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HEARING OF THE SUPREME COURT

ADVISORY COMMITTEE

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Taken before Anna L. Renken, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 17th day of May, 2002, between the hours of 1:15 p.m. and 5:14 o'clock p.m. at the Texas Law Center, 1414 Colorado, Austin, Texas 78701.

CHAIRMAN BABCOCK: Okay. Can we get going everybody? Okay. We're back on the record and we're taking up the third item on the agenda, which is FED, passing over the second item because of Mr. Orsinger's absence; and also we told the people that are visiting us that we would take this up right after lunch, and so we're keeping that promise.

HONORABLE JAN P. PATTERSON: Chip, do you know if we're going to meet tomorrow, or is Richard coming or Dorsaneo or one of our subcommittee members?

CHAIRMAN BABCOCK: We are going to be meeting tomorrow for sure, because we are not going to get close to getting through this agenda, so we will be here tomorrow for sure. And whether Richard is coming or not is anybody's guess. I'll say that on the record. He will not be here, so we're not guessing anyway. Let me just see if that affects the -- no. I think that's not going to affect the fact that we're going to be here tomorrow.

HONORABLE JAN P. PATTERSON: And Bill Dorsaneo is going to be here?

CHAIRMAN BABCOCK: Dorsaneo is not going to be here.

HONORABLE JAN P. PATTERSON: Is he?

CHAIRMAN BABCOCK: No, graduation. Has he taken, has he gotten a substitute for his item?

MS. LEE: Not that I'm aware of.

CHAIRMAN BABCOCK: Would you call him and ask him whether he has? Now before we get started we probably ought to talk about our next meeting. And Debra, where is it going to be?

MS. LEE: Dallas. I don't know the location yet. I'm working on it at SMU.

CHAIRMAN BABCOCK: Okay. And what about --

HONORABLE SCOTT A. BRISTER: It's not here?

MR. HAMILTON: What was her answer?

CHAIRMAN BABCOCK: Her answer was Dallas. Our next meeting is going to be in Dallas somewhere at SMU. We'll get the location. And have you arranged hotels?

MS. LEE: Anyone that had reservations at the Four Seasons here in Austin have been

transferred to Dallas with the same arrangements. If for some reason you don't want to keep those arrangement, please contact the hotel in Dallas and let them know that you want to cancel that arrangement and make new arrangements.

CHAIRMAN BABCOCK: Which hotel in Dallas?

MS. LEE: Four Seasons.

MR. GILSTRAP: I will be a little longer commute there.

PROFESSOR CARLSON: Oh, is it the one at Las Colinas?

MS. SWEENEY: In Las Colinas?

CHAIRMAN BABCOCK: Yes. That's the only Four Seasons in Dallas. So if you don't want to stay there.

MR. HAMILTON: Is that where the meetings are going to be?

MS. LEE: No. The meeting will be at a location at SMU; but I will let you know next week for sure exactly where it will be.

CHAIRMAN BABCOCK: It's about a 20-minute drive, Carl, from the Four Seasons.

HONORABLE SCOTT A. BRISTER: Let me get this one more time. June or July meeting?

CHAIRMAN BABCOCK: June.

HONORABLE SCOTT A. BRISTER: The June meeting is in Dallas, Texas?

CHAIRMAN BABCOCK: Correct, Dallas, Texas.

HONORABLE SCOTT A. BRISTER: You know, you trained me for five years to come here; and it's going to be hard to get off this track.

CHAIRMAN BABCOCK: You just have to go to concourse C at Hobby.

HONORABLE SCOTT A. BRISTER: I don't even know what gate to go to.

CHAIRMAN BABCOCK: Go to gate 31, 28 or 26. I've made that a couple of times myself.

MR. GILSTRAP: This is in connection with the Bar?

CHAIRMAN BABCOCK: Yes. The Bar is going on at the same time.

Okay. We're on FED, and we have some visitors here that are going to address us, and we welcome them; but Judge Lawrence is going to start out and tell us where we are with respect to the FED rules. Okay.

HONORABLE TOM LAWRENCE: Okay. There are

a number of handouts that were on the website. If you didn't download it, I think all of the handouts are over there under the seal that you can get copies of. There's handouts from the Travis County Legal Aid, I think three or four handouts from the Texas Apartment Association, one from the Houston Apartment Association, the committee's, subcommittee's handout on Rules 4 through 245, and then 738 through 755. Then there is a comparison of the comments from the various groups that have sent in comments to the subcommittee. So if you don't have those, they're available over there.

This is the fifth meeting at which we've taken up the FED rules. We started this last June. So I thought I would summarize where we are and bring everybody up-to-date. The 700 Series Committee started working on these rules in November of 2000 after receiving comments and proposed amendments from the State Bar Rules Committee. Our first draft was finished in November of 2000 and was a very short fix to the State Bar's problems and a tweaking of a few other obvious problems.

However we soon realized with Professor Carlson's help that we had a problem with the appeal scheme that would need to be fixed; and so we ended up having to do a thorough revision of Rules 748 through 755 and then also took a hard look at 738 through 747(a) and then also some of the other rules in the general section that deal with enforcement.

At the point that we realized that this was going to be a more in-depth process we started soliciting experts from various experts in the field including Larry Niemann of the Texas Apartment Association, Howard Bookstaff of the Houston Apartment Association, David Fritsche of the San Antonio Apartment Association, Fred Fuchs of the Travis County Legal Aid, Harry Spector of the SMU Tenants Group, various JP and county court judges throughout the state and deputy county clerks. We took all of their suggestions and began drafting with the following drafting principles in mind in no particular order: First, remove all ambiguities, vagueness and inconsistencies in the rules; two, do not change the balance of equity currently

existing in the rules between the landlords and the tenants; three, do not significantly increase the burden on the JP or county courts; four, make the FED rules consistent with the jurisprudence of the state; five, remember that a high percentage of laypeople operate within these rules, so try to keep them as simple and as understandable as possible; and then last remember the mandate to keep the process an expeditious remedy.

We made great progress in coming up with solutions to what has turned out to be an extremely complex series of problems. Our current draft is version 7.8 which indicates how many drafts of the process that we have gone through to try to achieve a workable set of rules to send to the Court.

I'd like to summarize some of the discussion and votes we've taken on some of the issues that we settled early on. First of all with regards to Rule 742 and 742(a) in June 2001 we voted to adopt the changes to those rules allowing private process servers to serve citation on forcibles and to allow 742(a) service after attempts at the residence

and all known addresses as listed on the lease.

Also in June we voted on Rule 738 and to allow contractual late charges to be included in the list of what could be sued for in a forcible. We also voted to add a comment explaining that a forcible entry and detainer also meant a forcible detainer in the context of these rules, and we voted not to change the term to "eviction." Now that was because of primarily a desire not to change more than what was absolutely necessary at that point and also to try to keep everything consistent we the existing case law. There are a lot of comments from some of the groups about changing it to "eviction," and we can discuss that.

And then also in June we voted on Rule 739, and there was some discussion on that later to make it clear that the appearance date in the citation is the trial date; and the committee directed us to put specific language in the rule that said "for trial" so that was not ambiguous any longer.

There are still six major issues that I

think we need direction on. We have had votes on some of these. Some of these we have not had votes on. All of these major issues generated a lot of comment from the various groups. First of all is how is the tenant to respond after being served with a forcible. And this is really Rule 739 since it's an expedited proceeding. Typically the tenant is advised of a date to appear that is the trial date. Now should that date in Rule 739 provide the tenant with a trial date or an answer date? We had a discussion as to whether this date is a trial date or answer date with the trial to be set later. The committee was in consensus that it was a trial date, directed the subcommittee to add "for trial" to the rule to make it clear, which we did. Although no vote was taken the language was discussed at a subsequent meeting and no objections were raised. The subcommittee recommends that the date in the rules be considered a trial date. If there are individual problems for litigants in a particular trial, we think the expanded continuance provisions in Rule 745 will allow

additional flexibility now that does not exist in the current rules.

The second major issue is the current rules provide for a mechanism for a landlord to take immediate possession by posting a possession bond, which is Rule 740. We have had long discussions about this rule both in June and in November. The debate focused upon whether or not to even keep this mechanism or to eliminate it; but several of the representatives of the apartment industry told the subcommittee it was needed, and Justice Hecht said the Court probably wanted to maintain this procedure. The rule is designed to give a landlord relatively immediate possession in the case of tenants who represent a general security or health risk. The discussions we've had centered on whether or not to allow a tenant a jury trial or to limit the trial to a bench trial to allow a quicker resolution. There were also a number of other issues discussed. The committee gave instruction to the subcommittee to redraft the rule. We did that and came back in November. There the committee voted to allow the tenant

an option of having a jury trial by a vote of 10 to 7. The committee then voted to not require the JP court to hold the jury trial within six days because of the practical impossibility of doing that consistently. That vote was 16 to 1.

The subcommittee has redrafted the rules accordingly; and the current version in 7.8 contains two options. Option one is the majority view of the committee which is no jury trial. Option two is a faster remedy, does not allow a jury trial, restricts it to bench trial. Now the subcommittee presented both options again, because the committee majority view of no jury trial we don't think really serves to have an immediate possession. It doesn't serve the intent of the rule. The current proposal which is much improved over the current rule does provide an abundance of due process, but is not a speedy process by any means. The question for the committee is how much due process should be sacrificed in order to speed up the process of immediate possession. If we limit the use of this procedure to those landlords who

demonstrate a true emergency, restrict jury trials, but provide for an expedited appeal for tenants, is this something the committee would look at in lieu of the current committee version?

The subcommittee with a minority of one recommends that we eliminate jury trials and try to speed the process up without sacrificing any significant due process. Now if the committee wants to look at that again, what I would propose is that the subcommittee sit down with some of the various groups that are probably going to address this later and see if we can work out some solution to try to resolve some of those competing issues.

Third is to what extent is discovery appropriate in a forcible entry and detainer action? Rule 741, 743 and 754 deal with that. We've had some discussion on this issue; but we've not taken any votes as yet. At the January meeting we had a discussion about discovery focusing upon Fred Fuchs' comments. The committee did not reach a consensus, but directed the subcommittee to rewrite Rule 741 so the plaintiff would have to plead more

specifically as to the exact cause of action and to attach to the petition any documents to be relied on by the plaintiff. The committee felt this may be sufficient to satisfy the concern of tenants who claim not to have any knowledge of why they're being evicted and the concerns of landlords who object to time consuming discovery without limitations. The subcommittee redrafted as instructed; but based on the comments that all the interested parties sent in nobody seems to like the redraft of 741 very much, so I'm not sure where that leaves us now.

The committee I think really has three choices. One is no discovery. Two is limited discovery, and three is full discovery under a level one discovery control plan. The subcommittee recommends option two which is limited discovery. We do not recommend simply leaving the issue alone, because it is ambiguous and the time limits in the FED rules and the time limits on the discovery rules for a level one discovery control plan clearly do not coexist well.

Some of the reasons not to leave the

status quo is that the rules are unclear. One Court may say "No discovery; the trial is today." Another Court may look at these rules and say "Well, yeah, 190 says that you can have discovery, so we'll just reset this. And how much time do we need? Is it 30 days or 45 days?" You're just going to have inconsistent results across the state because the rules are simply not clear.

And then secondly, if a forcible is a level one because it's always going to be under $50,000, how do the time limits for discovery work with the time limits for the forcible rules? There is just no clarification. The Courts are not going to know how to interpret this. I think the status quo means inconsistent results statewide.

If the committee wants to go with some limited discovery scheme, what I would recommend again is that you let the subcommittee work with some of these groups that are interested in the process, see if we can come up with a solution and report back at the next meeting.

Fourth, should litigants have an opportunity to make a motion for new trial or motion to set aside a final judgment based on a default or a DWOP, Rule 749? The current rule does not allow for a motion for new trial, but is silent on motions to set aside. The subcommittee felt it was important to provide a remedy for a litigant to set aside a default or a dismissal. If the litigant is late for court for a valid reason, there is no way that he can have a hearing on that without a de novo appeal, which is we think a harsh and somewhat expensive remedy. So the committee had some limited discussions on this issue; but we've not actually taken a vote on this as yet.

The motion for new trial was placed in the draft by the subcommittee as somewhat of an afterthought in order to provide relief for a new trial in the event of newly discovered evidence or judicial error. Frankly the number of cases helped by a motion for new trial probably would not be very many and the litigant would have the right to a quick appeal. The subcommittee does recommend

preserving the motions to set aside. We'll be happy to look at redrafting those to provide some more safeguards to prevent those from getting out of hand. As for the motion to set aside -- as far as the motion for new trial we don't have strong feelings about that. If the committee wants us to omit that, that can be done very quickly.

Five, is it constitutional to require a litigant to bond a justice court judgment as a prerequisite to appeal by trial de novo to county court? The appeal rules are found in 749, 749(a), 749(c), 750 and 751. The subcommittee realized there may be a problem with the current method of appeals given the Dillingham case, a case in recent Supreme Court rulings. And I'm going to turn it over now to Professor Carlson to comment on that issue.

PROFESSOR CARLSON: We have discussed this fairly extensively. Under the current forcible scheme a nonindigent tenant is required to essentially bond the judgment as a prerequisite to appealing by de novo appeal to the county court. I guess the positive side

of the current rules is it's pretty easy to calculate and apply, and it seems to be working. The negative side is it really flies in the face of our law.

HONORABLE SARAH B. DUNCAN: It's unconstitutional.

PROFESSOR CARLSON: It's unconstitutional. And Sarah and I have talked about this, because it also appears in the 500 series. We have the same problem in the 500 series of the JP rules as we do in the 700 FED. And that is the Supreme Court has made it very clear in Dillingham and as recently as a couple of years ago that you just can't require a party to bond a judgment as a prerequisite to appeal. It violates our open courts guarantee in the Constitution. And that's essentially what our rule does now.

We talked about the fact that there is case law that suggests that the judgment of the JP court is vacated. So you take the position, and we talked about his, "Well, is there anything really to bond?" There are of course to some extent presumptive validity given to a JP court judgment. We actually

voted on that. We thought that that was a positive thing to do. In the 500 series of the rule there is a provision for superseding JP court judgments, so it's there now for JP actions in general. It just isn't specifically in the forcible rules.

We brought to the committee the question, three key questions. Do we want to use the supersedeas procedures that are parallel going from county court, forcible judgment to court of appeals, or should we come up with some other scheme? We voted to do the parallel supersedeas provision and we've written the rules that way.

The down side to it is, you know, supersedeas, at least it can look complicated; but if it's a cash deal, it's not that complicated. We would hope to diffuse the complication, because these are many times pro se cases, by coming up with forms that hopefully would be easy enough for the litigants and the Court to apply. And we voted to give some presumptive validity and not to consider the JP court judgment as vacated and annulati notwithstanding the

de novo appeal, just kind of held in abeyance. So that was an important vote on our part as well.

We were concerned about what happens to the nonindigent tenant who supersedes -- who fails to supersede, but appeals to the county court. What is the effect of that? What is the enforcement of that lower court judgment if it has some presumptive validity? And our thought on that was we would provide in the rules, and I think we have, that the issue of possession, rightful possession is mooted at the county court level, that the county court judgment out of that forcible action is not a basis for collateral estoppel or res judicata that would preclude the litigant from proceeding, the tenant from proceeding in a wrongful eviction case if possession was in fact wrongly adjudged. And we had to put that language in there, because there would be this standing judgment of the JP saying that in this scenario the landlord is entitled to judgment.

So I think we've addressed the problems of presumptive validity, the vacated judgment

and the open courts provision; but I think you'll hear from some of the folks that are here today that that is not being well received. So we wanted in fairness to raise the issue again for the committee to be aware of and to hear what other solutions, if we want to take another approach, or if we want to stick with what we have.

HONORABLE TOM LAWRENCE: The committee decided that any defendant who filed and had approved an affidavit of indigence would be allowed to appeal for free and would not have to post a supersedeas to remain in possession. However any defendant indigent or not would have to pay rent as it becomes due into the registry of the court in order to remain in possession. There was quite a bit of discussion on this issue, and several votes were taken. Most of these were in September of 2001.

On the question of whether a defendant should have to post a supersedeas to remain in possession pending the appeal the committee voted 11 to 9 to require a supersedeas. By a vote of 13 to 3 the committee voted to exempt

indigents from the requirement to post supersedeas to remain in possession. The committee voted to require all defendants to pay rent into the registry as it becomes due in order to remain in possession by a vote of 21 to 6. There was a vote on whether or not to require the appellant to pay the filing fee for county courts into the JP court registry in order to perfect the appeal instead of paying it directly to the county court 20 days later which is the current rule. The vote was 12 two 8 to require it to be paid into the JP court registry in order to perfect the appeal to county court.

And then the last major issue is the validity of a JP judgment and the JP's jurisdiction to take action on a forcible after the appeal is perfected which is found in Rule 748, 749(b) and 750 which I think Elaine has already commented on. We had had a long discussion on this issue in September and in November. The committee directed the subcommittee to redraft several of the rules, which the subcommittee did. The resulting redraft was discussed with the committee and

two votes were taken. There were no objections raised to the new language. A vote was taken to give some presumptive validity to the JP judgment after the appeal is perfected which is in Rule 749(b). That passed eight to seven. There was also a vote taken that no factual determination in an FED trial give preclusive effect in other actions between the parties. That passed by a vote of eight to six.

The subcommittee tried several times to have, figure out some way to have the JP retain some jurisdiction after the appeal was perfected or alter it to maybe delay the appeal time so the JP could act on some matters such as passing on the sufficiency of the appeal or supersedeas bond sureties or issuing a writ of possession if rent was not paid into the registry pending appeal; but we couldn't find any way to do that and not run into problems with the issues Elaine raised. So we couldn't figure out a way to do that; and that's why the rules are drafted as they are.

Now this concludes the discussion of the

six main issues and brings us up to the end of the meeting in January. At that meeting the committee directed the subcommittee to redraft several sections, which we did and which are before you today with the idea that we would take the rules up, these rules up again in March.

Now after the January meeting several of the groups that are here today and have sent in comments asked for an opportunity to get together and meet to see if they could achieve a consensus and put off the rules for March and then take them up in May instead. And these people that are here can speak to this; but I've been informed that although the JPs, the apartment associations and the Legal Aid groups did meet and they tried to reach a consensus, they were just not able to reach a consensus on everything.

Now you have available to you all of the comments that those groups have submitted to the subcommittee. Most of these comments, quite a few came in Tuesday afternoon, some last week. We've gotten all of these within the last 10 days for the most part; but

they're all available and all are on the website.

Representing those groups today, and they've asked to address the committee, I've had long conversations. There are some excellent ideas and suggestions that they have sent to us. The subcommittee has not had the opportunity because they were received late to look at those in detail; but just in reviewing them it looks like there are some good ideas that we may be able to benefit and make some changes.

There are, although I don't think that they're going to reach a consensus, I think it's a fair statement to say that all of the groups that have sent comments like some of the things that are proposed, dislike some of the things, and probably are somewhat ambivalent about others. I don't think -- it would be nice if they could reach agreement. I don't think that's going to happen. I think we're just going to have to make a decision on some of these issues and move on.

What the subcommittee would like to have happen is that after these individuals have a

chance to speak is that we sit down and go over some of these main issues and try to give direction to the subcommittee and then maybe try to go as time permits through rule by rule to see where we stand on these. And that concludes the initial comments.

CHAIRMAN BABCOCK: Okay. Thanks, Judge. I was also approached today by a group from the State Bar that provides volunteer lawyers headed by Chuck Herring, I think, formerly of this committee; and they would -- they also would like to be heard at some point on this issue, because they having reviewed our work product so far believe that the compression of time as some of the rules contemplated as we are proposing them will put a burden on volunteer lawyers, and they want to talk about that. So I told them they're welcome to address us, as is anyone, and that I'm sure we will be talking about this in our next meeting, and they're welcome to come and talk to us as well.

We've got four people that have asked to speak: Larry Niemann of the Texas Apartment Association, Fred Fuchs who has addressed us

before of the Legal Aid of Central Texas, Robert Doggett from Legal Aid of North Texas and then Howard Bookstaff of the Houston Apartment Association. Since that's how they're on my list, we'll go in that order. If you could, in your remarks if you could limit it to maybe 10 minutes or so, if that is okay; and if you could try not to be repetitive of what somebody else on your issues is saying, that would be helpful to us; but if you need to repeat, then that's okay too. We're here to listen. So Mr. Niemann.

MR. NIEMANN: Where would you like me to stand or sit?

CHAIRMAN BABCOCK: You can stand anywhere or sit anywhere you want.

MR. NIEMANN: What about right here (indicating)?

CHAIRMAN BABCOCK: That would be great.

MR. NIEMANN: Okay. First of all, let me tell you who I am. I am Larry Niemann. I'm the attorney for the Texas Apartment Association for about 38 years now. I've had a little bit of experience in eviction and have seen a lot of things come and go.

I want to congratulate the subcommittee and the main committee for so much time and effort that has been put in and all the great ideas that have come out. I think the ideas that are in controversy are the vast minority of the ideas in the proposal. I would like to clarify one thing. I am actually the one that tried to get the three groups together; but it sort of fell apart. I'm not going to point any fingers. I might be pointing at some of my own clients if I did; but it sort of fell apart. And I frankly think a little nudging by this committee might help us get together. You know, sometimes when the boss says "meet" it makes realists out of people.

I would like for just a moment to discuss the five or six issues that were summarized by Judge Lawrence. Number one, on the citation, whether it should be an answer date or a trial date or give the JP a choice of an answer date or a trial date, it is the official position of the Apartment Association that it should be a trial date. It has worked well in Texas, nearly all over the state of Texas for many years. If setting a trial date in the

citation does become a hardship on the tenant, then you have the opportunity for delay on affidavit of the parties. The justices all over the the state have really been pretty reasonable in allowing delay when the tenant has requested it, so the answer date does not, particularly if discovery has been requested by an attorney.

Number two, is the bond for possession case issue. I would plead for you to allow bond for possession accelerated eviction to remain in the rules. In our industry we have death threats against managers, death threats against fellow tenants. We have molestations and rapes and murders and muggings by co-tenants, fellow tenants; and it's just extremely important that we have a very expedited procedure in those kinds of cases. What due process protections are there the tenant can ask for discovery right now. The tenant can ask for a postponement. The tenant can even ask for a jury right now. There has not been a factual problem in bond for possession cases. It has not been abused by the judges, the landlords or the tenants to my

knowledge. So therein lies the need for possession.

There is one requirement problem that we would like cured; and that is to put the pressure on the judges to set an early trial, because right now there is no requirement that an early trial be set. The tenant has to ask for an early trial; but the judge doesn't have to give an early trial.

The collateral issue with bond for possession is whether it should be a bench trial or a jury trial. Therein lies one thorn in the side of this particular procedure; and that is a jury request can really, really delay a bond, any kind of hearing. Judge Lawrence was telling me about cases in Houston where the central jury panel can delay three or four weeks getting a jury to the justice court. Even if there is no central jury docket or jury panel from downtown a jury trial is going to automatically delay at least a week, on the average two weeks and sometimes more. And when you have these very serious cases a delay because of a jury request can be quite onerous and even dangerous for many

parties.

We would -- we like the idea of a bench trial only in bond for possession cases. We don't mind a tough high bond. We don't mind making the landlord think seriously before asking for a bond for possession; but we truly and truly need the bond for possession procedure for safety and security purposes.

Number three, discovery, Judge Lawrence properly recounted four alternatives for the committee. One is outright prohibition of discovery. One is reasonable discretionary discovery. One is imposing restrictions and safeguards. I believe there is a fourth solution; and that is just remain silent.

Discovery is available through 523, because all the rules of the county and district courts apply to justice court unless specifically negated by the specific rules at hand, the eviction rules. Eviction has been -- I mean, discovery has been granted to my knowledge every time it has been legitimately sought. It has not been abused by the tenant lawyers. I think the judges have acted reasonably on discovery.

But let me tell you why the Apartment Association would respectfully request that we just let that sleeping dog lie. If we put discovery or even mention the subject of discovery in the eviction rules, we're going to have all of the pro se tenants in Texas who are defending themselves and fighting the landlord to the bitter end latching onto discovery just like they have, the smart tenants have latched to the defect in the pauper's affidavit right now. The smart, devious tenants have been appealing pauper affidavit rulings against them to the county court and buying three or four weeks or two months of extra time by beating the rule so to speak, beating the system. And we think the courts are likely to be inundated with either nonjustified discovery if we mention discovery in the eviction rules.

We have no problems whatsoever in leaving discovery like it is right now, because I think it is working. You're trying to fix something that ain't broke as far as we're concerned. I'm authorized to tell you through Sandy Prindle, the president of the JP and

Constables' Association, that even though their chart and their letters have said they object to discovery, Judge Prindle on behalf of his association says they will be perfectly happy if you just leave it alone.

COURT REPORTER: This is Judge Prindle?

MR. NIEMANN: Judge Prindle, P-r-i-n-d-l-e, Sandy Prindle. He is quite knowledgeable. He teaches in JP and Constable school. He's been the legislative chairman for a number of years.

Fourth, motions for new trial, I guess it boils down to the fact that motions for new trial are not allowed under the current rules. There hasn't been serious problems or abuse; and instead of having three trials, a first trial in the JP court, a second trial in JP court and possibly a third trial in county court we'd rather limit the potential of trials to two trials, one in JP and then a trial de novo in county court.

The fifth issue was supersedeas and payment of the rent. We think the supersedeas idea is a good one. I think the language and complexity of the rules can be worked on. I

agree with Judge Lawrence and Professor Carlson that we've got to write these rules for the layperson. Us lawyers it's easy for us to understand the complexities of the Latin words or what have you; but in my proposed counterpart of the supersedeas bond I have tried do in substance what the subcommittee did, but rather in simpler, more understandable language.

With regard to tender of the rent we think it is quite important in an appeal that in nonpayment of rent cases that we not just follow the rule while the tenant has to tender rent as it becomes due in the future, because if you do that in nonpayment of rent cases, you're going to be appealing to the county court, and it will be 15 or 20 days or 25 days later before it's going to be heard by a judge, and by that time the tenant has got another month's free rent. In cases, eviction cases in which rent is not the issue, but crime or rape or drugs or noise or disturbing the peace or many of the other grounds for eviction, in those kinds of cases tendering where rent is not delinquent it's fine to have

the rent tendered to the court as it becomes due; but in nonpayment of rent cases we're going to stiff the landlord even worse if we don't require a tender of some of a reasonable amount of rent or rental value in the case of no rent at the JP court level.

We think the concept of the JPs allowing a lesser tender of rent in the subsidized housing case is entirely appropriate. We have have suggested some additional safeguards to make sure that the landlord is not going to be duped into allowing a lesser payment of rent when in fact the landlord is not going to be getting rent from the third party or the government assisted housing program.

I have addressed all of those issues. I guess the last issue that I should address it's not a very big issue; but I can assure the committee that in the world of landlords and tenants and JPs the common vernacular is "eviction" and not "forcible detainer" and "forcible entry and detainer." And I personally have a great deal of confidence in the Bar and the judiciary of Texas that they can make the leap from the old cases that say

"forcible" to "eviction." You'll see that all the statutes say "eviction," all the leases say "eviction." Tenants and landlords and JPs say "eviction."

HONORABLE SCOTT A. BRISTER: But we've always said "forcible entry and detainer."

MR. NIEMANN: Please don't make us learn in an archaic, 19th century language over again. That is said in jest. That is the least important of everything I've said; but it is somewhat interesting.

I'm going to sit down now. I'll be happy to answer any questions. I'm sure you may have more, will have more as the other speakers pass on their wisdom to you. Thank you very much.

HONORABLE NATHAN L. HECHT: Larry, your remarks come from experience with residential tenants? This is all almost apartments?

MR. NIEMANN: Well, not really, Your Honor. I didn't tell you that I have for about 20 years represented the Texas Building Owners' and Managers' Association which is the office buildings.

HONORABLE NATHAN L. HECHT: Yes.

MR. NIEMANN: The retailers. And for about 10 years now I've represented the Texas Ministorage Association. The eviction process is quite frankly seldom used in the office arena and in the ministorage arena, more so now that I've gotten into the picture and am teaching them how to get people out pro se. But the problems in eviction have arisen more from in the residential arena, Your Honor; but I do speak for all three.

HONORABLE NATHAN L. HECHT: So your comments wouldn't be any different?

MR. NIEMANN: The comments would be no different whatsoever. Indeed in the -- I'll just leave it at that. No different right down the line.

CHAIRMAN BABCOCK: Thank you, Mr. Niemann.

MR. NIEMANN: Thank you.

CHAIRMAN BABCOCK: Fred Fuchs.

MR. FUCHS: Mr. Babcock, if it's okay, I'm just going to remain here. I'm sort of a back-of-the-pew kind of guy in the church. So if it's all right with everybody, I'll just stay on the back seat over here and make my

comments.

CHAIRMAN BABCOCK: That would be fine with us.

MR. NIEMANN: I'm going to express objection to his humility and attempt to persuade you by his modesty when in fact he has just been recognized as one of the top two tenant civil advocates in the United States.

(APPLAUSE.)

MR. FUCHS: Thank you, Larry.

MR. NIEMANN: Stand up.

MR. FUCHS: And I would also like to commend Dr. Carlson and Judge Lawrence for your yoemen's, yoewomen's work to date with respect to the rules. And this is not an easy task. There are certainly many things in the proposed rules that they've put forward that I think are advantageous to both landlords and tenants and would be a step forward.

I do have some conerns and they pretty well tie into the issues that Judge Lawrence mentioned and that Larry discussed. So if I might just go over those very briefly trying to keep in mind the 10-minute requirement.

With respect to the first issue, and that

is should appearance date be trial date, the current Rule, Rule 739 says that the citation shall provide for an appearance date of between 6 and 10 days, and then Rule 743 says that they shall be docketed and tried as in other cases. So there is some tension there. Well, what does appearance date mean? Does it mean trial date or does it mean an answer date? And the proposed rule would require that it actually be an answer date.

The practice in Travis County since I've been practicing and in the last several years in Williamson County has been that appearance date is appearance date, that it is actually answer date, and that the Justices of the Peace require that you answer generally within seven days, and then they'll set it for trial immediately thereafter. Some days you have a trial the next day. Some days you have a trial the next week. That's also the practice at least in some parts of the Valley. It's not the practice to my understanding in Dallas or Harris counties where the appearance date is in fact answer date and you have to show up and the trial is heard that day.

I have got a couple of sort of practical concerns about making appearance date actually trial date. One is these cases already move very quickly. On cases that we can't handle we already try to get pro bono attorneys; and it's difficult to get pro bono attorneys already because the cases are moving so quickly. That's one very real concern out in the real world is that cases where there may be merit where we're representing clients and you're trying to get a pro bono representation it will be even harder because they're on a short, such short time frame.

The other practical problem is that if you have got a case in which you need to do some discovery, and I'll talk about why discovery is important in a minute, that it's going to be at the discretion of the judge when you show up there and you're saying "Well, Judge, I need discovery." And the judge says "Well, no. You're going to have to go forward. Today is the trial date." And so you're going to have to bring whatever witnesses. If it is not a nonpayment case, you're going to have to make sure those

witnesses are there because you can't depend on the judge necessarily granting a continuance. So I would say that the better practice, and it gives Justices of the Peace more flexibility over their docket, is in fact to make appearance date an answer date and require then that they set those cases very quickly thereafter.

The second issue with respect to six-day possession bonds, I'm not opposed to a six-day possession bond rule. It's been in the rules for years. It's disingenuous a little bit to say that it's there primarily for rapists and murderers. Where I've seen it used is the nonpayment of rent cases; and there are some landlords who try to expedite the process even more by using it in a nonpayment of rent case. And it's not currently limited to threats to health or safety. That would be wonderful if the committee would limit it to threats to health or safety.

There are a couple of real practical kinds of problems with the current six-day possession bond rule, though. One is the whole issue of well, what if you -- there is

confusion often. There is a bond that the tenant is served with, and they're also served with a citation that gives an answer date, and it also says you have to demand trial; and I have seen cases where tenants have answered and because they didn't demand trial within six days there was a default judgment entered and an immediate writ of possession issued. So the rule should clearly be clarified that if you demand trial or file an answer, then that is indeed going to be sufficient to demand trial and you'll get your trial.

And the second little area that needs to be clarified is if you answer in a six-day possession bond case, but don't then show up for the trial, say, the next day, whether you still have those five days to appeal. It seems clear to me under the rules that if you answer or demand trial, but don't show up, you have five days to appeal; but that's not the way all of the Justices of the Peace in the state interpret it. Some say you've got to actually make your demand, show up for trial or a writ can be issued immediately after trial. So those are two things with respect

to possession bonds that really need to be clarified in the final rules. And again, if it could be limited to cases in which they're a threat to health or safety, that would be wonderful.

Why is discovery necessary in eviction cases? Often times it's not. In the type of cases that we take it is often almost always necessary in order to adequately represent the tenant. I am in agreement with Larry on this that Rule 523 says you apply the district and county court rules insofar as they can be applied and that the committee should just be silent on this. The rules speak for themselves.

Let me give you an example. I just had a case. The client had a default judgment in justice court, represented herself pro se. She works as a school crossing guard, single mom with two kids. She comes to our office after the -- within the appeal time. A judgment had been taken against her by the federally subsidized, privately owned complex for unpaid rent, $324 for four months. That was her share, four months unpaid rent and

possession.

Something didn't seem to ring right in talking to her; and because of discovery and getting into the records it became obvious very quickly what had happened. And in that case the manager had continued to include child support that she had not been receiving for several months which greatly overstated her rent. And after pointing that out and getting the documents from the other attorney we shortly on appeal, because we had to appeal to preserve her rights, on appeal we ended up settling the case. The client remained in possession; and she in fact got a refund because she had overpaid on her rent. There would have been no way to have achieved that result had it not been for discovery or either an attorney who just says "Here, you can come look at everything." And that's often not the case.

In public housing cases there is a particular federal regulation, public housing, not federally subsidized or Section 8 voucher; but in public housing there is a federal regulation that says that tenants have an

absolute right to examine any documents in the possession of the public housing authority which are directly relevant to the eviction. So you can examine documents then without discovery in public housing. But again, without discovery the housing authority attorney can say "These are the only documents relevant to the eviction" and not give you all of the documents that you need. So discovery remains important. Certainly the revised rule gives a lot more information which I really like; but it still would not have addressed the problem in my client's case where you need to actually look at the rent computation worksheets.

Motions for new trial, I think the only if you're going to do motions for new trial, I believe you should not slow down the process. I think they can be useful in expediting a resolution of the case in default judgments cases. And if you were to limit it to just the default judgment cases and give someone the five-day period to file a motion for new trial, overrule it by operation of law within the five days if there is no, if there

is no, if the judge finds no merit, that would be great. And so you wouldn't slow down the appeal process unless the judge looks at it and says "My goodness, this person appears to have a defense. I'm going to set a new trial" and set a new trial. And where I've seen this happen is again in default judgment cases where for one reason or the other the tenant doesn't show up and answer and they have a legitimate defense on the merits. And I think landlords are also interested in expeditious resolution. And as long as you're not slowing down the process and given the full five days or making -- overruling it by operation of law if it's not ruled upon and you're not slowing down the appeal unless a new trial is granted by the JP, that would be a wonderful improvement.

The bond is a prerequisite to appeal. The current rules allow someone who is indigent to stay in possession by paying future rent as it comes due. It's a little confusing to me; but I think that Judge Lawrence and Dr. Carlson have tried to do that in the proposed rules where you can still if

you're indigent stay in possession so long as you pay future rent. I think that the suspension of the judgment works fine right now with respect to indigents; and if that's indeed what the proposed rule does, allow someone who is indigent to stay in possession so long as they pay future rent as it comes due in a timely fashion, that would be fine.

Rule 755 should be clarified because there is an existing problem now with when the county court at law judges issue a writ of possession; and it should be clarified to conform to Section 24.007 of the Property Code which allows someone who wants to appeal in a residential case the issue of possession 10 days to post a supersedeas.

I'm still seeing judgments out of county courts at law where they're giving only five days and issuing the writ of possession even though the tenant has 10 days under Section 24.007 of the Property Code to post a supersedeas bond in an amount set by the Court if he or she wishes to remain in possession pending appeal to the courts of appeal. So that's one of the things that should be

clarified.

And finally with respect to late charges I know you've already taken a vote; but just a bit on that. Counterclaims are not allowed in eviction cases; and we've sort of expanded now what if you proceed with allowing late charges to be added, the kind of monetary award that can be awarded against the tenant when the tenant can't counterclaim for any kind of claims he or she may have against the landlord.

And I understand the nature of the process is to be expeditious and summary and why you wouldn't want to open that up; but I do have concerns by allowing the landlord to get more than just the rent and now expanding it to late charges in eviction cases. I'd be glad to answer any questions.

CHAIRMAN BABCOCK: Any questions? Thanks very much. We appreciate it. Congratulations on your award. So your mom wrote that recommendation letter?

(Laughter.)

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: On this first question

about whether the appearance date should be the trial date or answer date, don't the tenants know before suit is filed that legal action is imminent?

MR. FUCHS: Well, they have to be given a notice to vacate, yes.

MR. DUGGINS: I mean, so why is that so critical that there be more delay? If they've known for at least two to three weeks or if not longer that there is an issue over this, why is that as critical?

MR. FUCHS: Well, the notice to vacate for breach of a lease need only be three days. And the Texas Apartment Association lease and the Texas Association of Realtors lease provides that notice to vacate can be only one day for any kind of breach of a lease. So often times they're just given that notice.

Part of the problem is also procrastination with coming in until after you've been sued. I think that's not common to tenants. I think there is just a general problem with people dealing with legal problems, and you often see people after

they've already been sued or their time to answer has passed.

CHAIRMAN BABCOCK: Okay. Great. Robert Doggett, Legal Aid of North Texas.

MR. DOGGETT: Yes, I actually practiced with Legal Services of North Texas in Dallas for nine plus years and did eviction work there and recently moved to Austin. So now Fred is my boss, but just for clarification.

CHAIRMAN BABCOCK: Thanks.

MR. DOGGETT: But I practiced there, like I said, for quite some time. And just assuming there is kind of a perspective there; but in Dallas there was in Dallas county alone, not our service office, in Dallas county alone we had 150 evictions filed every business day approximately. So if you do the math, let's say 95 percent of the cases that are filed are correctly filed. Five percent or seven per day weren't; and there wasn't seven lawyers in our office and there wasn't seven pro bono attorneys available. So you can see what we're talking about in terms of numbers. So when you're talking about this process there are a certain percentage that

are not filed properly. Discovery and these time periods are important because they may help provide either services by pro bono attorneys or legal service attorneys and give us an opportunity to defend these cases.

And if I could back up on the step process on this delay. Remember this quote "delay" works in the landlord's favor as well I think if you talk to them, because if you have a one-step process on the trial date, you are forcing the landlord to bring an attorney to this trial that could occur and marshal all their evidence and be prepared for trial. That works on the landlord's side and the tenant's side. In other words, you will find if you talk to Larry's clients many of them like the way it is.

And this doesn't occur just in Travis County; but I actually now practice and have cases in Hidalgo County. And the judges and the lawyers don't mind the way that works, because what happens is it allows an opportunity to find out what cases are going to be contested, and both sides understand that. So in terms of if you're thinking about

let's just have one system, what we're saying is right now in the state of Texas there are two systems. I think there probably should have always been two; but the judges have opted to define the idea of an appearance date to be a trial date, and they force that IN Dallas county and for instance Travis county and Harris county.

So what I'm saying is why mandate that counties that and judges that have found and frankly Bars that have found a system that works just as well or better that they prefer? I don't see the necessity; and I'd urge the committee to consider that rather than mandate a forced system on the judges and the litigants that might be preferred differently.

And if I could touch on a few other things, one other issue that I think is of primary importance on this possession bond there is a variety of issues that I have with possession bond. I frankly don't like it at all on the way it works; but what I do hear time and time again it's for the rapists and the murderers. I just had a case in Hidalgo

county. The landlord did not make repairs to the apartment, refused to make the repairs. The tenant was a Section 8 tenant. The housing authority cut off the rent. The landlord filed an eviction case based on nonpayment of rent. We should win that case. Right?

Well, the landlord also was instructed to file a possession bond on that case; and this was not a rapist, not a murderer, no threat to health and safety. This was a simple rent dispute; and frankly the tenant should win that case, no question. In other words, if there is going to be all this possession bonds, and you know, I think I saw something like now two days to answer and no jury trial. This is for stopping and getting out the rapists and the murderers and their families I guess out of these apartment complexes. Then possession bond needs to be limited to those circumstances. Because obviously a nonpayment of rent case, a dispute over repairs why do we need all of these, I mean, accelerated processes?

And so that's what I will remind you when

we start talking about possession bond we're talking about those dates for the rapists and the murderers. Nowhere in any of the proposals that you're going to see over there talks about limiting it to those actual circumstances; and I think that's extremely important. If that's what it's for, then let's make that what it is for.

I concur, of course, with Fred about motion for new trial. I think it's a mistake to have them slow down the process. But remember this, remember this when you're saying let's not do those: It could force another trial. What we're talking about is why go to the county court. Why force tenants or landlords to appeal a case. Why not give a JP an opportunity to fix it in their court and that be the end of it? That's what we're talking about. When a tenant when he says "no shows" we are talking about 10 minutes late. We're not talking about not trying to get there. They've never been to the courthouse before. They have got the address. They go, they are here, and they're in the wrong. It's Precinct 3, Place 2. "Oh, I

thought it was Precinct 2, Place 1." Or "What does a place mean? I know the JP court is right over here next to my house. That's not it?" "No. That's place 1. Place 2 is three blocks over." Remember in these counties the precincts are divided up, and then inside the precincts there are places. Tenants believe it or not sometimes don't know exactly where to go. And if you look at the citations, the ones in Dallas County, there are no phone numbers. They take off the phone numbers so they don't get the calls. I know that's hard to believe; but it's true. I'll show you the citations.

So what we're saying is when a tenant arrives late the landlord has been there many times before. Right? They know exactly where it is in many cases. The tenant has never been there before in their lives. So when a tenant is late and a default judgment is entered we're talking about a motion for new trial where the judge sees that there was a defense and wants, the judge wants to hear it rather than forcing an appeal. Why force that whole appellate process to act and put more

burden on the county when the judge on their own decides "I want to hear this." If they don't rule within the five-day period after the judgment, then it goes away without a hearing, operation of law. So we're only giving an opportunity to a judge that decides there might be a situation here that I want to hear it and save all the litigants from going up to county court. So it's a process I think that needs to be there. It doesn't hurts anything. It doesn't slow down the process; and actually it could save appellate time.

A couple of other smaller points is that I think we just had a debate in Spanish in this state, and I think that a citation that mentions that you are about to -- you could be evicted in Spanish is not such a horrible thing; and I'm willing to say it out loud and on the record. We have devised, and I think you'll see that in some of the proposals that something very simple that's in Spanish that states, you know, what the situation is. And a JP or the local court could put it in other languages if they wanted to; but we think that in this state there should be a warning in

English and in Spanish saying this because these are people's homes and they are very quick time lines. Remember when we get sued in district and other cases the time lines are obviously longer and it's not for defense of your own home; and I think that is something that is important.

And just I'm trying not to cover some of the things that have already been mentioned; but I think that in terms of -- I concur, by the way, with everyone on trying to make the terms consistent, that eviction is stated in the Property Code. Numerous sections of the Property Code state the word "eviction" over and over and over again. I think also we need instead of using "landlord" and "tenant" in the rules we need to use "plaintiff" and "defendant" throughout, not " aggrieved party," none of this stuff. Let's just use the same term for the landlord and for the tenant or for the appellant. Remember these are de novo cases. There is no appellant in county court. They're still a plaintiff and they're still a defendant. One might have filed the appeal versus the other; and when

that needs to be designated, fine. But we don't need more confusion. I think we need less and just have one term, "plaintiff" and "defendant" no matter what.

And I agree the rules need to comply with the Property Code with regard to writs can't issue until after the 10 days expires. Also I think the rules should go ahead and reflect the Supreme Court's ruling already with regard to default judgments in county court, that a defendant has a right to a notice and a hearing before a default judgment is granted; and that was a case out of the Supreme Court. And I think that the rules should reflect that. Right now they don't. They just -- they imply a default can be obtained without a notice and a hearing in the court, and a per curiam opinion found that that would be required.

And lastly on small points, again these are just small points; but while I have a minute, is that the law has also changed with regard to writs of possession in mobile home cases. What a mean by that is where a tenant is renting a mobile home lot the Property Code

provides for slightly different execution procedures when the tenant wishes to have more time to move the mobile home. And that's all in the Property Code.

These are some of the issues that I've noticed that weren't mentioned by Mr. Fuchs that I think that the committee should consider and the subcommittee should consider in reviewing these rules. Thanks unless there are questions.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH B. DUNCAN: What is the case requiring notice and a hearing before a default judgment?

MR. DOGGETT: That's Hughes vs. Habitat Apartments which is 8060 S.W. 2d 872. That was a 1993 case; and I happened to be the counsel for the tenant, so I'm kind of familiar with it.

MR. FUCHS: Essentially what the Court said there was because the tenant had filed an affidavit of inability to pay the appeal costs that constituted an answer and the tenant would be entitled to get notice before if the tenant didn't file a formal answer in county

court or justice court.

HONORABLE SARAH B. DUNCAN: I see.

MR. DOGGETT: Yes. In that case the landlord -- we had appealed the case, and the landlord went and got a default judgment and didn't tell anybody, didn't tell me, didn't tell anybody, and the judge granted it; and of course we solved it in the end.

CHAIRMAN BABCOCK: Any other questions? Justice Hecht.

HONORABLE NATHAN L. HECHT: If I understand you, with respect to the appearance day/trial day procedure your experience is that Dallas does it by scheduling a trial on the appearance day and other counties including Travis County don't; and some people like it one way and some people like it the other. Is that correct?

MR. DOGGETT: Absolutely, Judge. You would find that actually talking to it's not just us in terms of the ones that are representing the defendants; but you'd find that the actual plaintiffs, not necessarily their lawyers, but the actual plaintiffs actually would prefer that system because they

don't have to come to court on the day of trial, because all they know is they call the court and find out who has answered and who hasn't answered; and so they already know they're going to have a default judgment granted in their case and they never had to go to court or bring their witnesses.

And when we have a case where in Dallas when I had to go it was sort of trial by ambush in some ways. If you hadn't had an opportunity to get a hold of the other side, for instance, you had to bring everybody you possibly could, try to get subpoenas done, that kind of thing before talking to the other side, because the other side is doing the same thing you are, preparing for a trial date.

MR. FUCHS: So the practice in the two-step counties is when there is no answer filed the landlord can call at 10 minutes after 10:00 on generally the seventh day, and the Court will grant a default over the telephone. That's how it happens. If they want a judgment for rent, if they want a judgment for rent, then they have to actually go to court and present evidence; but the

benefit to the landlord is when there is no answer under the two-step system the courts in the two-step process grant the default judgments for possession over the telephone.

CHAIRMAN BABCOCK: Judge Lawrence, is that the way it works?

HONORABLE TOM LAWRENCE: Let me get this straight. You're telling me that JPs are granting telephone default judgments?

MR. FUCHS: If there is, when there is no answer. If the tenant doesn't answer and the landlord calls up after the answer time, a default judgment for possession, not rent, will be granted.

HONORABLE TOM LAWRENCE: Well, to quote Bill Dorsaneo, "I find that to be remarkable."

(Laughter.)

MR. DOGGETT: But I guess what I'm trying to say is that maybe that system is problematic in some ways; but the point is that having this different process is actually preferred by the parties and the Courts. And I will tell you Hidalgo county doesn't exactly work that way; but the landlord knows that when they come they don't have to bring a

lawyer because there is no answer on file. They don't have to get all their evidence or anything else. It's a sworn document, a sworn petition; and so they can rely on that and the judge will make sure there is service and then it's done. And I just tell you it works both ways in terms of the parties.

And by the way, Judge, you mention a good point. In Dallas how they do the possession bonds the citation would say you have your appearance date is next Wednesday. They would file a possession bond and require within six days you quote "demand a trial." Well, the litigant said "I already have a trial" because they might call the court and they say "Do I come to court?" And, yes, that is your trial. Well, guess what. They get to court and the judge would say "You didn't demand this trial, did you?" There was a possession bond filed in this nonpayment of rent case, and they would issue the writ based upon the possession bond.

And if you don't believe me, I will show you plenty of cases where I had to sue the justice court for doing that because the

litigant said "I've got a trial date. Why would I need to demand one? I have one right here," and obviously huge confusion. So any time you have this quote "demand" for trial and it's something more than an answer, it's something more than an appearance for the trial as they normally should then it's trickery. It's a trap. And unfortunately that's being used. And you know, if we want to start clarifying, fine; but whenever we start cutting off rights to a jury trial and shortening these time periods I'm not in favor of them. But for gosh sakes if we're going to do that, it needs to be for these cases that the landlords keep claiming exist with the rapists and the murderers and the threats and all that, and then at least there is some explanation for this harsh procedure.

CHAIRMAN BABCOCK: Okay. Thanks, Robert. Howard. Howard Bookstaff is with the Houston Apartment Association. You can stand, sit or crouch, any way you want to do it.

MR. BOOKSTAFF: Basically I'm going to go off my comments that I made to Judge Lawrence in my letter dated May 14th which I know is on

the website. If anyone needs additional copies, I have additional copies. And to be brief, obviously the devil is in the details with respect to all this stuff, and it would take several hours to go through all the rules and really give you comments on wording and so forth. So rather than doing any of that I'll stick to just general concepts.

Just to respond, in Houston we -- I am general counsel for the Houston Apartment Association; but in private we do represent a number of landlords, frankly commercial and residential, assisted housing and marketing, so we kind of run the gamut on the experience we've had in these in practicing in these matters. And I guess what I want to bring to the table is requesting sensitivity on some of these sort of practical issues.

My clients have always had the trial date 6 to 10 days from date of service, never a problem. Unlike, and I'd like to get the judge's, if I can get a default judgment or any other judgment by phone, that would be great, you know; but I have not had that experience. My experience has been to show

up.

And a lot of times please understand that a vast majority of all evictions in the state of Texas are dealt with by nonlawyers. Most of the time lawyers are not the ones that deal with these things, so most of my clients will show up. Before they're my clients they'll show up to the JP court; and if the other side doesn't show up, they'll get a default judgment. It's not been a problem to show up for court. My God, if we are getting a judgment, they ought to show up for court. So we don't have a problem with that at all.

I like the way Judge Lawrence drafted that rule, so I don't have any additional comments on that other than it does work in most parts of the state. And frankly if you left the rule alone, that would probably be okay too. I understand they have their arguments, and the other side has their arguments.

General concepts that I ask you be sensitive towards it's essential that any proposed rule preserve the eviction process as a summary, inexpensive, expedited and

efficient remedy for landlords to allow their tenants, the residents in residential cases, the good ones and the good tenants, the good residents to peace and quiet and enjoyment. They're paying rent. They shouldn't have to be bothered by problem residents.

Often times we are evicting I wouldn't go so far as saying they're all drug dealers, they're all murderers, they're all rapists; but certainly they create problems and disturbances for the other residents, and that's a primary concern. And we need to preserve the efficient process so that there is a means for the landlords to get rid of these problems. It's not just the rent paying. It's the other ones as well.

Three issues come up that I really want you, I implore you to be sensitive towards. Number one is delay. There is just no reason to delay the process, the eviction process more than we now have. Delay will cause people who don't pay rent to stay on the property, people who cause problems to stay on the property thereby increasing the burdens monetary and nonmonetary on everyone else who

lives at a property or in a commercial case who work at the property.

Expense, don't make the rules too expensive to be used. You're going to chill the ability of landlords to use this remedy; and it is a remedy of the landlords, a remedy with judicial blessing, a very nice remedy. I'm against landlord's liens. I'm against lockouts and utility cutoffs because you don't have judicial blessing on any of that. Eviction is a remedy that you've got judicial blessing. Don't make it so expensive that it can't be used. And again, who is paying for this expense? It's going to be the good tenants, the good residents, the ones who pay the rent.

Finally complications, don't make the rules too complicated. We don't want to play "Got you" law. And I think if the rules are too complicated, too many requirements in a judgment, then the question becomes if you don't have that and you rely on that and you proceed on that, then later on you can be sued for wrongful eviction. So don't make the rules too complicated that the requirements

cannot be followed keeping in mind that a vast majority are nonlawyers that use these rules.

The discovery process, of all the rules I think that the discovery process will absolutely destroy the eviction procedures if you allow discovery to be infused in it. I disagree to some extent with Larry, although we practice on the same side. I understand that. I think there is an argument to be made that 5.3 does not allow for discovery because it says "so far as can be applied." You can't fit 30 days of discovery in 6 to 10 days. So there is an argument to be made on the other side that discovery doesn't apply. But be that as it may if you leave the rules alone, those who have that argument can persist on that agreement. Those that on the other side can use the other side.

So I think there has been no problem. I face no problem in the current rule the way it's written with respect to discovery. But don't expressly state that there is discovery. The discovery process can be easily, easily abused and can disrupt the longstanding policy of eviction to be summary

and inexpensive proceedings. If discovery is allowed, you're saying depositions are allowed. You're saying requests for production are allowed. You're saying interrogatories are allowed; but the parties and the justices are going to have to entertain discovery motions, deal with discovery disputes and possibly even reschedule discovery proceedings.

And I will tell you that, and obviously I'm a lawyer; but probably one of the most abused vehicles we have in our rules is in the district courts and the county courts is discovery. It's real easy to send out a discovery or create burdens and just create it so expensive for the other side that they're going to come to the table and want to settle.

Let's not infuse the discovery process into the eviction process. I don't think it's necessary. I don't know of any cases; and we do hundreds of cases a year. That's a good estimate. And by the way, the vast majority of those cases, maybe less than one percent -- maybe these fellows have the

statistics -- are assisted housing cases. And in those cases I usually send out a 10-day notice of proposed termination, because at one time they were required by the federal law. I think that was taken away; but I still send it out where they have -- we send out a notice to the assisted residents saying that in 10 days they have on the proposed termination they can schedule a hearing. Some of the leases even require that, schedule a hearing with us, just an informal hearing, come talk to us and find anything you want out. To tell you the truth although we do quite a few of these I can't remember more than two or three that have ever wanted to have a hearing. Maybe it's procrastination. Maybe it's they don't care. I don't know. But it's not been my practice that tenants really don't know what they're being evicted for. They do get notices to vacate in addition to the 10-day notice; and of course in all market cases and in commercial cases they give a three- or one-day notice to vacate. Commercial cases may even have more. Typically a lease will have an opportunity to cure and all that. It's just

not necessary.

Now I will say that justices can certainly use discretion to develop the facts as they deem appropriate in their cases. They can ask for whatever evidence they want. They can ask for whatever testimony they want. And what if somebody wants testimony or wants evidence and it's not able to be produced? The landlord should lose. If they can't prove their case, they ought to lose. I don't have a problem with that.

Also as I said at the beginning, keep in mind the eviction process is vastly used by non-attorneys. My clients that are not attorneys -- some of my clients are attorneys; but most of them are not -- they're not going to know what to do with a discovery dispute. In fact what they're going to do, and I've asked some of my clients "What if you're suddenly called for a deposition?" They're going to say "I'm going to want you here with me."

You're going to create a much more expensive process if you infuse the discovery because the parties will have no choice but to

obtain the assistance of attorneys when they're faced with discovery matters. I think that the motion docket alone on discovery the disputes that will happen will make already crowded dockets in the JP courts more crowded; and I don't think it's workable from even a judicial economy standpoint.

In the final analysis I think the benefit that is raised and that has been proposed to you as the benefit of discovery is far outweighed by the negative impact it's going to have on the overall eviction process. Again the eviction process for a lot of citizens of this state, one percent or less, I don't know. I don't have the statistics; but I bet you one percent or less are assisted housing. And you're going to create a much more negative impact on the eviction process.

Just the last two points that have seemed to be a trigger point for a lot of the discussion, the two trial process I talked about that. That has worked in Harris county, so I'd leave it the way Judge Lawrence has clarified it. And the motions for new trial I'm opposed to any additional motions. I

don't think you need additional motions. If somebody shows up late for trial and be it the landlord or the tenant side, the remedy is to either dismiss the case and re-file the case if you're the landlord or appeal if you're the tenant. I just don't see the problem there. It's an expedited proceeding. And again, the benefit you get from rescheduling a trial is going to be far outweighed by the need to have this be an expedited, summary process.

So once again, my letter is the May 14th letter to Judge Lawrence; and I've tried to give you most of my comments in there on the concepts of the rules. If anybody has any questions, I'm happy to discuss them.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: You cite the risk of essentially what sounds like frivolous discovery being launched. Who would do that in the scenario of an eviction?

MR. BOOKSTAFF: Well, I guess it depends on the case. In the nonpayment of rent case absent what Fred or Robert brought up, and I forget which one, about the issue about calculating the rent, in nonpayment of rent

cases I don't think there is a need for discovery at all. It seems to me there are certain defenses that the tenant can have; and the landlord is just as unable to do discovery as the tenant is when you get to trial. There's a couple of defenses available for nonpayment of rent. Who would abuse it? I would think that the tenant side would be more apt to abuse it to delay the process.

MR. SWEENEY: I understand that. What I was trying to figure out was I guess maybe rather than who is what could you do by way of discovery if you're indigent that is going to fool with the process as badly as you've described?

MR. BOOKSTAFF: Well, if I -- of course, this is on the record, so I don't want to give any tips to the other side; but what I'd do is I'd ask for the deposition of the president of the management company the day before trial. The president of the management company is not going to be available chances are the date before trial; and then you're going to be forced to appear before the judge. No matter what you put in the rule, no matter what words

you put around that "D" word, "discovery," I think the judge is going to have to make a decision. "Judge, we really need this deposition. We need to know what this president knows about the process and does he know what is going on," you know, blah, blah, blah, blah.

MS. SWEENEY: An indigent plaintiff -- or defendant?

MR. BOOKSTAFF: Who has an attorney, yes.

MS. SWEENEY: An indigent tenant with an attorney?

MR. BOOKSTAFF: Yes.

MS. SWEENEY: How would he pay? I'm just trying to line up how all these work together. I'm not trying to give you a hard time. But if they're indigent, they can't pay an attorney. If they have an attorney who is filing frivolous discovery, --

MR. BOOKSTAFF: Oh, there is an attorney for everyone in America. They get an attorney. They get an attorney.

MS. SWEENEY: With what?

MR. BOOKSTAFF: And maybe it's because of the fair housing case they want to file; and

they want to do discovery on the issues of the fair housing case not related to the eviction. Maybe it's on a personal injury matter that they want to go forward on, and maybe they want to find out about that. See, you're opening this up for anything.

MS. SWEENEY: Are we, in the rule?

MR. BOOKSTAFF: Well, let me tell you if the landlord says, if I'm sitting in the deposition and I'm representing the landlord's side and I say "Look, we object to that question because it has nothing to do with this, let's call the judge. Let's get the judge on the phone and let's go have a hearing before the Court to hear discovery disputes," well, the judge isn't available today. "Next week we can schedule it. Come on in." The judge now has to deal with this discovery dispute. This happens in real life.

MS. SWEENEY: I'm sorry. I'm just I'm still stymied about how an indigent individual being thrown out for nonpayment of rent --

MR. BOOKSTAFF: Can abuse the process?

MS. SWEENEY: No. Can hire a lawyer in the first place.

MR. BOOKSTAFF: I think these guys handle mostly indigent. Not that these guys would ever do that; but these guys handle mostly indigent.

MS. SWEENEY: And the guys who handle the indigent cases aren't filing the frivolous discovery. So who is or who would? I can't follow the bouncing ball.

MR. BOOKSTAFF: Frank would never file a frivolous --

MR. FUCHS: I hope the judge would sanction me if I tried to get the president of the management company in who hasn't been involved in the process at all. Thank you.

MR. LOW: How often do people request depositions in these cases? I mean, the discovery rules apply now; and you say you don't want to change that. How often? Do these tenants often go out and ask for depositions? How many times has that happened?

MS. SWEENEY: Judge, what do you see?

HONORABLE TOM LAWRENCE: Well, this is the fundamental problem is that depending on where you go some JPs take the position there

is no discovery because 523 really doesn't apply to discovery because the time limits are not, do not fit. So there is no discovery. This is your trial date.

Other JPs throughout the state take a contrary position that they allow discovery at whatever they think is reasonable not in accordance with any particular rules; and the point that I think the subcommittee is trying to make is that we have different interpretations of this law throughout the state and it needs to be addressed and fixed in some way.

MS. SWEENEY: And you-all's recommendation is to stay silent on it?

HONORABLE TOM LAWRENCE: No. What we had, the committee proposal, subcommittee proposal now is that discovery generally is not appropriate in forcibles. However at the judge's discretion it can be allowed. That is similar to the language that we have in the Small Claims Court Act now.

CHAIRMAN BABCOCK: Judge, what is your reaction that four of these guys say "Leave it alone"?

HONORABLE TOM LAWRENCE: That is absolutely the last thing I want to do is leave it alone because I think we're going to continue to have an inconsistent result throughout the state; and I hope we don't want to do that. I hope however we do it that we satisfy this issue and make a decision that this is going to be the process in forcibles, whatever that is and not leave it alone, because you've got some judges that say "No discovery," some judges that say "I'll let you have this, but not that," others that say "Okay. Fully discovery." And nobody knows what the parameters are. You can't apply a level one discovery control plan to a forcible. So that's the problem we have.

So any judge that says that "I'm going to let discovery" that's an arbitrary standard that that particular judge is applying in that court that is not going to be consistent statewide; and I think that that's bad.

CHAIRMAN BABCOCK: But Judge, how is it going to be different if you give the judge discretion under your proposal from what you say is happening?

MS. SWEENEY: Right.

CHAIRMAN BABCOCK: Because it sounds to me like what is happening is they're exercising whatever discretion they think they have.

MS. SWEENEY: Yes.

CHAIRMAN BABCOCK: I mean, it will be inconsistent in the sense that judges always exercise their discretion differently. You may do it one way and Gilstrap here may do it 180 degrees different. Maybe not.

HONORABLE JAN P. PATTERSON: But what he is saying is that the mention or acknowledgment that discovery is available but discretionary gives that judge that bit of information that it is available for that particular case, but may not be necessary for the vast majority. I think that is some information that is useful to practitioners and to judges as well.

I do have a question if I can ask.

CHAIRMAN BABCOCK: Sure. Absolutely.

HONORABLE JAN P. PATTERSON: For all of you, on the notice to vacate is it one day or three or?

MR. FUCHS: The statute requires a three-day notice --

HONORABLE JAN P. PATTERSON: Okay. Three-day notice.

MR. FUCHS: -- unless the lease provides for a different time.

HONORABLE JAN P. PATTERSON: On the three-day notice how many, what percentage of evictions are done on three-day notice and what, for example, on nonpayment of rent? Is there a standard notice of eviction for 10 days or something to be able to work it out, or is that also done on three days?

MR. FUCHS: In nonpayment of rent cases, Your Honor, all Texas Apartment Association owners who use the TAA lease and those landlords who use the Association of Realtors lease provide in the lease for a one-day notice to vacate for breach of the lease, so they give a one-day.

HONORABLE JAN P. PATTERSON: What I'm asking is what is the practice? Leases are one thing.

MR. BOOKSTAFF: The practice is three days for nonpayment of rent.

MR. FUCHS: Not in Travis County.

MR. BOOKSTAFF: Really?

MR. FUCHS: No.

MR. DOGGETT: I can give you an idea on what I saw. It's typically, you know, a landlord wants their money if that's what it's really about. So if it's only about money, even though you'll hear statistics of 80 percent are nonpayment of rent, really what is going on is the landlord refuses the rent for other reasons and then files for nonpayment.

But let's just say for instance it really is a nonpayment of rent case. They'll do a reminder letter. Come on in. They'll call them up. Right? And eventually they'll send them a one-day, and then they may file the next day. They may wait a few more days after that as a practical matter.

HONORABLE JAN P. PATTERSON: As a practical matter there is a period of time for --

MR. DOGGETT: Sure.

HONORABLE JAN P. PATTERSON: -- pure nonpayment of rents?

MR. DOGGETT: Nobody files the case --

HONORABLE JAN P. PATTERSON: There's not a past --

MR. DOGGETT: -- and wastes their money on the second day of the month.

HONORABLE JAN P. PATTERSON: Right.

MR. DOGGETT: I mean, that's absolutely true. That's absolutely true.

CHAIRMAN BABCOCK: Frank Gilstrap.

MR. GILSTRAP: I think Mr. Niemann had a comment.

CHAIRMAN BABCOCK: I'm sorry. Mr. Niemann.

MR. NIEMANN: You were wanting the practical viewpoint. I think as a practical matter very few landlords file notice or issue notice to vacate the very next day after the rent is late. They will invariably in 99 percent of the cases remind, cajole, try to get the rent in; and usually two or three days or maybe a week after the late payment date, and they're usually given a grace period, they give up and say "I've got to file for eviction."

The statute says three days unless contracted otherwise. Our lease says one day

simply because the vast majority of our people try to work with the tenant for five to 10 days, finally give up; and then if we give three days, that's two days of rent that is lost. We find as a practical matter that many judges in the state say "Fine. I'll recognize the one-day notice." Other judges in the state say "I don't agree with that statute, so I'm going to make you give three days notice." So it's all over the map.

As a practical matter you don't -- the tenant is usually given a pretty good chunk of time to pay the rent because those tenants don't want to get rid of a warm blooded human being that's got cold cash. They want to keep them. They don't want to replace them. It's hard to get a tenant.

CHAIRMAN BABCOCK: Frank Gilstrap and then Stephen.

MR. GILSTRAP: A question first to Bookstaff and to Mr. Niemann regarding the bond for possession. We had quite a bit of trouble in dealing with that here in the committee, and there was even a pretty strong suggestion it wasn't needed; but I think the

consensus was that it was needed in cases where there was a chance of danger to life or property. Your opponents are saying that people are using that in nonpayment of rent cases. Is there any -- I mean, does it make sense to limit the bond for possession cases to an endangered property or persons situation only?

MR. NIEMANN: I have no problem with that.

MR. BOOKSTAFF: I'll agree with that.

MR. GILSTRAP: That's all I have.

CHAIRMAN BABCOCK: Well, that sounds like a done deal to me. Buddy. No. Wait. Stephen.

MR. YELENOSKY: Thank you. I appreciate that concession, because I think that would help.

MR. NIEMANN: I've felt that way a long time.

MR. YELENOSKY: I thought your comment was interesting though on the amount of time that landlords give. And it's interesting to me because I understand we have summary process here and we have to work within the

understanding that this is going to be some type of summary process. But it seems like all the decisions we're being asked to make are being urged with the argument that if we do otherwise, the arguments that are being made by the Apartment Association, if we do otherwise, this will no longer be a summary or an easy process. And so to the extent we have some latitude in the amount of time to respond or whether there is allowed discovery and the argument is around how quickly it can be done in those circumstances I really have to wonder about the urgency that we're being told exists, because what I thought I heard you say Mr. Niemann was that the landlord will try for a while and then finally give up and file for eviction at least in a nonpayment of rent case.

MR. NIEMANN: Correct.

MR. YELENOSKY: And if we were to do something that lengthened the period of time it takes once you file for eviction, it seems to me that what landlords might start doing is filing their eviction a little earlier. And I don't know now how the advocates for the

tenants would feel about that; but if that is necessary to assure due process in evictions, I don't know that that's a cost that is too high to pay. Particularly in a nonpayment case where what we're talking about is financial loss on the part of the landlord why do I keep hearing again and again that there is such urgency once it's filed to get it over with? In other instances of health and safety and then there is talk about the six-day possession bond; but I really have trouble with urgency to get somebody out when the issue is financial when in almost every other context if we want to get, somebody owes us money and they're continuing to cost us money, we go through the rigmarole of the general due processing or we meet a very high burden to get an injunction or a TRO.

CHAIRMAN BABCOCK: And the question is?

MR. YELENOSKY: And the question is --

MR. NIEMANN: I know the question.

MR. YELENOSKY: They may not, you may not hear the question; but he heard it.

MR. NIEMANN: I did. Yes, we do work with the tenants. And, yes, once we make the

decision that we've been duped enough -- I better be careful here -- we want to move fast. And every day this committee would delay our ultimate judgment by elongating the process is lost rent; and we already lost rent by trying to be good guys and work with the tenants.

Now let me ask, let me address your other question. I'll give you the same answer that I have given judges on many occasions who refused to follow the statute and refused to adhere to the clear statutory mandate that shorter notices to vacate are lawful. I say "Judge, do you know what you're forcing me to do? You're forcing me to give early notices to vacate." So whenever I have a judge that says "To hell with the statute; three days notice is required" my recommendations to the owners are give notice to vacate immediately, okay, and get that ball rolling to be prepared to file the lawsuit. But the problem with that is once you give the notice to vacate many tenants don't know any different, and they say "The jig is up. I have got to move." And so the opportunity for working things out

is shortened and in some cases eliminated by your desire to have us move quicker with filing the lawsuit in the notice to vacate. And that's realty.

MR. DOGGETT: And of course if they move out and it really is a rip-off, if you will, then that actually works in Larry's favor, so that's what doesn't make sense. In other words, many landlords do give those notices to vacate early because they want to preserve their right to file their eviction when they want to; and many residents know that means I better pay up now or they can file.

So frankly I mean that sounds like a good response; but as a practical matter if the resident just picks up and moves in response to the notice to vacate, chances are they don't have the money and they're not planning to get any because they didn't offer it to the landlord, so they're going to move out. And they never even had to file; and Larry is thrilled and so is his client because they never had to file and they get the apartment that much faster.

The other side is they give them early

and the resident has got the money and he's going to start offering it quicker. So I don't see that working. And as far as discovery goes I have four words: "Criminal defendants have discovery." I mean eviction defendants --

HONORABLE JAN P. PATTERSON: Not much.

(Laughter.)

MR. DOGGETT: They've got some. I don't see -- I mean, some of the proposals I've seen. And if you put a rule in there that says discovery is not allowed in most cases, well, what I mean, does that mean?

CHAIRMAN BABCOCK: Okay. Buddy Low.

MR. LOW: Let me ask Judge Lawrence a question; and that is on discovery, because this appears to be an issue that's pretty basic and something we have got to come to grips with whether we do one thing or another. As I understand what you're saying is we have certain things now that are judged by abuse of discretion. If the judge doesn't allow you to call a witness under 702, abuse of discretion. So you want to give the judges discretion, and now some judges don't know

they have discretion. And so it wouldn't really operate to change; but the judge would have discretion and he would know, each one of them would know they have discretion to give some discovery.

HONORABLE TOM LAWRENCE: I don't know what the percentages would be; but I would venture a guess that a majority of the JPs in the state probably do not allow any discovery in a forcible because they think that there is no time to do it because the answer date is the trial date and it needs to be speedy. So you have no discovery in many courts.

The subcommittee thought this was a pretty small baby step to try to solve some of the problems while trying to make it clear that discovery is generally not appropriate; however, at the discretion of the judge it could be allowed.

MR. LOW: Did you consider a disclosure type thing in certain cases?

HONORABLE TOM LAWRENCE: Well, we did. And that's after the January meeting the committee directed the subcommittee to go back and do that, which is our draft to 741; but I

don't think any of the groups liked what we did. And that's in Rule 741 which is discovery; but I think that that's one solution to the problem.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN P. PATTERSON: This has been very helpful for us to hear from all of you. And Judge Lawrence's chart is also very helpful and so very organized. Would it be appropriate now for us to go issue by issue so that we can do it in an orderly manner, or?

CHAIRMAN BABCOCK: It would be as soon as we take our afternoon break. We will be recessed for 10 or 15 minutes.

(Recess 2:55 to 3:15 p.m.)

CHAIRMAN BABCOCK: Okay. Let's get back on the record. All right. Paula, that's enough from you.

MS. SWEENEY: I'm working over here.

CHAIRMAN BABCOCK: You guys are probably sharing fees.

MR. EDWARDS: We don't do that.

CHAIRMAN BABCOCK: We're going to abolish that.

MR. EDWARDS: We might refer; but we'll

never share.

(Laughter.)

CHAIRMAN BABCOCK: Okay. What has been happening, and the reason why we're a little late getting started after our noon break is there has been a lot of good discussion going on among the various interests here, which is great news, and we appreciate you doing that. Justice Hecht and I have conferred with Judge Lawrence and Professor Carlson. Are you Doctor too? Are you a Doctor?

PROFESSOR CARLSON: What do you want me to be, Chip?

(Laughter.)

CHAIRMAN BABCOCK: I have got a -- I have an idea for a title with the medical profession, but which should go unspoken.

So Doctor, and if it's appropriate and if you-all think not, then just tell us so. But we would on behalf of the committee and the court like to request you-all to continue this dialogue both with yourselves and Judge Lawrence and Professor Carlson and any of the other JPs that are interested and want to insert themselves into the process. We think

that it would be well worth your time because you guys are the guys on the ground, and what you've told us today is extremely helpful. Hardly any of us other than Stephen maybe practice very much, if at all, in this area, so you know, you have got to tell us the right direction. We'll try to make sure that the words fit and everything. So if we could make that request, that would be terrific. And so we'll do that.

In the meantime, Judge Lawrence, are there other things the full committee could productively do today that would be helpful to your effort?

HONORABLE TOM LAWRENCE: Well, there were six main issues that I mentioned. Issues two which is the possession bond and three which is discovery I'd like to hold on those and not go into those today and let the groups work with the subcommittee. I think we might be able to work out possession bond and possibly discovery and come up with something that would be workable, so let us report back at the June meeting on that.

CHAIRMAN BABCOCK: All right. That would

be good.

HONORABLE TOM LAWRENCE: The issue about the motion for new trial, is that something that this group wants to take up also and talk about a little bit?

MR. FUCHS: I certainly would like to.

MR. DOGGETT: I certainly would like to.

MR. BOOKSTAFF: We're willing.

HONORABLE TOM LAWRENCE: All right. Well, let's take that off the agenda today gentlemen and let the committee look at that. One is the trial date versus the answer date being a trial date versus appearance date. We have voted on that already. I don't know that there is anything we need to do on that today unless there is some reason to bring that back up. I'm just listing that as an issue that there was some conversation about.

CHAIRMAN BABCOCK: Yes. What I'd suggest to do on that is digest all their comments. If that bubbles up again at your informal meetings, then give us plenty of notice and we'll talk about that again in June.

HONORABLE TOM LAWRENCE: Okay.

CHAIRMAN BABCOCK: As you know, once

we've voted I don't particularly like to revote.

HONORABLE TOM LAWRENCE: I understand. I agree. And the five and six I would like to get. We have taken some votes on this; and I would like to get the sense of the committee finally how we proceed on that. I know that not everybody is happy on the groups as to the scheme for an appeal. We have talked about this in a lot of detail in the subcommittee, and we spent a lot of time on the record in the transcript talking about it in the full committee. I'd like to go ahead and put those to rest as much as possible.

Five would be the appeal scheme, which is specifically 749 and 749(a) which is affidavit of indigence. We've talked about that quite a bit. 749(b) which is the perfection of appeal, 749(c) and then 750, which is the supersedeas. And then also hand-in-hand with that is the validity of the JP judgment which is in Rule 748 which we've also discussed and reworded I think to the committee's satisfaction. And then the question of what the JP can do after the appeal has been

perfected.

I think a lot of the interested groups would like the JP to retain some jurisdiction to pass on the sufficiency of appeals bonds and supersedeas and then maybe to pay rent, issue a writ of possession if rent is not paid into the registry of the court. But Elaine once again went into the legalities of that; and we've not, the subcommittee has been able to come up with no solution to allow that to happen and still follow the rule. So I guess I'd like to try to put those issues to bed then.

CHAIRMAN BABCOCK: Okay. Does anybody object to proceeding that way? Judge Patterson, okay with you?

HONORABLE JAN P. PATTERSON: Good. Thanks.

CHAIRMAN BABCOCK: Okay. Start them off.

HONORABLE TOM LAWRENCE: Well, we have only, as Elaine indicated, we have proposed a dual track appeal. 749 talks about the appeal of the case itself; and in 749 we -- you would be able on appeal simply by posting an appeal bond or other security for the cost. And if

you're -- that's for the defendant. For the plaintiff you just simply post a notice of appeal, and that's got to be filed within five days. And also you would have to pay the filing fee in county court. And Andy Harwell who is on the subcommittee, this would be helpful, because what this does instead of the filing fee in county court being paid 20 days, within 20 days later at county court with the county clerk it will be paid to perfect the appeal and will get the appeal docketed 20 days sooner, up to 20 days sooner paid in the justice court. And we have already voted on that 12 to 8 to adopt that; but I'm just kind of going over some of the high points.

PROFESSOR CARLSON: And if I could just interject there, that that seems to be a significant time savings in expediting the de novo appeal. When you perfect by filing the filing fee for the county court and the justice court you lose the delay, the-20 delay that currently apparently is going on at the county court level, so that will eliminate a pretty big gap of time which is probably I think very positive,

HONORABLE TOM LAWRENCE: Up to 20 days.

PROFESSOR CARLSON: Yes. Up to 20 days.

HONORABLE TOM LAWRENCE: And really more if you consider the county clerk has to send a notice out. I don't know how many days. Maybe another week after that possibly; but you're saving quite a bit of time in getting the case transferred and getting the case off the JP court docket and on the county court docket. You're saving 20 days there.

HONORABLE JAN P. PATTERSON: Would you remind us what percentage of cases go to county court?

HONORABLE TOM LAWRENCE: About one percent approximately. 118,000, over 118,000 forcibles were filed in the JP courts last fiscal year and around one percent of those were appealed.

There is a provision for deposit in lieu of appeal bonds. This is all in 749. Motions to challenge the sufficiency of the appeal bond, one of the problems is if somebody posted an appeal bond and the sureties are not, turned out to not be any good, well, the difficulty is that you can post that appeal

bond on the fifth day, and we really have little opportunity if somebody comes in at 4:45 p.m. on day five. There's not much opportunity to check the sufficiency of sureties; and the existing case law for JP court appeals from the Supreme Court indicates that what you do is if it looks like it's substantially correct, you're supposed to pass it up. So we're just really saying that sufficiencies being checked by the county court is really existing law.

HONORABLE NATHAN L. HECHT: What does the bond cover?

HONORABLE TOM LAWRENCE: The bond is going to cover the courts costs only.

HONORABLE NATHAN L. HECHT: In the county court?

HONORABLE TOM LAWRENCE: In the JP court. And then you'll pay the filing fee in county court separately. So you're looking at --

HONORABLE NATHAN L. HECHT: Why haven't they already paid the costs of the JP court?

HONORABLE TOM LAWRENCE: The filing fee in county court? Because --

HONORABLE NATHAN L. HECHT: No. In JP court.

HONORABLE TOM LAWRENCE: Well, we're saying that if the defendant loses, the defendant is going to have to post a bond equal to the court costs already paid by the plaintiff in county court to protect those court costs to secure the court costs. And that will get the case itself appealed is by posting that appeal bond, or they can do an affidavit of indigence under Rule 749(a). And the affidavit of indigence, the procedure for that is if you filed in the JP court, if it's overruled or denied, then you go to the county court. If it's overruled or denied by the county court, then you come back to the JP court to post the appeal bond. And the time limits are the same as in the existing rules for the most part.

HONORABLE NATHAN L. HECHT: How much are the costs typically in the JP court?

HONORABLE TOM LAWRENCE: $67.

HONORABLE NATHAN L. HECHT: And do people really use bonds?

HONORABLE TOM LAWRENCE: Yes. Well, see,

the rule now is that the appeal bond is -- the rule now is that the appeal bond is typically set at the court cost plus two to three months rent. So that may be $1000, $2000 whatever. So, yes, an appeal bond is used quite a bit now. I would guess that under this new rule probably not. Probably mostly cash bonds.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: We used to require appeal bonds in appeals from district court, which we don't anymore, I don't think.

HONORABLE NATHAN L. HECHT: Right.

MR. HAMILTON: So why do we want to have an appeal bond at the JP court?

HONORABLE NATHAN L. HECHT: That's what I am wondering.

HONORABLE TOM LAWRENCE: Well, it's in the rules now. I mean, you post an appeal bond to appeal any judgment from a JP court whether it be a forcible or anything else. I mean, you're securing the payment of the court costs. You're getting the county court to get to invoke their jurisdiction by filing the appeal bond.

MR. GILSTRAP: The bond is much lower under the new scheme. Right?

HONORABLE TOM LAWRENCE: Just the bond is lower. It's only the court cost now. You've got the supersedeas approach that we're going to get to in a second which secures the outstanding judgment of the JP court. That's going to be a separate bond.

PROFESSOR CARLSON: This is really to make an unsuccessful party pay the costs.

HONORABLE TOM LAWRENCE: Uh-huh (yes).

MR. GILSTRAP: I think candidly our idea was to change it as little as possible; but we had to change it with regard to the rent because of Dillingham. In other words, the idea was not to rock the boat; but Dillingham compels the change with regard to the rent; but everything else will stay the same. It's just that it's a smaller bond and it's a procedure they're used to.

HONORABLE TOM LAWRENCE: And Dillingham tells us that one, we can't make them secure the judgment for the privilege of appealing. That's got to be the supersedeas bond. And two, you can't make them pay rent to perfect

the appeal, so we're kind of stuck. We have got other provisions for rent. The only thing the appeal bond really can be is just for the cost.

PROFESSOR CARLSON: You could just make it cash.

HONORABLE NATHAN L. HECHT: But the reason -- it seems to me one of the reasons that we switched from a cost bond generally under the Rules of Appellate Procedure was that the costs in the appellate court were insignificant enough and people were going to deal with them however -- there were other ways to deal with them rather than putting up a $500 cash appeal bond which just bore no relationship to what the costs were going to be.

But here maybe it makes more sense to have some deposit because otherwise the plaintiff is never going to, if the plaintiff wins, they're not going to the get the costs.

MR. GILSTRAP: Yes. In the appeal if you'll recall, I mean, basically in fact you pay the costs, the appellant pays the costs as he goes. He pays the filing fee. He pays for

the record; and so really there was no purpose for the appeal bond.

HONORABLE NATHAN L. HECHT: Right.

MR. GILSTRAP: Whereas here I think there still is some.

HONORABLE NATHAN L. HECHT: There is still a purpose.

MR. GILSTRAP: It has the advantage of kind of keeping a recognizable procedure.

HONORABLE NATHAN L. HECHT: Okay.

HONORABLE TOM LAWRENCE: The only thing on 749 at subpart (a), that's the section that deals with the motion for new trial and to set aside defaults; and we would -- I'd like to take that off for consideration now. We're going to talk about that later with the committee.

749(b) is the perfection of the appeal. I'm sorry.

PROFESSOR CARLSON: Is it appropriate to move the passage of 749?

HONORABLE TOM LAWRENCE: I'm sorry. Yes. So I guess the subcommittee would move the passage of 749 except for paragraph (a) which we'd like to keep for further

consideration.

CHAIRMAN BABOCK: Bill.

MR. EDWARDS: On (g) you say you deposit cash in lieu of bond with the trial court. What is the trial court?

HONORABLE TOM LAWRENCE: The JP court.

MR. EWDARDS: Why don't you just say so, because the county court is also a trial court.

HONORABLE TOM LAWRENCE: All right. We'll change that to "justice."

CHAIRMAN BABCOCK: Where did you find that, Bill?

HONORABLE TOM LAWRENCE: (g).

MR. EDWARDS: (g).

CHAIRMAN BABCOCK: 749(g).

HONORABLE TOM LAWRENCE: 749(g).

MR. EDWARDS: It says "Deposit in lieu of bond. Instead of filing surety appeal bond, the party may deposit with the" -- it says "trial court." That is "justice court" like up there in like in (e).

MR. HAMILTON: How about (d)? It also says "trial court."

HONORABLE TOM LAWRENCE: (d)?

MR. HAMILTON: (d), "identify the trial court."

HONORABLE TOM LAWRENCE: Yes. Okay. And also (f)(4) we can say "justice court" there. The second line of (4), (f)(4) we can say "justice court" there.

MR. EDWARD: Yes. When you're talking about two courts you better say which one.

HONORABLE TOM LAWRENCE: Okay. That's a good point.

MR. GILSTRAP: And Tom, that is consistent with. I mean, you haven't adopted any uniform nomenclature throughout here; but it seems like I remember something about "trial court." I just want to make sure we are not undoing something we did?

HONORABLE TOM LAWRÉNCE: No. I don't think we are confusing anything by doing that. I think it helps it.

CHAIRMAN BABCOCK: Anything else on that?

HONORABLE TOM LAWRENCE: (Nods negatively.)

CHAIRMAN BABCOCK: Anybody second the motion to approve 749 exclusive of (a)?

MR. HAMILTON: Second.

CHAIRMAN BABCOCK: Carl seconded it. Any further discussion? All in favor of approving 749 other than subparagraph (a) which will be discussed later raise your hand. Anybody opposed. It carries a vote 11 to nothing, the chair not voting. Go to the next one.

HONORABLE TOM LAWRENCE: 749(b) is the perfection of the appeal; and this is -- I'm sorry. 749(a) is affidavit of indigence. We have already taken several votes on this. And to review the votes, the votes are that if you're indigent and you have an approved affidavit of indigence, then you will not have to post the appeal bond. You'll get a free appeal, and you will not have to post a supersedeas bond to stay in possession during the pendency of the appeal. So the affidavit of indigence will have an effect on those other two rules. And as much as possible we have tried to follow the TRAP rules for affidavit of indigence. And I think that --

HONORABLE NATHAN L. HECHT: Is that currently the procedure?

HONORABLE TOM LAWRENCE: No. The

procedure currently is that you file what is called a pauper's affidavit. There is in the rules now very little in the way of information about what a pauper's affidavit has to be.

HONORABLE NATHAN L. HECHT: But if you do that, you don't have to pay costs in the county?

HONORABLE TOM LAWRENCE: If you do that, you don't have to post an appeal bond and so you therefore get a free appeal up.

HONORABLE NATHAN L. HECHT: And you don't have to pay the cost in the county court?

HONORABLE TOM LAWRENCE: That's correct.

HONORABLE NATHAN L. HECHT: And you stay in possession without supersedeas?

PROFESSOR CARLSON: You just pay rent when due.

HONORABLE NATHAN L. HECHT: Okay.

HONORABLE TOM LAWRENCE: 749(a) is the current rule on pauper's affidavit; but there is very little in the way of an objective standard. Now the procedure in the pauper's affidavit as far as where it's filed and the procedure for what happens if it's granted or

overruled we have kept that procedure almost religiously. All of the procedure in the existing rule is in the new rule. It's just set out a little bit differently.

The big difference is that the contents of the affidavit there really is not much in the existing rule that talks about what the pauper's affidavit has to contain. We've tried to track the TRAP rule as much as possible for the contents of the affidavit. As far as the contest of it the burden of proof and the hearing and the appeal of it that's all pretty much in accordance with the existing rule. We've tried not to change the way in which it's actually handled. The big difference is in the contents of the affidavit.

HONORABLE NATHAN L. HECHT: Do you have a sense of how often this is used?

HONORABLE TOM LAWRENCE: Well, I can't give you percentages; but I mean, I get a fair number of these. I might get maybe one a -- well, I say "a fair number." One or two a month. Not a lot, but with some regularity.

HONORABLE NATHAN L. HECHT: But of the one percent of the cases that are appealed how many times does the tenant use an affidavit of indigency?

HONORABLE TOM LAWRENCE: Well, in my court maybe five percent of the time or less. Now, you know, the tenants that Fred Fuchs and Robert Doggett are going to handle I would guess that almost all of those will use the pauper's affidavit; but in the overall scheme of the appeals I would not think it would -- I don't know what the percentage would be.

HONORABLE NATHAN L. HECHT: The tenant has to keep paying the rent that comes due to stay in possession.

HONORABLE TOM LAWRENCE: That's correct.

HONORABLE NATHAN L. HECHT: So you're walking a fairly fine line. He can't, he's too poor to pay $67; but he can continue to pay the rent. Usually affidavit of indigence says, you know, "I'm hopelessly broke and there is no way I can pay another dime."

HONORABLE TOM LAWRENCE: But the pauper's affidavit does two things. One, it allows

them not to have to secure the plaintiff's court costs, which is going to be $67. The other thing the pauper's affidavit does is it doesn't require them to post a supersedeas bond, which may be up to $5,000 because that's going to be to secure the judgment of the JP court. The payment of rent to the registry of the court we're not asking that tenant to do anything more than he's already legally obligated to do, which is to pay the monthly rent. So if that tenant is supposed to pay $500 a month, we're not changing that. He still has to pay $500 a month. And if he's on assisted housing and only pays $50 of that, then we've made a provision for that in the rules. He only has to pay what he's obligated to pay.

HONORABLE NATHAN L. HECHT: What is the filing fee in the county court?

MR. BOOKSTAFF: In the county court it is $155.

MR. GILSTRAP: But the important difference here is that he doesn't have to pay the rent to continue the appeal. He can give up possession and still have his legal right

to the appeal; and that cures the Dillingham problem which is kind of the core of the whole problem here.

HONORABLE NATHAN L. HECHT: Okay.

HONORABLE TOM LAWRENCE: And I have had people that have actually just wanted to appeal the judgment for rent and they don't care about possession. They want to get out; but they do want to appeal the question of rent.

CHAIRMAN BABCOCK: Okay. Any other comments about this? Do you want to move its adoption?

HONORABLE TOM LAWRENCE: I move the adoption of Rule 749(a).

PROFESSOR CARLSON: Second?

MR. TIPPS: Second.

CHAIRMAN BABCOCK: Any further discussion? All in favor of 749(a) now called the Affidavit of Indigence raise your hand. Anybody opposed? 13 to zero, the chair not voting. Okay. Let's go to the next one.

HONORABLE TOM LAWRENCE: 749(b) is the perfection of the appeal; and this is the -- this is a rule that tells you what you

have to do to perfect the appeal and therefore give the county court jurisdiction. We have revised this and added some notes and comments to this rule to clear up a couple of questions that Elaine talked about which is the finality of judgment and the effect to be given the judgment.

When the -- we're saying that in order to perfect an appeal you must first of all comply with 749 by posting the appeal bond deposit of security and pay the filing fee required by the county court to get the case to county court, or you have to get an affidavit of indigency approved, one of the two. You have to do one of the two of those to perfect the appeal. When an appeal is perfected the JP makes out a transcript and sends it up which is consistent with the current rule, sends everything up to the county clerk. The county clerk dockets the case. It tells the county clerk to notify both parties. All of this is the second paragraph. All of this is in the existing rules.

And then the third paragraph is we have spent quite a bit of time on this at two of

the previous meetings. And let me read this because this is important. "The perfection of an appeal in a forcible entry and detainer case does not suspend enforcement of the judgment" meaning that you can appeal the case but still be evicted if you don't suspend the enforcement of the judgment. "Enforcement of the judgment may proceed in the county court unless the enforcement of the judgment is suspended in accordance with Rule 750." And 750 is the supersedeas bond provision. "If the appeal is based on a judgment for possession and court costs only, then the tenant's failure to post a supersedeas bond when required will allow the appellee to seek a writ of possession, and the issue of possession may not be further litigated in the forcible entry and detainer action in the county court." And this was a discussion we had at some length as to the effect of what good does it do to appeal the question of possession if you have been evicted because there is no way to put you back in the apartment. It may have already been released. The landlord, there is no mechanism

to compel the JP or the county court judge or anybody else to put a tenant back in possession once they've been evicted. So this was the solution. This was the committee recommendation; and I think we spent quite a bit of time talking about this and changing the wording a little bit to satisfy everybody at I think the September meeting.

"No factual determination in a forcible entry and detainer action, including determination of the right of possession, will be given preclusive effect in other actions that may be brought between the parties." This is consistent with provision in the property code. What we're really saying is that this is just a forcible for possession. It doesn't have anything to do with any other lawsuit. It's not res judicata, collateral estoppel. It doesn't have an effect upon any other suit involving any other matter between the parties, only on this issue of possession and what's being litigated here.

Now the note and comment is -- we spent a lot of time on that, and I'll read that. "An Appeal by a tenant for rent, contractual late

charges, attorney's fees and court costs may be appealed without appealing the issue of possession." So you can appeal the rent question and not appeal possession if you want to do that.

MR. EDWARDS: There's something about the construction of the sentence that leaves me hanging up in the air. There's not an appeal for rent. There's an appeal involving rent. The tenant is not trying to get rent.

HONORABLE TOM LAWRENCE: You're right. So "involving rent"?

MR. EDWARDS: I don't know what you want to say; but I don't think "for" is the right word. I think "involving" does what you're trying to do. You're saying if the appeal --

HONORABLE TOM LAWRENCE: How about --

MR. EDWARDS: If there is a judgment against the tenant for rent or any of these other things and that's what the appeal is about, that's what you're talking about.

HONORABLE TOM LAWRENCE: How about "by a tenant for a judgment"?

HONORABLE JAN P. PATTERSON: "Relating to"?

HONORABLE TOM LAWRENCE: Pardon me?

HONORABLE JAN P. PATTERSON: "Relating to"?

MR. YELENOSKY: Well, "appeal by a tenant contesting a judgment for rent."

MR. EDWARDS: Yes. That's good.

CHAIRMAN BABCOCK: I like that, "contesting a judgment for."

MR. YELENOSKY: The next sentence is the one I've got questions about.

HONORABLE TOM LAWRENCE: All right. "An appeal by a tenant contesting a judgment for rent, contractual late charges, attorney's fees and court costs may be appealed without appealing the issue of possession." Does that sound all right?

MR. TIPPS: You want to say "or" rather than "and" I think, "or court costs."

MR. YELENOSKY: Yes.

MR. EDWARDS: Yes.

HONORABLE TOM LAWRENCE: Oh, "and for court costs"?

MR. TIPPS: No. "Attorneys fees or court costs," because you want that to apply to any, an appeal of any one of those things.

HONORABLE TOM LAWRENCE: Okay. "An appeal by a tenant contesting a judgment for rent, contractual late charges, attorney's fees or court costs may be appealed without appealing the issue of possession."

CHAIRMAN BABCOCK: Yes.

HONORABLE TOM LAWRENCE: "However, if the" --

CHAIRMAN BABOCK: Carl, have you got something on that?

MR. HAMILTON: No.

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM LAWRENCE: "However, if the appeal is based on a judgment for possession and court costs only, then the tenant's failure to post a supersedeas bond will allow the appellee to seek a writ of possession."

CHAIRMAN BABCOCK: Stephen, have you got something on that?

MR. YELENOSKY: Well, my question there, and I think I raised this question before, so you all may have already thought about it and figure out this is what you want to say. But the word "only" there is causing problems for me in understanding the sentence. Because

aren't you saying that whenever possession is one or more of the issues on appeal the failure to post the supersedeas will allow the appellee to seek a writ of possession?

HONORABLE TOM LAWRENCE: I think what we're trying to say is that if you're suing for possession and costs and not suing for anything else, meaning back rent, is what we're trying to convey.

MR. YELENOSKY: Right. And is that really what you mean though? Because suppose you're suing for everything on appeal, possession. You're contesting a judgment for possession, late charges, rent, the whole shebang, and then you fail to post your supersedeas. Are you saying that in that instance -- in that they could seek a writ of possession. Right? I mean, you would want I would think that you could.

HONORABLE TOM LAWRENCE: I think I see what you're saying.

MR. GILSTRAP: I think if you delete the words "and court costs only," you get where you want to get.

MR. YELENOSKY: Yes. Because the second

part of the clause is not limited to those situations in which you're appealing only for possession. It's limited to those situations in which possession is among the things that you're appealing. But the way the sentence reads now, you know, I mean --

HONORABLE TOM LAWRENCE: Yes. I agree.

MR. YELENOSKY: -- maybe it's favorable. If a tenant includes something more than possession, arguably that sentence precludes the issue of a writ of possession when they fail to post the supersedeas. So I'm arguing against interest here; but --

HONORABLE TOM LAWRENCE: That makes it clear. You're right.

MR. TIPPS: Justice, moral.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I understand that if a landlord sues for possession only and then the tenant appeals, but does not post a supersedeas bond, there is nothing for the county court to do except dismiss it.

MR. EDWARDS: That's right.

MR. HAMILTON: I think we ought to say that. And then that raises the question of it

says up here in the rule if the appeal is based on a judgment for possession and court costs, then the failure to post the bond means you can't further litigate it. What if it's not "and court costs"? What if it's just for possession? Does that mean you do relitigate it?

PROFESSOR CARLSON: Is that right? I mean, let's say I'm just doing parallel to the court of appeals. If you don't supersede and you go forward, it doesn't moot the appeal.

MR. YELENOSKY: Right. We had that long discussion last time about you can't. I mean you've lost the possession; but you still can contest it. You could still say that you should have never been dispossessed.

MR. EDWARDS: But it doesn't mean anything. It's not usable in any other proceeding. It doesn't mean anything. You're out. And a finding by the justice court you were wrongfully evicted is of no moment.

MR. YELENOSKY: I think Bill Dorsaneo said in the commercial context his clients may want back in; and if they're dispossessed in a commercial situation, they may fail to post a

supersedeas, they're out of possession; but they want to continue to litigate in that proceeding on appeal whether or not they were properly dispossessed and can get back in. Does that make sense?

MR. HAMILTON: This says you can't do that.

MR. EDWARDS: It makes some sense that somebody who got kicked out may want to do it; but from the standpoint of the commercial landlord I can see where, you know, this thing might go on including an appeal through the appellate courts. It could go on for a couple of years. In the meantime they would like to get somebody in there and reduce the losses; and they can't get anybody in there if they're going in for less than five years because they've got to convert to property. I mean, you know, it's --

MR. FUCHS: The one thing that is disturbing from the tenant's point of view here is that there is a stigma attached to a judgment, and that follows tenants around everywhere where they're trying to get other housing. A lot of landlords won't lease to

you if you've been evicted. And there is one if you do give up possession, I just have a legal question here. If you do give up possession, whether because of the stigma of the judgment if you don't post the appeal bond, but if you still want to appeal, whether that case could still be alive because of the stigma of the judgment.

And the Supreme Court indicated back in the 1963 case, not a landlord/tenant case, but where there is an involuntary payment of a judgment that there could be an issue of whether you could continue with the appeal and not be dismissed because of the possible stigma attaching to a judgment. And I'm just concerned about that one sentence; and I'll just maybe ask the members of the committee who are all smarter than I am to look at 369 S.W. 2d 927, Employees Finance Company vs. Lathram, 369 S.W. 2d 927 where the Court indicates that without deciding that, well, this is an issue.

MR. EDWARDS: It looks to me as though if there is a problem that comes from a wrongful eviction and entry of a wrongful judgment in

JP court, that if somebody wants to do something about it, they have the right to file an independent suit for wrongful eviction.

HONORABLE TOM LAWRENCE: Exactly.

MR. EDWARDS: And get and I would assume if the wrongful eviction judgment was causing difficulties of a financial nature, that that would be an element of damage in the wrongful eviction case.

MR. FUCHS: That's true. As a practical matter though once that eviction is decided there aren't the resources out there where anyone except the wealthy are going to pursue a wrongful eviction case.

MR. EDWARDS: As a practical matter is this a serious problem for tenants who have been evicted?

MR. FUCHS: The judgment is. The effect of the judgment is a very real problem.

MR. EDWARDS: And how often?

MR. FUCHS: Oh, on almost every case if you've got a judgment for eviction against you and the landlord does a tenant tracking search, you can count on many landlords not

leasing to you.

MR. DOGGETT: And in terms of judicial economy, which is what this was for, you're basically say "Well, sorry. You're out. You can file your own lawsuit in another court." What happened to judicial economy and making this thing quick and easy? It's gone now out the window.

MR. EDWARDS: Larry may be able to answer this: Does the standard application, the TAA application for lease include a question as to whether or not you have ever been evicted?

MR. NIEMANN: Yes.

HONORABLE JAN P. PATTERSON: And it's tracked as well, I think.

MR. DOGGETT: There's numerous services.

MR. NIEMANN: Well, it is tracked. Some credit bureaus do aggressively go find out JP court judgments. And to my knowledge they do not report the ones that are appealed until they're finalized.

MR. FUCHS: I don't think that's the case. I think once that eviction is filed it's picked up by tenant tracking services.

MR. NIEMANN: The filing?

MR. FUCHS: The filing.

HONORABLE TOM LAWRENCE: I know that this may be a problem; but I think that might be outside the scope of what we're trying to do here today. I mean, the effect of the judgment on other entities or other legal problems is really not something that we're trying to consider. We're just trying to handle the rules to trial of the appeal of the eviction itself. And I think we're making it clear and the case law is pretty clear that if there is a separate cause of action based on something the landlord has done, then that still is going to exist and nothing we do is going to have any effect on that. But I don't think we want to hold up our process because of some unintended consequence on some other legal issue.

MR. GILSTRAP: Let me add one thing. I think you've got to remember there are commercial settings. I mean, you can have a 25-year lease, and so the right to possession may still be worth litigating.

MR. EDWARDS: I'm not disagreeing with that. But the point is what happens when you

don't put up a supersedeas bond? The question here is I thought do you get possession, the landlord get possession if the tenant doesn't put up a supersedeas?

MR. GILSTRAP: Well, the tenant has been evicted. And, yes, there is somebody there, and they've got a lease from the landlord; but now as it turns out you are the person who has the right to the property.

MR. EDWARDS: That's a policy issue that you have got to look at. And the question is who is more likely to be able to respond? The person that owns the building or the person who hasn't been paying his rent in a wrongful eviction case? I mean, I'm not saying who does; but it's a policy matter.

MR. GILSTRAP: People are evicted in commercial settings for reasons other than failure to pay rent.

MR. EDWARDS: Well, and of course if you've got a commercial setting and a substantial amount of money involved, they can post a supersedeas bond with promises only that the rent is going to be paid and they don't have the problem.

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: Isn't the debate and the problem we're having here due to language that is being proposed that does not currently exist in the rule and can we take it out, that language being "and the issue of possession may not be further litigated in the FED in the county court"? If we take that out, it certainly leaves open the question. It's not going to maybe be urged that often; but in the case where Fred Fuchs has got the case and he thinks it was a wrongful eviction and for whatever reason they're not posting supersedeas, maybe they've moved, but they still want to clear up the judgment, that would not prevent him from doing it yet it's not going to happen very often.

HONORABLE TOM LAWRENCE: But what is the point of the litigation in the county court? If the defendant is out, if the county court judge says judgments for the defendant for possession, what is going to happen as a result of that? And the answer is nothing, because the county court law judge doesn't have the ability to put the whoever the new

tenant may be in there or to make that tenant go back in there if the landlord has re-leased.

MR. YELENOSKY: There generally is not going to be anything valuable to anybody except what Fred said; and that's why it probably won't happen that often. But why would we want to preclude it from ever happening?

HONORABLE TOM LAWRENCE: Well, we in the next two sentences of this first paragraph we spend two sentences explaining that "No factual determination in a forcible entry and detainer, including determination of the right of possession, will be given any preclusive effect in other actions that may be brought between the parties. Thus, a tenant dispossessed under writ of possession is not precluded under res judicata or collateral estoppel principles from bringing a wrongful eviction action." So let them if they feel that it's a wrongful eviction, let them bring it. But why waste the county court's time litigating something to no effect?

MR. YELENOSKY: Well, because it

sometimes apparently does have an effect on tenants by creating a record that can be tracked by the landlords that they can't clear up unless they file another wrongful eviction.

I agree it doesn't sound like it happens very often; but if that's true, then why is it so important to put in language precluding it?

HONORABLE TOM LAWRENCE: Well, I guess because it has no effect and it's a waste of the county court's time to have to deal with it when they have got other matters on their docket. It's just not -- I don't see how it's the forum to litigate that that is going to help anybody. I mean, isn't it going to adversely affect the landlords? That's what I thought I was hearing in one of the comments, that once the supersedeas, if there is no supersedeas, there is a writ of possession, and the landlords want it to be over. But you're worried about --

MR. BOOKSTAFF: Yes. I'm real concerned about potential exposure from a landlord's perspective if you don't get the supersedeas

and the landlord -- the tenant keeps going into county court, prevails. The landlord cannot give back possession once they've rented the unit or the commercial space to another tenant as opposed to what we have now which is if you file an affidavit of indigency or a pauper's affidavit, you pay into the registry of the court the rent. And if you don't make the payment, then the landlord is entitled to have a hearing and get a default and get possession.

So when you compare the two I'm concerned that you have this issue of exposure and it might chill the landlord's willingness to get the possession.

HONORABLE TOM LAWRENCE: You're still going to have to defend yourself from a wrongful eviction regardless of what happens. Right?

MR. FUCHS: Not necessarily.

MR. BOOKSTAFF: I mean, down the road you still may have to do that.

MR. BOOKSTAFF: Not as clear. I mean, right now if you're following the rules and the tenant did not follow the rule paying into

the registry of the court, if you follow the rules, there is some degree of comfort that the judge has given the judge's blessing on you didn't follow the rules and therefore the landlord would get possession.

CHAIRMAN BABCOCK: Greg, did you want to say something about this?

MR. HITT: Yes. Thank you. My name is Gregory Hitt, and my background is representing public housing authorities. I'm not here on behalf of them. But I see a practical problem with that; and that's if a tenant decides they want to get rid of that judgment, mostly likely they'll appeal and most likely the landlord is not going to fight it. The landlord is not going to show up because it has no practical effect. A judgment against in favor of the tenant has no practical effect creating incentives for tenants to appeal these, all these to the county courts where the county court at law judges will be seeing cases that have, many cases I assume that would have no practical effect.

And what the tenant is gaining there is

really an incorrect adjudication. Because of the plaintiff's unwillingness or lack of interest in showing up they are getting a judgment overturned that was valid. So I see that there are some practical problems with that.

CHAIRMAN BABCOCK: Larry, did you want to say something?

MR. NIEMANN: I'm going to premise my argument that I had to step out; and I hope my comments are not two ships passing in the night. But I think it's imperative that once the tenant is out either through voluntarily --

COURT REPORTER: I can't hear you. I'm sorry. I can't hear you very well. I apologize.

MR. NIEMANN: Once the tenant is out either through voluntarily surrendering the premises or by writ of possession I think it is imperative that the issue of possession be finalized. Otherwise the landlord doesn't know whether to re-let the premises, and the premises could linger vacant for months during the appeal and all that rent is lost. It's a

very uneconomic approach to the entire situation for everybody. And when the landlord loses money, believe you me, all the good tenants end up paying for it in the long run.

CHAIRMAN BABCOCK: Okay. That's point. Counterpoint, Robert.

MR. DOGGETT: Well, but keep in mind that what we're talking about is changing the law. What is being proposed is changing the law. Right now as it exists, for instance, in a pauper's case if the pauper is not able to keep for whatever reason, believe or not, a pauper might not be able to post the rent, it might be because the government assistance was cut off because the landlord requested it be cut off.

I'm giving you an example, believe it or not, that happens, that landlords say "I don't want this money," and then the tenant posts their $20, and then the government doesn't do their share, and then the landlord argues there is no rent, there is a violation of the current lease 749(b) and gets possession.

Okay. In other words, right now the law

is the tenant can keep appealing the case even though they're out. That is the law as it stands today. And what we're talking about is cutting off this appellant's right to continue the case just because they didn't have the money to post up the supersedeas bond. You are cutting off someone's right to appeal based upon how much money they have.

HONORABLE TOM LAWRENCE: No, we're not. We are absolutely not doing that. We're cutting off their right to possession because they didn't supersede. We're not cutting off their right to appeal. That's a different issue.

MR. DOGGETT: Absolutely you're not. What you're saying is if they don't post a supersedeas and the only issue, let's say the landlord just sued for possession, nothing else, and the landlord obtains possession, the landlord obtains possession because the tenant was unable or unwilling to post the supersedeas bond whatever for whatever reason. What you're saying is once the tenant has lost possession then that is it. That's the end of story.

PROFESSOR CARLSON: In the forcible.

MR. DOGGETT: They can't continue the case.

HONORABLE TOM LAWRENCE: In the forcible for possession. That's all.

MR. DOGGETT: Exactly right. And so my point is this: That that is not currently the law as it is today, and this is not a problem. If we're trying to fix problems in the world, I'm feeling that the county court judges are not seeing vast numbers of these cases, because right now the law is that the tenant can continue to appeal the case even though they're out.

PROFESSOR CARLSON: Are you speaking of indigents? Excuse me.

MR. DOGGETT: I'm speaking of folks that, not indigents necessarily. They can be. To be honest an indigent tenant in a nonpayment of rent case has to continue to deposit. But the point is that you're cutting off someone's right that they otherwise would have to appeal a case that is not currently in the law and that we shouldn't do that.

The other issue is in cases in county and

district court you appeal. There is no supersedeas. The judgment creditor can go after whatever it is, and the law is in place now to handle that. In other words, it doesn't end there either of course because there is a fight over some sort of property.

And so what we're saying is that the fight should continue even though you've lost possession. There's no reason why we should have this procedure that says "Oh, you can just sue them later." Well, that's not judicial economy. The parties are already in front of the court, and this is supposedly a summary proceeding to begin with. What we're saying is leave the law alone. The county court judges aren't saying that we're seeing vast numbers of these. There are certain situations where it's helpful in both commercial and residential tendencies. Leave them alone. There is nothing to be garnered from that. Certainly the JP courts don't care.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Isn't the law currently that if you're a nonindigent and you

don't bond the judgment, you don't get to appeal?

MR. DOGGETT: That's true.

PROFESSOR CARLSON: So you're never going to get to possession in county court today.

MR. DOGGETT: That's right.

PROFESSOR CARLSON: Okay.

MR. DOGGETT: I'm talking about in indigent cases on 749(b) appeals where they don't put in something similar to a supersedeas bond.

PROFESSOR CARLSON: Well, nonindigents are not required to post supersedeas.

MR. YELENOSKY: But a nonindigent who posts an appeal bond and yet then failed to pay rent when due, right, --

MR. DOGGETT: That's right.

MR. YELENOSKY: -- and then at that point lose possession?

MR. DOGGETT: That's right.

MR. NIEMANN: Why not?

MR. YELENOSKY: Maybe the question --

MR. DOGGETT: Well, I continue to say this is not right.

CHAIRMAN BABCOCK: Don't talk over each

other, guys. The court reporter can't get it.

MR. YELENOSKY: Well, and I guess, I mean, they lose possession in that they are dispossessed. But should that be the final word on their legal right of possession or repossession, I guess?

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: The ill that we were trying to cure, even though it may not be perceived as a practical ill, was that we didn't want people to lose their right to appeal because they couldn't post the equivalent of a supersedeas bond.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: And so if we say that if they don't -- if they can't pay the rent, the appeal is over, I mean, we have done the same thing. I mean, it seems to me that the right to appeal has got to go on or we haven't accomplished anything. I think that's right.

PROFESSOR CARLSON: What would the judgment be? If the sole issue is right of possession and a writ of possession is issued, what would the judgment be?

MR. GILSTRAP: That the tenant has the right of possession.

HONORABLE TOM LAWRENCE: Well, isn't that kind of nonsensical if the tenant is already out of possession? What is the point of that?

MR. FUCKS: It would eliminate the stigma of the judgment.

HONORABLE TOM LAWRENCE: Well, that's not -- I don't know that that's the charge of this committee to look into that, the stigma of the judgment. Maybe it is. That's not been one of our drafting principles.

MR. FUCHS: But it goes though with whether the case is still moot, I mean, whether the case is moot or alive.

CHAIRMAN BABCOCK: So what you're saying is that even though the premises might have been re-let, nevertheless the appeal goes on just so that the tenant won't have it on his record basically that he's been dispossessed?

MR. FUCHS: I'm saying that that could keep the case alive.

CHAIRMAN BABCOCK: That would present a live controversy in your mind --

MR. FUCHS: Yes.

CHAIRMAN BABCOCK: -- which would allow the case to proceed?

MR. GILSTRAP: And Tom, I thought that was the purpose of the rule. Maybe I'm misunderstanding. I thought that was the purpose of the rule we were drafting.

HONORABLE TOM LAWRENCE: Well, the purpose of 749(b) was to determine when the appeal was perfected and also to deal with some of the other issues which is the effect to be given that perfection. And, you know, I'm not sure. I'm looking at my notes; and I've got a note that we're already voted on the last two sentences of 749(b) on November 2nd.

MR. GILSTRAP: You're right.

HONORABLE TOM LAWRENCE: Transcript page 5055 I've got that we voted eight to six on the last two sentences. So I'm not sure. I mean, that's what I have got.

CHAIRMAN BABCOCK: Larry has had his hand up for a while. Larry.

MR. NIEMANN: I think Fred and I are in agreement that so long as the purpose of the

appeal possession is simply to get it off the tenant's records, that's fine. And so long as the success on the appeal doesn't force us to out the replacement tenant, Fred is fine with that. If you give us 30 minutes, we might be able to work it out.

HONORABLE JAN P. PATTERSON: Yes. I was going to ask whether this would be fruitful discussion for the committee.

MS. SWEENEY: I second that.

CHAIRMAN BABCOCK: Yes. Under the auspices of the power of the chair that 30 minutes is granted.

MR. EDWARDS: You need to take a look at the comment that is on page 26 which talks about "A defendant who perfects an appeal by approval of an affidavit of indigence may remain in possession." And over here on the one we're talking about it says "supersedeas bond if required."

MR. YELENOSKY: Yes. I think we understood with indigents that this situation couldn't happen.

MR. EDWARDS: Well, I heard some talk about indigents.

MR. YELENOSKY: Oh.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: Just if we're done here, back up in the first sentence there is another wordsmithing issue. That first sentence is currently saying "An appeal may be appealed," and I think probably it ought to say "a judgment for rent may be appealed."

HONORABLE TOM LAWRENCE: Where are you, Stephen?

MR. TIPPS: The very first sentence of Notes and Comments.

MR. YELENOSKY: "An appeal by a tenant contesting a judgment for rent."

MR. TIPPS: You can't appeal an appeal. You appeal a judgment

HONORABLE TOM LAWRENCE: You're right.

PROFESSOR CARLSON: Thanks.

CHAIRMAN TOM LAWRENCE: You're right. Thanks.

HONORABLE TOM LAWRENCE: So are we closed on 749(b)?

CHAIRMAN BABCOCK: We're going to -- yes. We're going to pass for 30 minutes or more.

HONORABLE TOM LAWRENCE: Okay.

MR. YELENOSKY: Can we get the rest of that wordsmithing down that we were talking about before we got into this 30-minute discussion?

CHAIRMAN BABCOCK: I thought we had that wordsmithing down.

MR. YELENOSKY: Well, I don't know if we did or not. I had put down I think Frank had suggests taking out "and court costs only."

CHAIRMAN BABCOCK: I thought we agreed to that.

MR. YELENOSKY: I have a suggestion for the problem that I see which was a wordsmithing problem.

CHAIRMAN BABCOCK: Throw it out there.

MR. YELENOSKY: Okay. Looking at the second to last paragraph in the rule itself where the sentence begins "If the appeal is based on a judgment for possession and court costs only," et cetera, my proposal is change that to "If the appeal does contest a judgment for possession, then the tenant's failure to post a supersedeas bond when required will allow the appellee to seek a writ of

possession," and then the rest of the sentence is subject to this 30-minute discussion.

HONORABLE TOM LAWRENCE: Well, "does contest" does that automatically infer an appeal? Or are you saying if the appeal does contest?

MR. YELENOSKY: If the appeal does contest a judgment.

HONORABLE TOM LAWRENCE: Okay.

MR. YELENOSKY: Because the prior sentence, the prior part of it talks about, well, the point is to say that essentially the appeal, whether or not it contests other things, if it contests possession, you can nonetheless lose possession by failing to pay the supersedeas.

CHAIRMAN BABCOCK: Got you.

MR. YELENOSKY: And the parallel changes that I'm suggesting are in the comment; but that actually raises another question in my mind. Why do we have almost verbatim the same sentence in the comment that we have in the rule? That doesn't seem to advance the ball any.

CHAIRMAN BABCOCK: Yes. All this

discussion has come up about the comment. Is the rule okay, or does the rule need to be fixed?

HONORABLE TOM LAWRENCE: Well, we only really had one, Steve's comment on the rule. That's the only comment on the rule itself. Well, except for one.

MR. YELENOSKY: Except and the issue of possession.

HONORABLE TOM LAWRENCE: Yes. Except for the last sentence of the third paragraph and the issue of possession and it being further litigated. I think we're discussing that still.

CHAIRMAN BABCOCK: Okay. Well, let's pass that. Let's pass 749(b) pending this discussion. And Greg, did you get to say everything you wanted to say?

MR. HITT: Yes, I believe so. I think I just had a comment on discovery. Well, there were two items that haven't been mentioned; but I think in the future it might be something the committee would like to look at is in terms of making the process less complicated looking at evidence rules and

making the evidence rules in forcible detainer cases like the evidence rules in small claims courts or something similar to that.

CHAIRMAN BABCOCK: Okay.

MR. HITT: And I represent public housing authorities who have cases involving drug crimes or criminal, other criminal activity; and often times the managers can't technically swear to the complaint. And I think it would be worth looking at the requirement of having a sworn complaint in eviction cases.

CHAIRMAN BABCOCK: Okay.

MS. SWEENEY: Why can't they?

MR. HITT: Well, they won't have personal knowledge necessarily of, say, a drug bust, something like that. If a tenant is arrested for drug related criminal activity which is a violation of the public housing authority's lease, then the --

MS. SWEENEY: Getting arrested is?

MR. HITT: No. Not arrested. The actual crime.

MS. SWEENEY: So getting convicted is?

MR. HITT: No. The act of possessing drugs.

MS. SWEENEY: But so you evict them when they get indicted, arrested?

MR. HITT: That's right.

MS. SWEENEY: And then you have a trial?

MR. YELENOSKY: Proven by a preponderance of the evidence.

MR. HITT: And proof, right, the burden of proof is by preponderance of evidence. But proving it and the person, the people who have personal knowledge of it are the policemen, perhaps witnesses, but not the manager.

CHAIRMAN BABCOCK: Greg, could I get you to do me a favor, --

MR. HITT: Sure.

CHAIRMAN BABCOCK: -- do us a favor? Take these two areas; and if you could submit something in writing to Professor Carlson and Judge Lawrence.

MR. HITT: Okay.

CHAIRMAN BABCOCK: And they'll look at it as they digest these other comments, because we like to do nothing but create work for them.

HONORABLE TOM LAWRENCE: And you're very good at that.

CHAIRMAN BABCOCK: We've been good so far. We've kept this show running for a year or more. Okay. Let's try 749(c). Would that be the next one?

HONORABLE TOM LAWRENCE: Yes. This is the actual form of the appeal bond. And we've changed the language a little bit in this. One of the comments that we got from somebody -- I don't remember who -- was that we now have the address of the surety in here. One of the comments was that we have phone numbers of the surety put on the appeal bond. And I don't think the subcommittee has any problem with doing that. And this, the form of the appeal bond itself is actually in the rules, and we would just merely suggest that this form be in there with the addition of having a space for phone numbers for the sureties would be the only addition not currently on this.

CHAIRMAN BABCOCK: Any comments about 749(c)?

HONORABLE JAN P. PATTERSON: Have you accepted their friendly suggestion that this be called eviction?

HONORABLE TOM LAWRENCE: Well, I don't mind taking that back up again. I don't have any problem with that. We've already voted the other way; but I don't have any problem with it.

CHAIRMAN BABCOCK: I don't want to get into that right now at this point. We can talk about that again in June; but let's just try to get through these rules.

HONORABLE TOM LAWRENCE: If we do that, it would be very easy to go through and change all of that.

CHAIRMAN BABCOCK: We had a discussion about "eviction" versus "FED."

HONORABLE JAN P. PATTERSON: Well, I recall that that was before we knew anything.

(Laughter.)

CHAIRMAN BABCOCK: Well, speaking only for myself.

(Laughter.)

CHAIRMAN BABCOCK: Okay. What else on 749(c)? Any other comments about it? Yes, Ralph.

MR. DUGGINS: I do not agree that we need to have the citation in Spanish; and this

again brings up that or calls to mind that issue. If we are going to do one form in Spanish, would we have to at the same time consider whether this form?

CHAIRMAN BABCOCK: Have we done a form in Spanish yet?

MR. DUGGINS: Well, no. Someone in here proposed that.

HONORABLE TOM LAWRENCE: That was a comment, a recommendation and comments from Fred Fuchs.

CHAIRMAN BABCOCK: Yes. Let's not bring that.

MR. DUGGINS: I'm just saying I don't agree with it.

CHAIRMAN BABCOCK: As I read this this one is in English. So let's see if; and then if we have got to translate it later, we'll worry about that. But for right now this one, any other comments about it? I'm not trying to cut you off on this. I just foresee us talking for hours about that. 749(c) going once.

MR. HAMILTON: Let me ask one question.

CHAIRMAN BABCOCK: Yes, Carl.

MR. HAMILTON: Did we deal anywhere with the question of the appellant dismissing the appeal?

HONORABLE TOM LAWRENCE: Yes.

MR. HAMILTON: And having the right to?

HONORABLE TOM LAWRENCE: 754.

CHAIRMAN BABCOCK: We're not there yet.

PROFESSOR CARLSON: I think we fixed it.

CHAIRMAN BABCOCK: Motion 749(c) moved?

HONORABLE TOM LAWRENCE: I so move.

CHAIRMAN BABCOCK: Anybody second it?

MR. HAMILTON: Second.

CHAIRMAN BABCOCK: All right. All those in favor of 749(c) raise your hand. All opposed? 13 to nothing, and the chair not voting. Okay. What is next? 750, is that next?

HONORABLE TOM LAWRENCE: 750, supersedeas. Elaine asked if we voted on this.

CHAIRMAN BABCOCK: I thought we had.

MR. EDWARDS: (b)(2) you have got a little language that needs to come out of there. You took out "county clerk" but not "of the county in which the case was heard."

HONORABLE TOM LAWRENCE: We voted on a number of things on supersedeas.

MR. EDWARDS: Am I right on that?

PROFESSOR CARLSON: Yes. Got it.

CHAIRMAN BABCOCK: Take care of that, Elaine.

PROFESSOR CARLSON: Got it.

HONORABLE TOM LAWRENCE: We voted on -- we've taken about five votes on the supersedeas. I don't know that we've gone through it line by line; but what we have voted on is one, that you must post a supersedeas to remain in possession; two, that if you get an affidavit of indigence approved, you do not have to post a supersedeas. We voted that you must pay rent, all tenants, all defendants must pay rent to the registry of the court as it becomes due. And now there was one other taken on where the filing fee would be paid in county court; and that really comes into 750 and another rule, I think.

So we've actually, the hard parts of that we have taken up and voted on. The mechanics of it we have not gone through line by line. What we have tried to do as much as possible

on this is to follow the TRAP rules.

CHAIRMAN BABCOCK: Elaine, do you see any rough spots here that you're worried about?

PROFESSOR CARLSON: No. But Bill's comment is right. Subsection (b)(2) should end with the word "creditor."

CHAIRMAN BABCOCK: Okay.

MR. EDWARDS: What happens if the writ of possession has been executed and then a supersedeas has been filed?

HONORABLE TOM LAWRENCE: Well, there's --

MR. EDWARDS: You talk about if it's been issued; but you don't talk about if it's been executed.

HONORABLE TOM LAWRENCE: No. We --

MR. EDWARDS: I know that is something that was of concern to these folks that are here from outside today.

HONORABLE TOM LAWRENCE: No. We do actually --

MR. EDWARDS: Do you?

HONORABLE TOM LAWRENCE: We do actually talk about that.

MR. EDWARDS: Where? (e)?

HONORABLE TOM LAWRENCE: Yes, (e), if the

court issues a writ of possession, or it could be a writ of execution; but we're really talking about a writ of possession.

MR. EDWARDS: No. I'm talking about execution of a writ of possession. I'm talking not about a writ of execution.

HONORABLE TOM LAWRENCE: Well, okay.

MR. EDWARDS: I'm talking about actually going out, the levy, whatever you call it of the writ of possession. In other words, you kick somebody out, and a month later somebody comes in and posts a supersedeas bond.

HONORABLE TOM LAWRENCE: Well, I think that Elvis has left the building on that one if they're already out. But if you get the writ --

MR. EDWARDS: I know. But this says that if you issue it, if you issue it and then a bond is posted, the county court will promptly issue a writ of supersedeas. A writ of supersedeas suspends the operation of the --

HONORABLE TOM LAWRENCE: Enforcement.

MR. EDWARDS: -- execution or the writ of possession. You've already kicked them out. They've got new tenants in. This is six

months after they've got new tenants in. What do you do?

PROFESSOR CARLSON: That certainly wasn't the intent.

HONORABLE TOM LAWRENCE: Well, I think what we're trying to say, and I guess I thought the second sentence said, that enforcement begun before the judgment is superseded must cease when the judgment is superseded. I guess I had intended that by inference if they've already dispossessed and already executed a writ of possession, then that's it. There is nothing to supersede.

MR. EDWARDS: But it doesn't say that.

PROFESSOR CARLSON: What would be the fix?

MR. EDWARDS: I don't know. You have got to say something about it, whatever you want to do. What is your intent?

CHAIRMAN BABCOCK: Supersedeas is moot. Larry, did you want to say something?

MR. NIEMANN: Yes. On I guess page 25, number (2)(a) and (b).

CHAIRMAN BABCOCK: Well, let's keep with this problem first.

MR. NIEMANN: Well, that is.

CHAIRMAN BABCOCK: Does it relate to it?

MR. NIEMANN: It's part of this Rule 750. Isn't that what we're on?

CHAIRMAN BABCOCK: Yes. But we're going to try to fix this problem in (e) first.

MR. NIEMANN: Okay. My concern is about the posting of the lesser amount. When you get to that I would like to address it.

CHAIRMAN BABCOCK: Yes. Hold that thought. Let's see if we can fix subparagraph (e).

MR. EDWARDS: I think what the intent is that if the possession is -- if possession is given up and a supersedeas is filed, you don't get possession back.

PROFESSOR CARLSON: Right.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM LAWRENCE: I tracked the language exactly in 24.1(f) --

PROFESSOR CARLSON: Of the TRAP rules.

HONORABLE TOM LAWRENCE: -- of the TRAP rules. I used the exact language.

MR. EDWARDS: Well, we're not talking about the same problem.

PROFESSOR CARLSON: No. We can fix it.

CHAIRMAN BABCOCK: Can we fix that, Elaine?

PROFESSOR CARLSON: Yes.

HONORABLE TOM LAWRENCE: Yes. We'll --

CHAIRMAN BABCOCK: We can fix that, Bill. Thanks. Stephen.

MR. TIPPS: I don't understand what the last sentence of (e) means.

CHAIRMAN BABCOCK: Of what?

MR. TIPPS: The last sentence of (e). "If execution or a writ of possession has been issued, the county court will promptly issue a writ of supersedeas." That doesn't seem to follow.

HONORABLE TOM LAWRENCE: Well, that's what the TRAP rules call the order to stop executing on the judgment.

HONORABLE JAN P. PATTERSON: That's because this is for laypeople, and we aren't able to understand it.

MR. TIPPS: Okay.

(Laughter.)

MR. EDWARDS: The writ of supersedeas is what you -- if you post a supersedeas bond and

somebody wants to go out and get your stuff or get possession, the way you stop that is with a writ of supersedeas.

MR. TIPPS: A writ of supersedeas gives effect to the supersedeas bond.

CHAIRMAN BABCOCK: Right.

MR. EDWARDS: It tells everybody to stop.

MR. TIPPS: Okay. Okay.

CHAIRMAN BABCOCK: Easy for the layperson to understand.

HONORABLE TOM LAWRENCE: If you can read Latin, you can understand these rules.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: And subsection (d), we passed over that.

CHAIRMAN BABCOCK: Yes. Hang on. Let's see if we've got (e) fixed first.

HONORABLE TOM LAWRENCE: Yes. I'm glad you brought that up, (d).

CHAIRMAN BABCOCK: Wait a minute, Tom. Elaine, you're going to fix (e)?

PROFESSOR CARLSON: Yes. Bill, something like this: I'd just kind of like to have input. "Unless a writ of possession has been

executed and the tenant has been dispossessed," is that, would that be clarifying to you? "Then" whatever?

MR. EDWARDS: As far as the writ of possession; but it wouldn't apply to the other stuff. I presume if you get money, you have got to give it back if you post a supersedeas; but you can't give the possession back. No one is worried about giving the money back. They're worried about giving the possession back. So you are dealing with two things. You're dealing with the potential of a money judgment.

PROFESSOR CARLSON: Right.

MR. EDWARDS: And you're dealing with a problem of rent. And if -- I don't know what you do if somebody has gone out and levied execution and gotten money and then somebody posts a supersedeas bond. I just never have seen that; but the possession issue is the one that has caused the problem here with these folks as I understand. And I don't know how. You are dealing with the two problems.

PROFESSOR CARLSON: I understand them.

MR. HATCHELL: There is a provision of

the Property Code that deals specifically with payments and then when superseded and then the right. You have to pay the money back at interest. It's 12.014 of the Property Code that deals with it.

PROFESSOR CARLSON: When property has been executed upon --

MR. EDWARDS: That's one thing.

PROFESSOR CARLSON: -- without supersedeas and then the judgment is reversed on appeal the Court of Appeals or Supreme court and the Property Code gives you an action and restitution for the fair market value.

MR. EDWARDS: I understand that. We're talking now about a posting of a supersedeas bond --

PROFESSOR CARLSON: Right.

MR. EDWARDS: -- while an appeal is pending and after the execution for property has been levied.

HONORABLE TOM LAWRENCE: I don't know how you can have an effective remedy and be evicted. I don't know what that remedy would be.

MR. EDWARDS: Well, I'm jut all I'm doing is saying that the language is -- the problems are floating around there, and you guys with better brains than mine need to see if you can.

CHAIRMAN BABCOCK: Yes. Let's just fix that. Now Carl had something. Who had something on (d)?

MR. HAMILTON: I have something on (d).

CHAIRMAN BABCOCK: Carl had something on (d).

MR. HAMILTON: We're using the word "debtor" there instead of "appellant." "Appellant" is used in bonds.

CHAIRMAN BABCOCK: What do you-all think about that?

PROFESSOR CARLSON: We just took it out of the TRAP rules. And a comment was made by one of the folks here that eventually we need to pick some more consistent terminology throughout.

MR. EDWARDS: You're really talking about judgment debtor.

PROFESSOR CARLSON: We are talking about judgment debtor.

HONORABLE TOM LAWRENCE: You're talking about (d)(1).

CHAIRMAN BABCOCK: "If the debtor does perfect an appeal."

MR. GILSTRAP: And in the previous sentence too.

MR. EDWARDS: The landlord might lose.

MR. HAMILTON: But the bond says "appellant."

CHAIRMAN BABCOCK: Right. Carl is saying that the prior language says "appellant," not "debtor."

HONORABLE TOM LAWRENCE: Well, now wait a minute. What does the supersedeas bond say? Doesn't that say "debtor"?

MR. HAMILTON: No. It says "appellee" and "appellant."

HONORABLE TOM LAWRENCE: You're right. Could we? Howard, you had a comment about (d), the conditions of liability. Howard had a comment about the problem of what happens, at what point has the judgment debtor not performed? When can you go forward with that and do something?

MR. BOOKSTAFF: You've got to put a time

deadline in there for performance before you go after the surety.

HONORABLE TOM LAWRENCE: So what is your suggestion on that?

MR. BOOKSTAFF: I think I said in my comments, you know, perhaps 30 days. There has just got to be something definitive, because I'm not sure what it means if you don't have a time deadline, "does not perfect an appeal or the debtor's appeal is dismissed"; or the debtor -- "does not perfect an appeal or the debtor's" -- yes, the second part of that. "The debtor does not perform on the justice court's judgment," that is in (1), and in (2) "does not perform on an adverse judgment." Both of those should have some time deadline.

HONORABLE TOM LAWRENCE: There is no deadline in the TRAP rules. But do we want to put a deadline in?

MR. EDWARDS: Well, if the debtor doesn't perfect an appeal or the judgment becomes final, you can't do it past what is it? Five days? What is the time for appeal? So that takes care of that part of it. And if it's

dismissed, it takes care of that part of it.

MR. BOOKSTAFF: Right.

HONORABLE TOM LAWRENCE: But it's (2) that is the problem. Right? You want to eliminate --

MR. BOOKSTAFF: It's the next part, performance. How do you know when --

MR. EDWARDS: Well, it's the next one; and all you need is within X days after the judgment becomes final.

MR. BOOKSTAFF: Right.

HONORABLE TOM LAWRENCE: So what do you recommend?

MR. BOOKSTAFF: He's asking what X is.

MR. EDWARDS: X, how many days?

MR. BOOKSTAFF: 24 hours would be fine with me.

MR. EDWARDS: Especially if it's in favor of the tenant. Right?

MR. BOOKSTAFF: 10 days, 30 days?

PROFESSOR CARLSON: Well, let's think about this, because you can appeal. A residential FED you can appeal this to the court of appeals. Right?

MR. BOOKSTAFF: By filing in 10 days, a

supersedeas within 10 days.

HONORABLE TOM LAWRENCE: But that would be covered by (1). I mean, you've still got an appeal in progress.

MR. BOOKSTAFF: Why not say 10 days?

HONORABLE TOM LAWRENCE: Because your (2) is it's final on appeal. Therefore it's final on appeal so the appeal process is over.

MR. BOOKSTAFF: So "does not perform on the justice court's judgment within five days"; and "the debtor does not perform an adverse judgment." You're wording is messed up, "adverse judgment final on appeal"? An adverse final judgment is what you mean.

PROFESSOR CARLSON: It's right out of the TRAP.

HONORABLE TOM LAWRENCE: Don't blame me. Blame the TRAP rules committee for this.

PROFESSOR CARLSON: We thought it would be simpler if we picked up that language.

HONORABLE TOM LAWRENCE: I would think just off the top of my head 30 or 60 days seems reasonable. But I don't -- does anybody have any thoughts?

CHAIRMAN BABCOCK: Pick one.

MS. SWEENEY: Do you-all want to make us a recommendation?

HONORABLE TOM LAWRENCE: Pardon me?

MS. SWEENEY: Does somebody want to make a recommendation?

MR. BOOKSTAFF: The only concern I have is having it too long then the surety who gave you the address and the phone number may not be there anymore. So maybe 30 days.

HONORABLE TOM LAWRENCE: Well, 30 days seems reasonable. I move 30 days. "The debtor does not perform an adverse judgment final on appeal within 30 days."

PROFESSOR CARLSON: Howard, is it your position that if you were to appeal from the county court to the court of appeals, that you then need a different supersedeas bond than what has been put up?

MR. BOOKSTAFF: Yes. Because I think that is established in the Property Code.

PROFESSOR CARLSON: I know the requirements for the supersedeas is in the Property Code. But would it have to be a different bond? Could this bond serve through the appeal process?

MR. BOOKSTAFF: I don't know the difference between this supersedeas and the one that's required in the Property Code.

PROFESSOR CARLSON: And until we do we can't really make an informed decision. Let me look at that.

CHAIRMAN BABCOCK: Okay. We'll look at that. Carl.

MR. HAMILTON: Is there a difference between the not performing the justice court's judgment and not performing an adverse judgment final on appeal?

HONORABLE TOM LAWRENCE: Well, we're --

PROFESSOR CARLSON: I think you're envisioning further appeals potentially.

MR. TIPPS: I think in the one case you're contemplating a situation in which there never is an appeal; and the second case contemplates a situation in which there is an appeal, but the appeal is over and the judgment becomes final.

MR. HAMILTON: Yes. That's right. Okay.

MR. TIPPS: And the language in (2) is inartful; but I think that's what it means.

MR. BOOKSTAFF: In that case it wouldn't be any time frame. Once it's final you can go against the surety.

HONORABLE TOM LAWRENCE: Does anybody know what the appellate practice is? Anybody have any experience with trying to collect on a surety on an appeal from county or district?

MS. SWEENEY: I think we should never have another meeting without Orsinger.

(Laughter.)

MR. YELENOSKY: Now let's think about that.

CHAIRMAN BABCOCK: I move to strike that comment from the record.

(Laughter.)

MR. HATCHELL: No. You're in contempt.

CHAIRMAN BABCOCK: It's a lot smoother without him.

MR. EDWARDS: Basically the way it works out of the appellate system is normally the order, not the opinion, but the order of the appellate court renders judgment against the principal and the surety. And then you can execute on that judgment against the surety as

soon as that judgment is, the mandate is issued. That's the way it works.

PROFESSOR CARLSON: In fact the appellate rules say that the court should invoke --

CHAIRMAN BABCOCK: Yes.

PROFESSOR CARLSON: -- the judgment against the surety.

MR. EDWARDS: That's the way it works.

HONORABLE TOM LAWRENCE: All right. Well, let me -- I hate to jump ahead; but maybe this solves the problem, 754(f) on page 30, "When the appellant fails to prosecute the appeal with effect or the county court renders judgment against the appellant, then the county court must render judgment against the sureties on the appellant's appeal bond or supersedeas bond, for the performance of the judgment up to the amount of the bond." So isn't the county court judge, --

MR. EDWARDS: Which is what you're saying.

HONORABLE TOM LAWRENCE: -- isn't he going to do that? Doesn't that solve your problem?

MR. EDWARDS: Yes.

MR. BOOKSTAFF: So it's automatic, and he has the surety --

MR. EDWARDS: Automatic.

MR. BOOKSTAFF: -- and the judgment.

MR. EDWARDS: Correct. You can't execute on the surety unless you have a judgment against him.

HONORABLE TOM LAWRENCE: So that solves the problem. Right?

MR. BOOKSTAFF: Yes.

CHAIRMAN BABCOCK: Okay. What other problems? Larry, did you have some later on?

MR. NIEMANN: Yes.

CHAIRMAN BABCOCK: Was it before (f) or later than (f)?

MR. NIEMANN: The 30-minute conference was being conducted in 30 seconds over here; and I lost track of what you were saying.

CHAIRMAN BABCOCK: That's okay. We're on (f).

MR. NIEMANN: I think what I was referring to is the two places in 750 where it addresses a lesser amount for the supersedeas and a lesser amount for the tender of rent.

CHAIRMAN BABCOCK: Uh-huh (yes).

MR. NIEMANN: I think there are circumstances where the tenant needs more protection and the landlord needs more protection and the JP needs more guidance in the decisionmaking of a lesser amount. So I would implore the committee to at least leave some opportunity for the interested parties to readdress possible improvements to that language to the subcommittee. That's all I have.

HONORABLE TOM LAWRENCE: Sure.

CHAIRMAN BABCOCK: Okay. Carl, do you have something in (f)?

MR. HAMILTON: Yes. I don't quite understand (5)(a), (f)(5)(a). It says if the judge -- unless the judge finds that a posting of a bond will cause irreparable harm to the appellant. Well, doesn't that mean that -- I mean, that could only mean that the appellant can't afford it. And doesn't he have to make a pauper's affidavit then or something? Can the judge just find that and no pauper's affidavit?

PROFESSOR CARLSON: One of the reasons we tracked the TRAP rule is because of course

there is already a legislative provision that sets forth this standard in general; and we adopted basically the legislative language in the TRAP rule after there was, you might recall, quite a bit of controversy between the legislature and the rulemaking authority of the Court in this area after Penzoil. So we were just trying to embrace the existing law because of that sensitivity. I mean, that is the exact language now I believe out of the TRAP rule.

MR. EDWARDS: What is good for Texaco is good for the tenants.

CHAIRMAN BABCOCK: Yes.

HONORABLE TOM LAWRENCE: I guess the subcommittee thought that if we followed the TRAP rules as much as possible, that we'd be on pretty safe ground as far as constitutionality having some track record as to how it worked and it would be consistent.

CHAIRMAN BABCOCK: Have we solved Carl's problem?

PROFESSOR CARLSON: I don't think he's satisfied; but that's the reason we did what we did.

MR. HAMILTON: I mean, that's the way around the supersedeas or the pauper's affidavit, to just tell the judge "Well, I can't afford it, judge."

PROFESSOR CARLSON: Well, the case construing that language says that's not enough.

MR. HAMILTON: Oh, it does?

PROFESSOR CARLSON: Yes. The case law construing the TRAP rules says that's not enough to come in and say "I don't have any money."

MR. HAMILTON: Okay.

PROFESSOR CARLSON: You have to meet both parts of that test.

MR. HAMILTON: Okay.

CHAIRMAN BABCOCK: Well, Carl, are you reasonably unsatisfied or satisfied?

MR. HAMILTON: Reasonably satisfied.

CHAIRMAN BABCOCK: Reasonably satisfied. Okay. What else in this rule? Anything else?

MR. BOOKSTAFF: In the whole rule?

CHAIRMAN BABCOCK: Yes. We got through (f) and sort of (g). But, yes, anything else

in the whole rule?

MR. BOOKSTAFF: In (g) the fair market value should only be relevant, should be expressly states only relevant when the lease does not identify a rental amount or if there is no lease.

CHAIRMAN BABCOCK: What do you think about that, Judge?

HONORABLE TOM LAWRENCE: Well, this ties into Rule 748; and maybe we should have taken 748 up for first. But we're envisioning those situations where you've got someone is in a unit or a piece of property and there is no agreement to pay rent. So we're trying to determine how do you set the supersedeas amount for him to pay. So if there is no obligation to pay rent, then the JP is going to have to make a determination as to what the fair market rental value is.

MR. BOOKSTAFF: Right. Just clarify that. Clarify that it's in cases, it's only relevant when the lease does not identify the rental amount or if there is no lease. That's the only time you go into fair market value.

HONORABLE TOM LAWRENCE: I think if you

look at 748(c) on page 12, perhaps I should have gone over 748 first.

PROFESSOR CARLSON: But it wouldn't hurt to include that language.

HONORABLE TOM LAWRENCE: Do you want to make that same language and move it over to (g)? I mean, that's no problem.

MR. BOOKSTAFF: Yes, just clarify.

HONORABLE TOM LAWRENCE: All right. We'll do that. 748(c), restate in (g). Okay? No problem. We can do that.

MR. YELENOSKY: One question on that.

CHAIRMAN BABCOCK: Yes, Stephen.

MR. YELENOSKY: Does that work in tandem with individuals who may not be paying rent because of government payments? I know that is mentioned above.

HONORABLE TOM LAWRENCE: No. If there is an obligation to pay rent, then you're not going to have to calculate the fair market rental value.

MR. YELENOSKY: Right. But couldn't somebody be on zero rent?

MR. FUCHS: But that would still be an obligation to pay zero rent.

HONORABLE TOM LAWRENCE: That's (b)(4).

MR. YELENOSKY: Okay. That was my question.

HONORABLE TOM LAWRENCE: Yes. That's covered.

MR. YELENOSKY: If the tenant pays, in fact pays no rent because of a government subsidy, we used to say on zero rent. Do we consider that to be an obligation to pay rent?

HONORABLE TOM LAWRENCE: Well, for the purposes of the rules, yes. Although the supersedeas portion of that is going to be zero. Well, no. I'm sorry. The obligation to pay rent he won't have to pay rent to the registry of the court other than what he is obligated to pay. Now if the housing takes him to a market value and he suddenly has to pay $400 a month, then he has got a problem. He has got to come up with $400. But as long as the government pays their portion and he pays zero, then he doesn't have to pay anything during the pendency of the appeal.

MR. FUCHS: This is really going to affect foreclosures where there is a foreclosure, the mortgage company buys and

there is no lease. That is what this is going to affect. That's where the judge is going to need to set fair market value.

HONORABLE TOM LAWRENCE: Yes. And trespassers and things like that.

MR. NIEMANN: It really doesn't affect subsidized housing, because even in those cases the tenant has an obligation to pay the full rent; but the government has come into the picture and told the landlord we will pay 75, 80, 90 percent of it, something like that.

MR. YELENOSKY: Okay. That solves my problem, because I was afraid somebody would read the government subsidized situation as triggering, setting of fair market valve.

MR. NIEMANN: Those tenants, even the government subsidized tenants they sign a lease for the full amount.

MR. YELENOSKY: All right. Then (c) would not --

MR. FUCHS: You might want to include a comment.

MR. YELENOSKY: A comment saying that no obligation to pay rent does not include a

tenant who is paying zero rent due to government subsidization.

MR. FUCHS: Right.

MR. YELENOSKY: Otherwise somebody could read that to mean that the court comes in and sets fair market value when you have a government subsidy.

MR. NIEMANN: If you don't understand how the system works, you could jump to that conclusion.

CHAIRMAN BABCOCK: Yes, Carl.

MR. HAMILTON: In (e) we say that the county court issues a writ of supersedeas; but in (h) you say the justice court issues the writ of supersedeas.

HONORABLE TOM LAWRENCE: Well, that's because this was a surprisingly difficult problem to figure out, because you have five days to appeal the judgment. The problem is if someone comes in on day one after the judgment is signed and posts an appeal bond, you can't -- and doesn't post a supersedeas, you can't issue a writ of possession because they've still got five days to post the supersedeas. So if they come in and post the

supersedeas on the fifth day, then I think that's what we're trying to accomplish in (h). Right?

MR. HAMILTON: But your supersedeas bond is filed with the JP.

HONORABLE TOM LAWRENCE: Right.

MR. HAMILTON: And you're saying here once that's filed that he's the one who issues whatever writ of supersedeas is needed. So the writ of supersedeas bond has to be filed before he can do that. So why do we?

MR. DOGGETT: Isn't it the bond that is being filed and the writ can be issued by either court to stop someone from doing something? So it seems to me a JP can issue a writ and a county can issue the writ to stop an action.

HONORABLE TOM LAWRENCE: Either court can issue the writ.

MR. BOOKSTAFF: Can the JP issue the writ of possession after the five-day period?

HONORABLE TOM LAWRENCE: Yes, if the supersedeas bond hadn't been filed. But I'm sorry. You've cleared it up. Here is the issue: You filed the appeal bond within the

five days; but you don't post a supersedeas bond. Day six passes, and the landlord doesn't come in to get the writ of possession, and then on day seven the tenant comes in and posts a supersedeas bond. This will allow the supersedeas bond to be posted. The JP had issued the writ of supersedeas to make sure that no enforcement is going to be taken on that. So you have got this small interim period between when the writ of possession could be issued, but it hasn't been issued yet because the landlord has not come in, and between then and when it would be docketed in the county court and you'd have to go to the county court.

MR. HAMILTON: But under what circumstances would the county court ever issue a writ of supersedeas if the JP didn't?

HONORABLE TOM LAWRENCE: Well, if the landlord never comes in to get the writ of possession for whatever reason and the tenant appeals and it goes up and it's docketed in the county court, and then the tenant realized "Uh-oh, I forgot to post the supersedeas bond," and then they rush up to county court

and post the supersedeas.

MR. HAMILTON: They post it in the JP court.

HONORABLE TOM LAWRENCE: No. Once the appeal has been perfected they would have to post it in the county court.

MR. BOOKSTAFF: How does the JP have jurisdiction unless you -- I guess you have to give it JP in this rule. Once it's been appealed, it's not superseded, once it's been appealed the file goes from the JP court to the county court, and the landlord comes in a day after the fifth day, on the sixth or seventh day, let's say, and says to the JP "I want a writ of possession," and the JP says "Well, I don't have jurisdiction anymore because it's been appealed."

MR. HAMILTON: 750 says the supersedeas bond is filed in the JP court.

HONORABLE TOM LAWRENCE: Well, it is; but it could be filed in the county court.

MR. EDWARDS: It doesn't say so here.

MR. HAMILTON: That doesn't say that.

MR. EDWARDS: 750(a)(2) and (a)(4) and (a)(3) everything is with the justice court.

MS. SWEENEY: Since there is a redraft coming back, might we get that?

HONORABLE TOM LAWRENCE: Well, yes. Let me look. Let us look at that.

MR. EDWARDS: Who issues the writ of possession if it's been appealed and no supersedeas has been filed and the landlord doesn't ask for a writ of possession until the 30th day?

HONORABLE TOM LAWRENCE: If the appeal has been perfected?

MR. EDWARDS: Who issues the writ of possession?

HONORABLE TOM LAWRENCE: The county court.

MR. EDWARDS: Where does it say that?

HONORABLE TOM LAWRENCE: I think it's 748.

MR. BOOKSTAFF: Is there a way to get the JP jurisdiction issued so you don't have to wait for the time when the case gets docketed in a county court? Before the case is docketed in the county court, but after the five days can the JP issue the writ of possession?

HONORABLE TOM LAWRENCE: I don't think so once the appeal is perfected. That was the problem that we -- that Elaine discussed a little bit earlier is that when the appeal is perfected the JP is going to lose the jurisdiction.

MR. EDWARDS: But this says that's where you file your supersedeas bond. It doesn't put any limit on it. That rule itself would extend at least some form of jurisdiction in the JP court.

PROFESSOR CARLSON: Yes. And that occurs in the district court and the court of appeals now.

MR. HAMILTON: I think you do say in (i). In (i) that's the five-day deal. Then you file it in the county court.

HONORABLE TOM LAWRENCE: Oh, there it is.

MR. EDWARDS: Have we already got it covered?

HONORABLE TOM LAWRENCE: I knew it was somewhere. Thanks. Thanks, Carl.

MR. EDWARDS: I'm glad this is so easy for all these laypeople to follow.

HONORABLE TOM LAWRENCE: If you can read Latin, you can understand this.

PROFESSOR CARLSON: I would once again invite any members of the committee who would like to serve on our subcommittee.

CHAIRMAN BABCOCK: Larry, do you have a comment?

MR. NIEMANN: It's a pretty basic problem for us when the appeal is perfected and not being able to get possession despite that until 20 or 30 days later sometimes. We would like also to visit with the committee about brainstorming to figure out a way out of that box, because that loss of rent after an appeal is perfected is a pretty serious loss. Do you want to add anything to that, Howard?

MR. BOOKSTAFF: No. That's the same issue with you've got to extend jurisdiction for the purpose of granting the writ of possession.

HONORABLE TOM LAWRENCE: Yes, (i). And (i) is what I couldn't find that I think would answer William's question.

CHAIRMAN BABCOCK: Which rule?

HONORABLE TOM LAWRENCE: 750(i), "Once

the appeal has been perfected and five days have expired since the day the judgment was signed any actions to enforce or suspend the enforcement of the judgment or to modify an existing justice court order suspending the enforcement of the judgment must be filed in the county court." So you've got five days to file your supersedeas bond in the justice court; and after that it has got to go to the county court. So I think that's the answer to your question.

CHAIRMAN BABCOCK: Got anything more on 750?

HONORABLE TOM LAWRENCE: I can't tell you how many drafts I had trying to figure out a way to give the JP the ability to look at the sureties on supersedeas and to look at the sureties on the appeal bond and a way that the first month's rent would be paid into the JP court registry, and if not, then it would constitute not perfecting the appeal; but we couldn't, the subcommittee couldn't find a way to do that. I mean, if you-all can come up with something, we would love to hear it.

MR. NIEMANN: We'll try.

CHAIRMAN BABCOCK: Okay. Do we need to have the full committee do anything else with these rules either today or in the morning, or should we let the various groups get together and try to take this up again in June?

HONORABLE TOM LAWRENCE: Well, I guess the only one I'd like to discuss in the morning would be 748, if we could knock that one out.

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM LAWRENCE: And then everything else I think we can wait on.

CHAIRMAN BABCOCK: All right. And Hatchell, as I understand it you're prepared to talk tomorrow about visiting judge peer review and rules of judicial administration regarding counties which send cases to more than one court of appeals? Okay. What are you prepared to talk about tomorrow?

MR. HATCHELL: Sarah handed me a stack of papers and said "Tell them that our subcommittee is in favor of peer review." That's the extent of the report that she told me to give.

CHAIRMAN BABCOCK: We've got materials on

peer review. And there are proposed changes, are there not?

MR. HATCHELL: Yes.

HONORABLE TOM LAWRENCE: You've got until 8:30 in the morning.

MR. HATCELL: Sorry. That isn't going to help.

CHAIRMAN BABCOCK: So do you think we should discuss peer review tomorrow or not?

MR. HATCHELL: No, we should not do that.

CHAIRMAN BABCOCK: Okay. Motion for new trial you're not going to talk about?

MR. HATCHELL: Well, I actually could report on that; but I could also report on that in about 30 seconds right now.

CHAIRMAN BABCOCK: Why don't you take the next 30 seconds and report on motions for new trial.

MR. HATCHELL: Pardon?

CHAIRMAN BABCOCK: Yes. Why don't you do that right now.

MR. HATCHELL: Let me get my papers out here. What was submitted to our subcommittee was a proposed change to the motion for new

trial rule that said "For good cause a new trial or partial new trial under paragraph (f) may be granted and a judgment may be set aside on motion of a party or on the judge's own motion in the following instances:" in which there were 11 stated sentences.

The entire purpose of this is why I understand it's origin is to be able to identify the ground upon which the trial court grants a motion for new trial in order that a party may attempt to mandamus for -- I'm sure most everybody knows, and somebody can grade my papers on this. At present there are at least and I think two and possibly three grounds upon which you can mandamus now: When the motion for new trial is granted strictly because of conflicting issues; number two, when the court is without power to grant a motion for new trial. And Elaine, is there a third? It seems to me like there was third.

PROFESSOR CARLSON: No. I think those are the two.

MR. HATCHELL: Okay. So the 11 grounds that were listed here as to whether or not courts are going to permit mandamus on those

grounds is an open question.

Our committee believed that because the only purpose of this specification was to identify the grounds upon which the motion was granted and was taking no stand whatsoever as to whether those were mandamusable, that the grounds ought not be stated and that the rule should simply say "If the court grants a new trial in whole or in part, it must be stated in the order granting the new trial or otherwise on the record the reasons for it's finding that good cause exists?" That's our suggestion.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: There is no point in stating grounds unless there is some way to remedy the improvidently granting of the new trial. It either has to be by mandamus or appeal. And if you're saying that there is only two ways now, then we need to create a way in the rule whereby the Court is required to issue a mandamus if the record does not show that the grounds stated are appropriate grounds.

MR. HATCHELL: What would your -- could

you name me a ground?

MR. HAMILTON: Let's just say that the judge says it's done in the interest of justice.

MR. HATCHELL: Okay.

MR. HAMILTON: Not a sufficient ground under -- hopefully under your proposed rule that wouldn't be sufficient. And so therefore the Court should mandamus the trial judge.

PROFESSOR CARLSON: To perform that ministerial duty of designating the ground.

MR. HAMILTON: Of entering the judgment on the verdict. Or secondly, if he says "Well, I'm granting a new trial because there was no evidence to support the answer in issue number one," and the record shows that there was.

PROFESSOR CARLSON: That's a radical change in our practice.

MS. SWEENEY: Yes.

MR. HAMILTON: Of course it is.

MR. EDWARDS: This is a continuation of what we've seen in the last 10 years of depriving juries of their power, depriving trial judges of their power and depriving

court of appeals judges of their power and taking everything to the top. We get rid of all the juries, all the trial judges, and we'll just take everything to Austin. Right?

MR. HAMILTON: Well, we have -- I don't know whether anybody else does; but we have a real bad problem in Hidalgo county.

MR. EDWARD: Well, how about the secede and we just throw them out and they can be a state by themselves?

MR. HAMILTON: Practically every case that goes to the jury, jury verdict in favor of the plaintiff the courts grant them a new trial. Sometimes they have to retry them once, sometimes twice.

MR. EDWARDS: Part of that problem is that the CALAP program in the Valley has been so strong with "Don't ever let it happen again; you've lost your job," the juries are coming in and they're finding negligence and no damages where there are substantial damages. And of those new trials you are talking about probably I bet you 85 percent of them are because of zero damages where there's clear damages and there's finding of

liability.

MR. HAMILTON: No, they're not. They're straight defense verdicts all the way down, liability and everything.

MR. EDWARDS: I see a lot of appeals coming out of that court where plaintiffs lost.

MR. HAMILTON: So I mean, this is what we need to correct. We need to correct the abuse of some judges in improvidently granting motions for new trial when there is really no grounds for it other than to give the plaintiff or the defendant, to give them another shot.

MR. EDWARDS: And we call that the power of the vote.

MR. SWEENEY: We have an elected judiciary, and that's the remedy for the problem that you have. Rulemaking by this committee or by the Supreme Court cannot change the kind of substantive law issue constitutionally that you raise in my judgment. And if there are judges who are flagrantly disregarding the will of the electorate or the law, then they need to be

voted out of office. We cannot here make the kind of substantive law change in good conscience that has been proposed.

CHAIRMAN BABCOCK: Mike.

MR. HATCHELL: I just wanted to make clear because of Carl's statement that I don't believe our subcommittee was taking any position that said that a trial Court could not grant a motion for new trial in the interest of justice. That may be the implication where we're headed.

CHAIRMAN BABCOCK: What was the -- yes. I'm a little fuzzy about the charge of this. I thought it was not the problem that Carl was addressing; but it was a different problem. Maybe I'm wrong about that.

MR. GILSTRAP: Didn't this have to do with Justice Hecht's dissent in the Bavaria Autoworks case?

PROFESSOR CARLSON: Yes.

MR. GILSTRAP: That's what I think put this originally is my understanding.

COURT REPORTER: What's the case again?

MR. GILSTRAP: Bavaria Autoworks.

CHAIRMAN BABCOCK: And his --

MS. SWEENEY: Wait. I'll ask. What was that?

MR. GILSTRAP: It was basically he said that and he was talking about the case that Carl is talking about where they tried the case. The jury has -- and they spent thousands of dollars, and the jury has decided in favor of the defendant. And the judge comes back and says "You know, that was a career case for the plaintiff's attorney. I think he needs another shot," something like that.

MS. SWEENEY: Okay.

MR. GILSTRAP: You know, he doesn't say it on the record. But there is -- we are all familiar with those kind of cases. And that's what I think he was talking about in that dissent; and that seems to me to be kind of where this thing is headed if it's going anywhere.

PROFESSOR CARLSON: And wasn't that a dissent to the Court?

MR. GILSTRAP: It was a dissent.

PROFESSOR CARLSON: Not entertaining the mandamus.

MR. GILSTRAP: That's right.

PROFESSOR GILSTRAP: The trial Court granted a new trial without stating any reason on the record; and they attempted to mandamus the judge, and the Court did not grant leave for the mandamus proceedings.

MS. SWEENEY: Which requires how many judges? Four?

CHAIRMAN BABCOCK: Five.

MS. SWEENEY: Five.

CHAIRMAN BABCOCK: Mike, is that what you sensed your subcommittee was all about, or was it not?

MR. HATCHELL: I'm sorry. What is the "what"?

CHAIRMAN BABCOCK: What Frank just said, the dissent.

MR. HATCHELL: I think that is what generated this, yes.

PROFESSOR CARLSON: Because we voted I thought. Did we not vote at some point --

MS. SWEENEY: Yes.

PROFESSOR CARLSON: -- that the trial Court should be required to state a ground in granting its new trial; but we did not then

say a mandamus would then be available though arguably if the Court didn't state any reason and that may be a ministerial duty. But it wasn't all of a sudden a mandamus and abuse of discretion granting new trial.

MS. SWEENEY: Can somebody help me? Can you mandamus a Court now to enter findings of fact and conclusions of law generally?

PROFESSOR CARLSON: They can be ordered to, yes.

CHAIRMAN BABCOCK: Yes.

MS. SWEENEY: They can be ordered to do something; but not to do it right.

PROFESSOR CARLSON: You can't tell them what finding.

MS. SWEENEY: Right.

PROFESSOR CARLSON: To make a finding.

MR. HATCHELL: You can also move to abate an appeal or remand. That's probably the more practical way of doing it.

CHAIRMAN BABCOCK: So the subcommittee has come up with language that is neutral on the issue of mandamus. Carl says "Well, wait a minute. We ought to be proactive on that." Bill and Paula say "No way." And so the

question is do we want to have the fuller committee discuss this?

PROFESSOR CARLSON: Yes.

MR. GILSTRAP: Yes. Let me just let me point out one thing here. As I remembering my thinking on that it seems to me that this rule might be helpful in a jury case if you're really going to examine, you know, why the Court granted the new trial and going to in effect you're opening the door to somehow abrogate the rule that the Court has absolute discretion to grant a new trial that is out there somewhere. But it seems to me there is no purpose in things like default judgments or even nonjury cases. I mean, the Court has, should have absolute discretion, for example, in a default judgment case.

So you know, if we take it up, it seems to me like we certainly might want to limit it to jury trials only. I think that's where the perceived evil is.

MR. HAMILTON: I think I would agree with that because what we're trying to avoid is a retry of a lawsuit that costs the parties $200,000, $300,000 in legal fees and experts'

fees to have to do it all over again if it can be tested by mandamus for a whole lot less.

MR. HATCHELL: Carl, just help me, because I need some help here. Assuming that the ground that the Court specifies is that the findings are against the weight and preponderance of the evidence and your contention is no, that's note true. That goes up on mandamus. What does the court of appeals do? They review the record and say "Yes, there is some evidence here" and then mandamuses the Court to set aside the judgment and to enter -- I mean, set aside the order on new trial and enter a judgment. And then an appeal takes place and the losing party -- I guess it would be the plaintiff in this case -- wants to make a contention that the evidence was sufficient. So they've already lost at this point?

MR. HAMILTON: No, they haven't lost.

MR. GILSTRAP: Chip, we're not going to be able to polish this off in 30 seconds.

CHAIRMAN BABCOCK: Yes. I've noticed that.

MR. HATCHELL: I said I could tell you

what we recommended.

CHAIRMAN BABCOCK: See, you misled me.

MR. GILSTRAP: If this is going to come back on the agenda, it needs to come back on, I think it needs to come back on with some recollection of what we decided in the past.

MS. SWEENEY: Yes.

MR. GILSTRAP: I think I need, speaking for myself, I need to have my memory refreshed as to what we did, because that recommendation was sometime back.

CHAIRMAN BABCOCK: Deb, can you do a little summary of what we did before? What happened was this was on the agenda and then it got inadvertently dropped last time I think or maybe two times ago and it only got put back is the problem. And then Sarah is not here, so we've lost our memory. So we'll put that on the agenda for next time.

MS. SWEENEY: Next time, excuse me, tomorrow or next time in June?

CHAIRMAN BABCOCK: In June.

MS. SWEENEY: Thank you.

CHAIRMAN BABCOCK: And Mike, on Rules of Judicial Administration Re: Counties Which

Send Cases to More Than One Court of Appeals don't give me a time estimate because they're worthless. But are you prepared to talk about it?

MR. HATCHELL: Not in the morning; but at the next meeting, yes.

CHAIRMAN BABCOCK: At the next meeting?

MR. HATCHELL: Right.

CHAIRMAN BABCOCK: All right. So we'll put that on the agenda again. So the only thing we have left to talk about in the morning, and we are coming back because Justice Hecht is coming back, is and it may be a cozy meeting by the way, is the FED one rule we've got left to talk about.

HONORABLE TOM LAWRENCE: Well, we can talk about more if there is nothing else. I mean, if you're saying we're coming back regardless, then there are other FED rules to talk about.

CHAIRMAN BABCOCK: Yes. Let's see what kind of mood we're in.

HONORABLE TOM LAWRENCE: Okay.

CHAIRMAN BABCOCK: Chris, have you got anything?

MR. GRIESEL: No.

CHAIRMAN BABCOCK: Is that everything for everybody? So let's come back at 9:00. No sense getting back at 8:30. So we'll be back at 9:00. And for everyone who is not coming back, don't forget the next meeting in June is in Dallas, not Austin. And we've got a very full agenda for next time.

(Adjourned 5:15 p.m.)

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CERTIFICATE OF THE HEARING OF

SUPREME COURT ADVISORY COMMITTEE

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I, ANNA RENKEN, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on the 17th day of May, 2002, and the same were thereafter reduced to computer transcription by me. I further certify that the costs for my services in the matter are $ 1420.00 charged to Charles L. Babcock. Given under my hand and seal of office on this the 28th day of MAY, 2002.

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