisioning it, it seems to me that it would be ill-advised for us to delete it totally, don't you think?

PROFESSOR CARLSON: That's why we have option two. We want the sense of the committee, but we obviously had concerns.

CHAIRMAN BABCOCK: Does everybody share my thought that if the Legislature contemplates it then we have no business deleting it from a rule?

MR. WATSON: Yes.

HONORABLE SARAH DUNCAN: Yes.

CHAIRMAN BABCOCK: Okay. Then it's option two.

HONORABLE TOM LAWRENCE: Okay. Option two, we've got a couple of changes, "aggrieved party" to "plaintiff," "final judgment" to "trial"; but the significant part is when you get down to (a) or the second paragraph, rather. If you get a citation on a possession bond, you could in theory serve that citation under Rule 742a, which is attaching to the door. I would suggest that we not want a possession bond attached to the door, that we want service under Rule 742. In (a) --

MR. ORSINGER: And why?

HONORABLE SARAH DUNCAN: Yeah. Stop there.

HONORABLE TOM LAWRENCE: I guess my thought is if you're going to end up evicting somebody without any other notice or hearing whatsoever that a Rule 742a is -- on that short time period is maybe not the way to go. Maybe just an abundance of caution. We can leave it as it is.

CHAIRMAN BABCOCK: A guy's on vacation for a week with his kids in Bimini, and he comes back, and the furniture is on the street.

HONORABLE TOM LAWRENCE: Now, the downside of that I guess is if you don't -- 742 has to be personal

service of someone over the age of 16. I guess the downside is that if they don't come to the door then you wouldn't get service.

HONORABLE SARAH DUNCAN: Yeah.

HONORABLE TOM LAWRENCE: I mean, that would be an argument to keep 742 in there.

HONORABLE SARAH DUNCAN: At least in -- maybe not in all cases, but at least in those cases where you've explained it to the JP court sufficiently that they agree that you need 742a service.

MR. ORSINGER: What size bonds are we talking about here? Are we talking about $50? $5,000?

HONORABLE TOM LAWRENCE: No, you shouldn't be talking about $50. You would have to calculate what it's going to cost to move, the expense of trying to rent some other place, the security deposit. I mean, it should be a fairly substantial bond.

MR. ORSINGER: And that means the bond is posted so that if this person is thrown out, finds alternate residence, and then wins the FE&D, they are compensated for the cost of moving out and moving back.

HONORABLE TOM LAWRENCE: That's correct. That's the point of the possession bond.

MR. ORSINGER: Okay. And then if counterbond is posted, how much is it?

HONORABLE TOM LAWRENCE: The counterbond would generally be in a lower amount, and that's really --

MR. ORSINGER: Is that just to protect the rent, or how is the bond set on the counterbond?

HONORABLE TOM LAWRENCE: Let me read that section. The counterbond -- "Said counterbond shall be approved by the justice and shall be in such amount as the justice may fix as the probable amount of costs of suit and damages which may result to plaintiff in the event possession has been improperly withheld by defendant."

Normally it's not going to be that much.

MR. ORSINGER: It could be just lost rent, but if it's something like Sarah's talking about, it could be more.

HONORABLE SARAH DUNCAN: Could be substantial.

MR. ORSINGER: If it's hurting other people or it's hurting the building or something like that.

CHAIRMAN BABCOCK: Well, you raised the point about whether we should limit it to service under 742 or whether we should allow service under 742a, and I'd like a sense of the committee on that. Richard, do you think it ought to be 742a?

MR. ORSINGER: If what Tom is saying is all we're talking about here is four days --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- and we're talking about bonds in the neighborhood of less than a thousand dollars.

HONORABLE TOM LAWRENCE: For the counterbond maybe, but the possession bond might be significantly higher.

MR. ORSINGER: Really? So it's not likely someone will frivolously seek a writ of possession or file a possession bond.

HONORABLE TOM LAWRENCE: No. I don't think as a general rule it's frivolous. I think that they feel like they really have a problem and need to do something about it.

CHAIRMAN BABCOCK: And the problem is the person is there causing problems.

MR. ORSINGER: Well, I know, but --

HONORABLE SARAH DUNCAN: Well, it may or may not be.

MR. ORSINGER: The real deadbeats won't answer the door and so you may not ever get your writ of possession.

HONORABLE TOM LAWRENCE: That would be an argument to keep 742a as an alternative.

HONORABLE SARAH DUNCAN: And you can't get 742a service, as I understand it -- correct me if I'm

wrong -- unless you can't get 742 service.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: So there's a built in --

CHAIRMAN BABCOCK: Protection

HONORABLE SARAH DUNCAN: -- protection.

MR. ORSINGER: Here's what I'm thinking. I'm thinking that the landlord is never going to get a writ of possession if you have to have personal service, and we can protect the tenant from an abusive landlord by having a high enough bond that they receive some money and compensation for being wrongfully thrown out, and I'd rather stay I think with the personal -- I mean with substitutable service, the flexible service.

HONORABLE TOM LAWRENCE: Here's another problem with 742a service on this, is that you have to hold the trial within six days, but 742a service allows you to set the trial no sooner than six days after that. So we've got a conflict. If we want to keep 742a in, we've got to rewrite this in some way to limit the time period.

HONORABLE SARAH DUNCAN: Uh-huh.

CHAIRMAN BABCOCK: So, Richard, you're a 742a guy.

MR. ORSINGER: Uh-huh.

CHAIRMAN BABCOCK: Judge Peeples?

HONORABLE DAVID PEEPLES: I agree.

CHAIRMAN BABCOCK: You agree with that? What do you think, Bobby?

MR. MEADOWS: I'd agree.

HONORABLE TOM LAWRENCE: Well, then let me rewrite -- work on that.

CHAIRMAN BABCOCK: Well, wait a minute. They're just three guys.

MR. MEADOWS: On the wrong side of the table.

CHAIRMAN BABCOCK: Justice Hecht, where do you come out on this?

JUSTICE HECHT: I agree with Richard.

CHAIRMAN BABCOCK: Huh?

JUSTICE HECHT: I think the justice ought to have the flexibility to do it either way.

CHAIRMAN BABCOCK: Bonnie, you got an opinion about this?

MS. WOLBRUECK: No.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I don't have it as long as we can solve the problem with the six days.

CHAIRMAN BABCOCK: Okay. Ralph.

MR. DUGGINS: I agree.

PROFESSOR DORSANEO: Agree.

CHAIRMAN BABCOCK: Okay. So let's fix it so that we put 742a in there, but we're going to have to fix the six-day problem.

HONORABLE TOM LAWRENCE: Okay. Well, let's go to the next problem then.

CHAIRMAN BABCOCK: Wait a minute. Sarah has got a question.

HONORABLE SARAH DUNCAN: Can we fix the timing problem with just "742 or 742a," parentheses, "with time periods modified appropriately"?

HONORABLE TOM LAWRENCE: Yeah. What I'll probably do is go in and say if it's served under 742a then you have to return it X number of days. I'll have to look at that, but I think that's -- probably change it here and not in 742a.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM LAWRENCE: But I can fix that.

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM LAWRENCE: All right. The next problem is in (a)(2). "Defendant demands a trial." Now, the problem is that if the defendant demands a jury trial and you've got to do this within the six days after service, they can come in on the fifth day and demand a jury trial presumably.

MR. ORSINGER: And still get it one day later?

HONORABLE TOM LAWRENCE: No. They won't get it. That's the problem. I mean, if they ask for a jury trial, there's no way they're going to get it within the six days. It's going to be tough enough to do a bench trial, but you're a lot closer doing the bench trial. The jury trial, the JP's don't go down to the central jury pool and have people brought out.

You have to get the constable to summons people in, and short of going to the local Dairy Queen and rounding up a number of jurors, there's no way to do a jury trial that fast. So I recognize that we're limiting someone's right to trial by jury here, but there's no way to make this rule work if you have a jury trial and make the other time periods fit.

HONORABLE SARAH DUNCAN: Can we do that within the Constitution?

CHAIRMAN BABCOCK: Any constitutional limits?

MR. ORSINGER: Well, it's an election they are making. In other words, they are electing to give up their jury trial in order to have a trial within six days. If they want their right to a jury trial, they can have it in 21 days or whatever. Wouldn't that be a voluntary

waiver? It's an election. You're not forcing them to do it, are you?

HONORABLE TOM LAWRENCE: No. No. They don't have to have a trial. They can post a counterbond and just wait and have the regular trial, which they could do on a trial by jury.

HONORABLE SARAH DUNCAN: Yeah.

MR. ORSINGER: Or they could not post a counterbond and they could demand a nonjury trial immediately, but if they want a jury trial then they are going to have to be dispossesed, wait for their jury trial, and then get their right to a jury.

HONORABLE TOM LAWRENCE: Well, the rule doesn't allow -- if they ask for a trial the rule doesn't allow you to dispossess them. You've got to give them a trial. You can't evict them if they've asked for the trial.

MR. ORSINGER: Even under a possession bond?

PROFESSOR CARLSON: Yeah.

HONORABLE TOM LAWRENCE: Yeah. Yeah.

HONORABLE SARAH DUNCAN: One and two are alternates. (a)(1) and (2).

MR. ORSINGER: Well, if you don't do this then you've negated the possession bond, because it's going to take you at least three weeks to get a jury

impaneled, or how long?

HONORABLE TOM LAWRENCE: No. But you're talking maybe a week.

CHAIRMAN BABCOCK: How was it handled before? How is it handled under old Rule 740?

HONORABLE TOM LAWRENCE: Well, I think that probably most tenants don't ask for jury trials of that. Most tenants come in and ask for trial and don't post a counterbond, and you have the trial. You have a bench trial, but if they ever ask for a jury trial then you've got this problem.

CHAIRMAN BABCOCK: And the current rule is just silent?

HONORABLE TOM LAWRENCE: That's right. Current rule just says "trial." And Rule 744 says that you can have jury trials in justice court on these forcibles, so, you know, presumably you can.

HONORABLE SARAH DUNCAN: But isn't the issue whether -- isn't the constitutional right to jury issue whether you were entitled to a jury of common law, and since this is a statutory procedure I would think that you weren't, but I don't know that.

CHAIRMAN BABCOCK: Isn't the fix just to be silent on that?

HONORABLE TOM LAWRENCE: We can do that.

CHAIRMAN BABCOCK: Given the fact that it just never arises.

HONORABLE TOM LAWRENCE: I don't know if I want to say "never," but I've not heard of that occasion, but we can just leave out "by judge" and leave the rule essentially like it is.

CHAIRMAN BABCOCK: Yeah. I mean, the other rule has been around since 1943, so, I mean, if there was a real big problem we would have heard about it.

HONORABLE TOM LAWRENCE: Okay.

CHAIRMAN BABCOCK: So I think let's take "judge" out of there. Bill? No. Okay. What else?

HONORABLE TOM LAWRENCE: Well, in (b) I want to make it clear that you just don't go to the sheriff or constable to get possession back, that you have to get a writ of possession from the justice court.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM LAWRENCE: And then (c), we're talking about the justice court issues the writ of possession again, not just sheriff or constable.

And (d), "Whenever a justice court issues a writ of possession under this rule, a defendant may appeal in the same manner as a traditional forcible entry and detainer trial," to make it clear that there is an appeal. In current 740 it doesn't really talk about how you appeal

this.

Now, the one issue that I have not resolved yet is what I alluded to earlier. What happens if the defendant does not post your counterbond, does not ask for trial. The JP issues a writ of possession under the possession bond, and the tenant comes in under his original citation on day nine and says "Where's my trial? This citation says report for trial on this day." So what happens then? Is that moot? The current rule doesn't talk about it. How do we handle that?

PROFESSOR DORSANEO: I stopped understanding you about 20 words ago, but --

CHAIRMAN BABCOCK: But under the current --

PROFESSOR DORSANEO: What does (d) --

HONORABLE TOM LAWRENCE: Pardon me?

PROFESSOR DORSANEO: What does (d) mean? What does that mean? You issue the writ of possession and somebody wants to appeal. They give notice of the -- refresh our recollection of what that means and how would that affect all the rest of this.

MR. ORSINGER: You have a de novo trial in county court.

HONORABLE TOM LAWRENCE: That's right.

PROFESSOR DORSANEO: On the issue --

MR. ORSINGER: On the eviction.

PROFESSOR DORSANEO: -- of whether they're to take immediate possession or --

HONORABLE TOM LAWRENCE: No. I think under the possession bond if the tenant comes in and asks for trial, you're going to have a full-blown trial on the merits of the case. It's just going to be short-circuited. It's going to be within six days, and what I'm saying is that Rule 740 doesn't talk about appealing from that particular trial. So I'm making it clear that if you have a trial and a writ of possession is issued under the possession bond statute that you can appeal that.

MR. ORSINGER: Yeah. Because it's your substitute for your later trial.

HONORABLE TOM LAWRENCE: Yes.

PROFESSOR DORSANEO: But what you're not saying is that -- see, this looks to me like kind of an interim appeal, but you're saying you're going to have your full-scale trial.

HONORABLE TOM LAWRENCE: No. I'm saying --

MR. ORSINGER: It's an accelerated final trial.

HONORABLE TOM LAWRENCE: I'm saying this is an appeal from final judgment. The problem that I'm identifying is what happens if the defendant doesn't do

anything, doesn't post a counterbond, doesn't ask for a trial; therefore, on day seven a judge can issue a writ of possession and then he's dispossessed, but yet he's had the original citation filed when the forcible was first filed, and that citation tells him to appear for trial on day nine.

He shows up on day nine not having done anything in response to the possession bond and says, "Where's my trial?" And the judge says, "Well, I just issued a writ of possession on you"; and the tenant says, "But I have a citation here that says appear for trial on this date. Here I am. Where's my trial?" And the issue is what do you do about that scenario?

PROFESSOR CARLSON: So the citation that's issued when the landlord seeks the writ of possession is giving a different trial date than what may be demanded by the --

HONORABLE TOM LAWRENCE: Well, it gives a trial date. The possession bond doesn't give a trial date. It just says "post a counterbond or request a trial within six days."

MR. ORSINGER: And at the end of six days then you automatically issue a writ of possession with no fact hearing.

HONORABLE TOM LAWRENCE: Well, the tenant

has to come in -- I mean, the landlord has to come in and ask for a writ of possession. I mean, there's got to be some showing, I would presume, although Rule 740 now doesn't require an evidentiary hearing particularly.

PROFESSOR CARLSON: Nice.

HONORABLE TOM LAWRENCE: I mean, there's nothing in there that requires that currently.

CHAIRMAN BABCOCK: But we're talking about, it seems to me, two different problems. If the tenant does nothing, no counterbond and no demand for a trial within six days, the landlord gets the writ of possession, but you haven't tried the merits of the FED. You've only tried, in quotes, the merits of the immediate right to possession.

MR. ORSINGER: No. That isn't right. You're making it sound like a temporary injunction hearing, but it's not.

MR. GILSTRAP: There's only one issue. Possession. That's the only issue that's going to be tried.

CHAIRMAN BABCOCK: But Sarah's point is you haven't tried it yet.

HONORABLE TOM LAWRENCE: Yeah. Well, the possession bond doesn't really talk in terms of -- it just -- actually, it says now the sheriff or constable

puts them into possession. I mean, it doesn't talk about a trial at all, but the point I'm trying to make -- and you've identified a problem. The point I'm trying to make is this tenant is going to be evicted before his case even comes to trial on his original citation that was filed. He's going to be out --

HONORABLE SARAH DUNCAN: Right.

HONORABLE TOM LAWRENCE: -- before he comes to trial under the rule.

HONORABLE SARAH DUNCAN: But he's still entitled to a trial on the ninth day --

HONORABLE TOM LAWRENCE: Yeah, but --

HONORABLE SARAH DUNCAN: -- on the merits of the FED, is what I'm saying. And I've never tried one of these. I want to put that on the record. I'm only looking at this theoretically, but it seems to me that it is like a temporary injunction. There's going to be a writ of possession issued, and all that does is give the landlord the right to immediate possession because the tenant didn't either file a counterbond or demand a trial within six days. It doesn't try the right to possession or back rent, contractual late charges, attorneys fees.

MR. ORSINGER: I think what you're saying is what we can change it to read; but I believe the way it reads now is you only get one trial; and if the landlord

posts a bond, you're out unless you get your trial before you're put out. And so I think this is a way to accelerate your trial. It is not like a temporary hearing to decide whether that it's probable that you'll be evicted or not probable that you'll be evicted.

CHAIRMAN BABCOCK: Can I ask a question? Judge Lawrence, if the original citation calls for trial on June 22nd, let's say, then you'll have on your docket "trial in Smith vs. Jones" on June 22nd, right? Then there is a possession bond filed and no response from the tenant and you don't -- and he -- let's presume that the tenant gets evicted. You haven't taken off your June 22nd docket the trial, have you, just because there's been a --

HONORABLE TOM LAWRENCE: Not under the rule as it exists, no.

CHAIRMAN BABCOCK: Okay. So that's still on the docket, so why wouldn't we want -- you know, even if the guy is out, why wouldn't we want to keep that trial setting, let him come in on June 22nd, and we try everything? We try --

PROFESSOR CARLSON: So the landlord can't release the premises, or if they do, they risk putting the tenant back in possession.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: Either do that or

change (b) to say that you're going to have the trial and that it's your job not for somebody to demand an earlier trial setting than the one they got notice of, which is odd.

HONORABLE TOM LAWRENCE: I think it's an easy fix to make the trial of a possession bond a full-blown evidentiary trial on the merits.

PROFESSOR DORSANEO: That's what you would want to do, isn't it?

CHAIRMAN BABCOCK: Right.

HONORABLE TOM LAWRENCE: The more difficult problem is what happens when you have the tenant does nothing. The writ of possession is entered, and, you know, the remedy is that the -- yeah, the tenant comes to court and he may win, but he's already been dispossesed. There's nothing that prevents the landlord from reletting, and he has to sue on the possession bond. I mean, that's not a great remedy for the tenant.

MR. ORSINGER: Well, now, wait a minute. Why wouldn't you -- if you get to trial on the ninth day and the tenant wins, why wouldn't the tenant be permitted to move back in the premises?

MR. GILSTRAP: He's already relet it.

HONORABLE TOM LAWRENCE: Well, what would mandate that? I mean, are you going to put that in a

rule?

MR. ORSINGER: Well, your FE&D fundamentally is that the tenant -- the person entitled to possession or person in possession remains there until the law tells him he has to move. Normally the law doesn't tell him he has to move until after there's a trial; but because of this bond procedure you've got, if he doesn't request a counterbond or request an accelerated trial date, he's out on the bond, even though there hadn't been a trial yet.

HONORABLE TOM LAWRENCE: That's right.

MR. ORSINGER: So then three days later a trial comes along, and you rule in favor of the tenant. Then by law he's entitled to have possession of the tenancy. Isn't that right?

And you move him back in and then he's got a claim for having had to move out and move back.

HONORABLE TOM LAWRENCE: Okay. Now, what do you mean, "you move him back in"?

MR. ORSINGER: Well, I don't know what I mean by that.

HONORABLE TOM LAWRENCE: Let's say I render a judgment for the tenant for possession of the trial. The tenant's been evicted. He's gone. The landlord may have released that. So what is the real remedy? I mean, I don't have injunctive powers. I can't make the landlord

kick that new tenant out and let this old tenant back in. I mean, the remedy may be a cause of action for unlawful eviction or something of that type.

PROFESSOR DORSANEO: Right.

HONORABLE TOM LAWRENCE: But I don't think you're going to necessarily get that guy back into possession.

MR. ORSINGER: Then this writ of possession is tantamount really to just giving possession to the landlord without any evidence that they're entitled to it.

HONORABLE TOM LAWRENCE: Exactly.

PROFESSOR CARLSON: Which is I think why Judge Lawrence favored doing away with it.

PROFESSOR DORSANEO: I think it may not be constitutional, but, you know, maybe the thing that makes it look constitutional is that the tenant can -- a very astute tenant, maybe somebody represented by a legal clinic, can ask for this earlier trial under (b); but if they don't, if they don't, then there's a writ of possession and there's some sort of an appeal.

MR. ORSINGER: You've got a piece of process out there that tells him he's going to get a trial later. He's been thrown out before his trial, and now that he shows up for trial he's told there isn't a trial.

PROFESSOR DORSANEO: Yes.

PROFESSOR CARLSON: I think Bill's right on this. I think this is similar to prejudgment garnishment. We don't have the hearing to support the judgment. It's almost like a default judgment if you don't do these things.

PROFESSOR DORSANEO: But you are giving this right to ask for the trial early.

MR. ORSINGER: You either ought to have a temporary hearing to evaluate the legitimacy of the claim for immediate possession or you ought to accelerate the trial on the merits.

MR. GILSTRAP: That may be why we should get rid of this procedure.

HONORABLE TOM LAWRENCE: Some landlords need it, and there may well be a need for something like this. I just want to --

MR. ORSINGER: Could we -- instead of having the possession bond could we make it more like a temporary hearing where they have the opportunity to come before you and show some exigent circumstances and probability of success?

HONORABLE TOM LAWRENCE: Yeah. What if under (b) of this option two, what if rather than just an automatic issuance of writ of possession, what if you made it only after a full-blown hearing like a default

judgment? That would make it a little better, but you still have the problem with the guy coming in with his original citation after all of this has occurred.

HONORABLE SARAH DUNCAN: Not if you, like Richard suggests, consider this as something like a prejudgment garnishment or --

JUSTICE HECHT: TRO.

MR. ORSINGER: Yeah. It's a temporary possession only. You're not litigating -- pardon me.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: What if you made the possession pending the trial on the merits so it was just purely a temporary turnover?

HONORABLE TOM LAWRENCE: And what's the point of the possession bond? I mean, the whole point of the possession bond is to get them out quick. If you do that then we don't even need it.

MR. DUGGINS: I'm saying do that, allow that, but say that the plaintiff's right to possession is only for the period up to the time of the trial on the merits.

PROFESSOR CARLSON: We could do that and require the landlord to not relet.

MR. DUGGINS: That's the point, is it keeps the landlord from reletting pending the trial.

MR. ORSINGER: Tom, that's the way injunctions work right now. You're seeking some kind of permanent relief, but you want some intermediate relief; but you've got to go to court and prove it up; and if you can prove a probability of success and that your ultimate possession would not make you whole then you can get your temporary injunction; but you have to post a bond so that if the junction is not ultimately vindicated, the party who got the injunction has to pay the bond -- pay the damages.

HONORABLE SARAH DUNCAN: And the landlord takes the risk of, one, procuring the writ of possession pending trial and, two, reletting.

HONORABLE TOM LAWRENCE: Okay. Let me work on that.

PROFESSOR CARLSON: But is it the sense of the committee that the landlord should not be able to relet? Or risk losing --

MR. ORSINGER: I think on any kind of preliminary hearing you shouldn't adjudicate final rights.

HONORABLE DAVID PEEPLES: Tom, what's your experience? What percentage of the cases in which the landlord does relet do you never hear about them again because the tenant is gone and other things, and what percentage does the tenant come back and they have

releted and it's a problem?

HONORABLE TOM LAWRENCE: I think in most, if not almost all, the tenant is just gone and wouldn't come back.

HONORABLE DAVID PEEPLES: If we change and say the landlord cannot relet, we're changing the result in 99 percent of the cases.

PROFESSOR DORSANEO: But the reason why the tenants don't come back is maybe not because they don't have any kind of claim. It's because the law screws them out of their rights.

MR. ORSINGER: They found another place to live, and they probably had to post a deposit and sign a six-month lease.

HONORABLE TOM LAWRENCE: But requiring the landlord not to relet is really not that big a problem because what he really wants is to get them out. When he gets them out, if he went through the normal eviction process, in another week or ten days he would have them out anyway probably if he got a writ of possession, so maybe that's not such a bad fix. Let me work on that.

CHAIRMAN BABCOCK: Okay. We'll work on that, so we'll defer this until our next meeting. Tell us, if you could just --

MR. ORSINGER: Chip, before we leave this

I've got to ask a question. Tom, you've deleted "constable or sheriff placing plaintiff in possession of the property."

HONORABLE TOM LAWRENCE: Right.

MR. ORSINGER: But I don't see a catchall phrase later that says "upon issuance of writ of possession the government official delivers possession."

Is this the only place where the constable or the sheriff is directed to deliver possession?

If so --

HONORABLE TOM LAWRENCE: No. The Property Code takes care of all of that.

MR. ORSINGER: Okay. It's not in these rules, I don't think.

HONORABLE TOM LAWRENCE: No. That's Property Code.

PROFESSOR DORSANEO: The Property Code says what the writ of possession is and how all that works?

HONORABLE TOM LAWRENCE: Yes. Well, no.

MR. ORSINGER: I mean, right now the rules say that the constable is supposed to deliver possession, and we're taking that out and saying the JP is supposed to issue a writ of possession. Now, I want to know where it says that a writ of possession means a constable is supposed to deliver possession. That's all.

PROFESSOR DORSANEO: In the writ of possession.

HONORABLE TOM LAWRENCE: 24.00 --

MR. ORSINGER: Shouldn't it be in the Rules of Procedure?

PROFESSOR CARLSON: Maybe. Look at page 41.

HONORABLE TOM LAWRENCE: But the Legislature has already adopted very specific guidelines for how writs of possession are served in 24.006 of the Property Code. Very specific guidelines.

MR. ORSINGER: Unfortunately my pages are not numbered.

PROFESSOR CARLSON: Do you not have a Bates stamped?

CHAIRMAN BABCOCK: We'll get to that. Tell us -- Judge, just give us an overview because we're going to recess here in a second so Professor Dorsaneo can catch a plane.

PROFESSOR DORSANEO: You don't need to put that on the record.

HONORABLE TOM LAWRENCE: All right. 741, all I'm doing is changing the reference, changing it from a specific section of the Property Code in Chapter 24 in case the Legislature comes back and renumbers stuff, as they do. No substantive change.

742 and 742a we talked about.

743, the only change, the issue of discovery. This is an accelerated proceeding. Things are done very quickly, and generally most JP's believe that there's just not time for discovery under the normal discovery rules in this. There may, however, be some occasions where some discovery, particularly in some complex commercial eviction, may be needed. So I've got a provision here that "Generally discovery is not appropriate in forcible entry and detainer actions; however, the justice has the discretion to allow reasonable discovery."

This is almost the exact language that the Legislature has in Chapter 28 of the Government Code that deals with small claims court. This is exactly how discovery is handled in small claims court cases. I think that additional language will tell the JP's generally how to do that.

744, demanding a jury. All we've done is change from "a jury fee of $5" to "a jury fee required by law."

745, trial postponed. Currently it says you can only postpone it for six days. That really doesn't work very well because most judges set their dockets one day a week. We need to at least have it seven days. A

lot of times people want continuances. Plaintiff and defendant want to have more time to work it out, resolve it, or settle it, so we're allowing basically a Rule 11 agreement. We're saying it may be postponed for a longer period on agreement of all parties, provided it's in writing and filed with the court or if the agreement is made in open court. This really happens frequently where parties want to come in and need a little bit more time.

746, we're just -- we just really kind of rewrote that. There's not a substantive change. Instead of saying Section 24.001/008 of the Property Code, we just say "Chapter 24."

Rule 747, that actually is the only rule not changed in all of this. 747a there that talks about representation by agents, the Property Code, Section 24.001 of the Property Code, actually, it has slightly different language, so we're just updating this rule to correspond with the Property Code. It's not a substantive change. There's just a conflict now, and that gets to -- that's the easy stuff.

CHAIRMAN BABCOCK: Okay. And then we'll tackle the hard stuff. I think the timing actually has worked out nicely because when we get to the hard stuff we will have a fuller committee here, and what I'm going to do next time is to after the -- the first item on the

agenda will be Justice Hecht's report as usual, and then I think we'll go right into your stuff on the morning of the first day.

MR. ORSINGER: A better strategy would be to have one really controversial short topic right before that so everyone shows up for that, because otherwise they will come late.

CHAIRMAN BABCOCK: Well, maybe so, Richard. We'll just have to rely on people --

MR. GRIESEL: They'll come for the boss.

CHAIRMAN BABCOCK: Put a fake item in there?

MR. ORSINGER: Get all the plaintiffs lawyers here.

HONORABLE DAVID PEEPLES: Abolish voir dire.

CHAIRMAN BABCOCK: Yeah, get Paula in here. Well, thanks, everybody. I know this was a difficult weekend, and summers are particularly a problem to have a meeting, which is why we're not going to meet again until September, and thanks again to Judge Lawrence and Elaine Carlson. This work is just terrific. Great work product.

Thank you. We're in recess.

(Meeting adjourned at 11:33 a.m.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 16th day of June, 2001, Morning Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 889.00 .

Charged to: Jackson Walker, L.L.P.

Given under my hand and seal of office on this the 2nd day of July, 2001.

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