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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

June 15, 2002

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified  
Shorthand Reporter in Travis County for the State of  
Texas, reported by machine shorthand method, on the 15th  
day of June, 2002, between the hours of 8:59 a.m. and  
12:17 p.m., at Southern Methodist University, Storey Hall,  
A. J. Thomas Faculty Room, Dallas, Texas.

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

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1 \*--\*--\*--\*

2 CHAIRMAN BABCOCK: All right. We're back on  
3 the record and talking about FED. And what rule are we  
4 on?

5 HONORABLE TOM LAWRENCE: Well, we're going  
6 to be on five rules at once.

7 PROFESSOR CARLSON: Because we multi-task.

8 HONORABLE TOM LAWRENCE: We think we're up  
9 to that. Okay. This gets in -- there are two areas that  
10 are left, discovery, which is going to take -- probably  
11 the more controversial, and then motions for new trial,  
12 which is also going to be somewhat controversial.

13 The original -- the problem now is that the  
14 current eviction rules do not address the issue of  
15 discovery at all, makes no provision for it. There is a  
16 rule in the 500 series, Rule 523, that says in essence  
17 that you apply the county and district court rules  
18 whenever the rules are silent. So some people take that  
19 to mean that you apply, therefore, all of the discovery  
20 rules to an eviction, which very few judges in the state  
21 agree with, because nobody that I've ever known has done a  
22 Level 1 discovery control plan on an eviction or allowed  
23 the time limits and depositions and everything else that  
24 goes with the Level 1 discovery control.

25 However, Fred Fuchs has testified before

1 this committee that in Travis County and Williamson County  
2 that the JPs there take the position that discovery is  
3 appropriate in JP court, and they routinely allow whatever  
4 discovery they are presented with. Most of the other 252  
5 counties in Texas generally take the position there is no  
6 discovery in JP court because the discovery rules just  
7 don't mesh with the eviction rules.

8 PROFESSOR CARLSON: Timewise.

9 HONORABLE TOM LAWRENCE: Timewise. The time  
10 limits just don't fit. There's just no way to do it and  
11 still meet the time requirements in forcibles. Initially  
12 all of the groups, the JPs, the landlords -- and we have a  
13 landlord representative here -- who I'm sure will want to  
14 comment, and also the tenants didn't want to address that.  
15 They just wanted to leave it alone and let the status quo.  
16 The subcommittee feels like that's not a good idea because  
17 you have an inconsistent application of the rules  
18 statewide. Depending on which court you're in, you may  
19 get discovery, get no discovery, or get some discovery,  
20 depending on how the judge interprets the law, which is,  
21 frankly, not clear. It's ambiguous.

22 The JPs now have come to the position that  
23 they would like the issue settled. Now, the JP position  
24 is that they would prefer there be no discovery; however,  
25 they could live with some limited discovery. The position

1 of the landlords is that they believe no discovery at all  
2 is more appropriate. They think that there are going to  
3 be abuses; and the JPs also anticipate abuse, a lot of  
4 motion hearings on motions, be very time consuming and  
5 delays involved in that.

6           The tenants, on the other hand -- and I see  
7 the tenants' representative just came in, who will  
8 probably want to comment, too; but the tenants, on the  
9 other hand, feel that there are some instances where  
10 discovery is needed and is appropriate. Probably 90  
11 percent of the eviction cases in Texas are nonpayment of  
12 rent. It may even be a higher percentage of that. Most  
13 of those eviction cases for nonpayment of rent really do  
14 not need any discovery. So we have got a situation where  
15 the vast majority of the cases really don't need any  
16 discovery, but there are some cases that need some  
17 discovery, and perhaps some limited discovery.

18           The subcommittee's original recommendation  
19 is outlined in Rule 743, which is the last sentence of  
20 that rule; and what the rule says, if I can find that rule  
21 quickly, the rule says, "Generally discovery is not  
22 appropriate in eviction actions. However, the justice has  
23 discretion to allow reasonable discovery," period. And  
24 then after the subcommittee added the phrase, "of limited  
25 scope which does not unduly delay the trial" as a result

1 of a request made at the May 30th meeting with the  
2 interest groups.

3           That was our original proposal, and what we  
4 felt was that that would give the JPs the discretion. The  
5 judge would have the discretion to determine what  
6 discovery was going to be appropriate and how much was  
7 going to be allowed. Now, that language is not language  
8 we just made up. In the Small Claims Court Act in Chapter  
9 33 of the Government Code, the Legislature uses that  
10 identical language, virtually identical language, to  
11 describe how discovery occurs in small claims court. So  
12 we thought, well, we've got a track record. It makes  
13 sense to apply that same standard to the forcibles, and  
14 that was the subcommittee's recommendation.

15           At the January meeting of this committee  
16 there was discussion, Fred Fuchs testified at that and  
17 there was some discussion, and the committee basically  
18 directed the subcommittee to go back and try to beef up  
19 the discovery, and they told us to look at disclosures,  
20 for example, or to look at maybe some expanded filings.  
21 And we talked about disclosures and that. We tried to  
22 make that work, but that -- there's got to be something  
23 that triggers that, and that seemed to be taking too long  
24 to do that.

25           So we couldn't make disclosures work, so we

1 came up with the concept of trying to make the expanded  
2 pleadings, and that's Rule 741, and so we added quite a  
3 bit to Rule 741 that requires the landlord to file with  
4 the pleadings as exhibits quite a bit of additional  
5 information, and that information would be -- if it's a  
6 nonpayment of rent would be the lease agreement or the  
7 portions of the lease agreement he's going to rely on in  
8 the trial, the payment records. If it's not a nonpayment  
9 of rent case then what are the provisions of the lease or  
10 other information. Other documents that would be  
11 available that would go to substantiate that case,  
12 basically file up front what they're going to have to  
13 produce at trial anyway to give to the judge, but there  
14 were some problems with that, and we talked about this in  
15 June. Nobody -- none of the groups really seemed to like  
16 this plan very much, but, again, this is what the  
17 committee told the subcommittee to look at.

18           Some of the objections to that from the  
19 landlord standpoint, naturally it's going to require every  
20 landlord in every case, which is about 118,000 a year, to  
21 copy those documents and file those documents with the  
22 case. The other problem from the JP standpoint is the  
23 storage problem. We have a records -- civil cases have to  
24 be kept 10 years, and that's 10 years of this. So we're  
25 talking about a case file now that's going to be like

1 that, it's now going to be about like that. So we've got  
2 a storage and retention of records problem.

3           So we looked into that, and we found a  
4 solution to that, and the solution was found in the State  
5 Archives. They're the ones that dictate through the  
6 Legislature what records you have to keep and how long,  
7 and I find out that there's a Rule 14b I guess I should  
8 have known about that dictates how records are handled,  
9 and the Supreme Court has an order that dictates how  
10 exhibits are handled. So if we treat these documents that  
11 are filed as exhibits, which really they are, they are  
12 evidentiary exhibits, if we treat them as exhibits then  
13 they come under the Supreme Court order and the Supreme  
14 Court can decide how they are treated, and they are not  
15 case papers then like a petition or a citation that would  
16 have to be kept for 10 years.

17           So our solution, which I think is workable,  
18 is that we treat these as exhibits; and that's the last  
19 paragraph of 741, which is (h); and so we would treat them  
20 as exhibits. They would be filed with the case. We would  
21 not require those to be sent out to the -- to the  
22 defendant in the citation any longer. That was going to  
23 be somewhat burdensome, and we have made a change to Rule  
24 739, the last sentence of 739, the citation, which says,  
25 "The citation must also inform the defendant that the



1 information the plaintiff is required to file pursuant to  
2 Rule 741 is on file at the justice's office and is  
3 available for inspection during regular business hours."  
4 So the citation that they're served with is going to tell  
5 them that these documents are at the JP's office, you can  
6 come look at them at any time.

7           And we're telling -- in part (h) of 741  
8 we're telling the justice court that you would have to  
9 keep these documents on file with the case for up to 30  
10 days. Now, if there's an appeal then all of these  
11 documents would be sent to the county court and they would  
12 be out of the judge's possession; but if there's not an  
13 appeal then they would be kept for 30 days, could be given  
14 back to the landlords or destroyed. 30 days is arbitrary.  
15 That could be 40 days, could be 20 days. We wanted to --  
16 there to be enough time to make sure that any appeals --  
17 or it would certainly have to be at least 10 days because  
18 within 10 days the landlord can come back and ask for the  
19 writ of possession.

20           So the minimum time would be 10 days after  
21 judgment, and after that it's sort of arbitrary what  
22 period. 30 days was just what we picked. It could be as  
23 little as 10 or it could be more than that, but we didn't  
24 see much reason to go any longer than 30 days.

25           So in essence you've got this expanded

1 pleading requirement that's going to require all the  
2 documents to be produced at trial to prove the case to be  
3 on file with the court that the defendant can inspect.  
4 That should take care of most of a high percentage of all  
5 of the discovery needs of anybody involved, we think.  
6 There may be some other situations where it's not going to  
7 be enough.

8           Then Rule 743, the last sentence of 743  
9 which says generally no discovery, but there can be some  
10 reasonable discovery at the discretion of the judge which  
11 doesn't unduly delay the trial, etc. So that's the  
12 solution that -- you know, that the subcommittee has come  
13 up with. Rule 741 is going to be burdensome on the  
14 landlords because they're going to have to file all of  
15 this, and they're going to have to file this in cases  
16 where it's not -- they're going to have to make copies and  
17 file it. I think their position is they're going to have  
18 to do it in cases where really it's not going to be needed  
19 for the most part.

20           The JPs would -- it's more case papers and  
21 documents they have to come up with, but compared to other  
22 solutions and schemes that the subcommittee was presented  
23 with, this seems to be the least intrusive and least  
24 burdensome, and that is where we are at this point.

25           CHAIRMAN BABCOCK: Does Rule 76a apply to JP

1 courts?

2 PROFESSOR DORSANEO: It would have to apply  
3 through 523, wouldn't it, because 76a is in the part of  
4 the rule book for district and county level courts and the  
5 JP courts only buy into that by transitioning back?

6 HONORABLE TOM LAWRENCE: Well, years ago I  
7 wrote a letter to this committee asking if someone could  
8 explain or could the committee take up what 523 means,  
9 because I don't know anybody that understands what Rule  
10 523 really means. I mean, in concept it sounds good, but  
11 if you start applying it to particular cases you'll get  
12 arguments on both sides that it applies or doesn't apply.  
13 So I don't know -- I mean, there's nothing in the specific  
14 700 series or 500 series that would seem to apply to this.

15 CHAIRMAN BABCOCK: The only reason I asked  
16 the question is that you may need to -- if you're going to  
17 have this 30-day retention period, you may need to  
18 accommodate a request under 76a if 76a applies to JP  
19 courts.

20 HONORABLE TOM LAWRENCE: Well, but we're not  
21 sealing them.

22 CHAIRMAN BABCOCK: No, but you're getting  
23 rid of them after 30 days.

24 HONORABLE TOM LAWRENCE: Well, why wouldn't  
25 -- does 14b -- does 14b conflict with 76a? 14b says that

1 they can dispose of them after two years, right?

2 CHAIRMAN BABCOCK: Yeah.

3 HONORABLE TOM LAWRENCE: So why couldn't the  
4 Court say, well, if it's two years for that, why can't it  
5 be 30 days for forcible exhibits?

6 CHAIRMAN BABCOCK: The only thing I'm  
7 thinking is if there's a 76a motion that is filed before  
8 the expiration of a 30-day period and then you just kind  
9 of ditch the records and that moots the motion.

10 PROFESSOR CARLSON: You never had 76a?

11 HONORABLE TOM LAWRENCE: No. Never even  
12 heard of one being filed in a forcible.

13 CHAIRMAN BABCOCK: I can't imagine that  
14 there would be, although there was a 76a proceeding that  
15 went to the Dallas court of appeals involving a lease with  
16 Hughes & Luce.

17 PROFESSOR DORSANEO: Well, that restaurant  
18 at the top of the defunct office building in Fort Worth,  
19 those kind of cases.

20 CHAIRMAN BABCOCK: Yeah. We're talking  
21 about 99.9 percent of the cases nobody is going to care  
22 about.

23 MR. GILSTRAP: Chip, you're getting into  
24 that kind of very small but important percentage of  
25 commercial evictions that we've got to accommodate, too;

1 and it was really hard to kind of, you know, make a  
2 provision for those that would also burden --

3 CHAIRMAN BABCOCK: Right.

4 MR. GILSTRAP: -- you know, the 99.9 percent  
5 of residential evictions. It's a real hard balance to  
6 draw.

7 CHAIRMAN BABCOCK: Yeah.

8 HONORABLE TOM LAWRENCE: Well, whatever we  
9 do affects Rule 190 because Rule 190 is the discovery  
10 rule, and we propose to exempt evictions from Rule 190.  
11 Rule 741, which is -- or Rule 739, which is the last  
12 sentence of the citation; Rule 741, which is the provision  
13 for the filing of the documents with the complaint; Rule  
14 743, which is the last sentence of that, deals with the  
15 discovery. Then also we need to talk about Rule 754(c),  
16 which is discovery in county court. Now, obviously the  
17 filing requirements wouldn't matter in county court  
18 because all of the papers filed in the JP court are going  
19 up to county court. Those documents are going to be  
20 there, but we have a -- the subcommittee's recommendation  
21 is that the same language in 743, which is "Discovery is  
22 generally not appropriate. However, the judge may allow  
23 reasonable discovery," that that same language be in  
24 754(c). So I guess another question is, is should the  
25 standard be the same in JP court for discovery as in

1 county court.

2 PROFESSOR DORSANEO: Why would it in county  
3 court? You don't have the same kind of timing issues at  
4 all, do you, in county court?

5 HONORABLE TOM LAWRENCE: Well, I think the  
6 county court judges are supposed to give precedence to  
7 these matters over their docket. I think there is a -- I  
8 think there is an inference that they move these speedily,  
9 needs to be done fairly quickly. I mean, that's in the  
10 rules now.

11 PROFESSOR DORSANEO: To cutoff discovery in  
12 the JP court -- although I don't like that first sentence,  
13 "Generally discovery is inappropriate." I don't think  
14 those kind of sentences are helpful at all, leaving it to  
15 the JP's discretion because of the timing involved and  
16 given the additional complaint thing, that sounds like an  
17 accommodation of the circumstances that makes some sense,  
18 but at the county level it doesn't make any sense to me to  
19 not have the normal county level court rules apply if we  
20 don't have those timing constraints except prudential  
21 ones.

22 HONORABLE TOM LAWRENCE: Well, the only  
23 timing restraints in county court is the language that  
24 says something like -- I mean, there's some timing on the  
25 default judgments, but as far as the timing of the trial

1 itself is 754(a), "The trial of an eviction appeal as well  
2 as all hearings and motions shall be entitled to  
3 precedence in the county court." And that's -- you know,  
4 that's about the only language.

5 PROFESSOR CARLSON: Bill's right. It could  
6 go either way.

7 HONORABLE TOM LAWRENCE: Yeah.

8 MR. GILSTRAP: Yeah, but we've got to  
9 remember that one of the things that -- one of the kind of  
10 general guidelines that we dealt with is we weren't going  
11 to try to seriously disturb the power of the landlord and  
12 the power of the tenant; and, you know, one of the real  
13 issues here is delay; and if you go into the county court  
14 and somehow say, well, we're going to allow discovery,  
15 you're going to stretch those things out a lot; and that's  
16 going to change the ball game a lot.

17 PROFESSOR DORSANEO: It doesn't have to be  
18 double-barreled discovery. The only time I've ever really  
19 been involved in forcible detainer cases are cases that  
20 are commercial cases, small businessmen, cases get  
21 appealed to the county court, and that's really where the  
22 ball game is played, and, you know, those people need to  
23 have discovery. These are not nickel and dime deals.  
24 These are million-dollar deals, and to operate them  
25 without discovery -- and, frankly, just somebody's own

1 home I would feel the same way about it -- is unnecessary,  
2 and if it's unnecessary then why should we do it?

3 CHAIRMAN BABCOCK: Yeah, Fred.

4 MR. FUCHS: My position on this is that for  
5 years we've had discovery both in justice court in  
6 eviction cases and county court at law under Rule 523(a);  
7 and in subsidized housing cases and voucher cases, as I've  
8 explained to the committee before, it is needed both in  
9 nonpayment of rent cases and other cases because of the  
10 rent formula tying into income; and if there's a lawyer  
11 here who can say they had a case that the other side said  
12 was simple and why do you need the discovery and you  
13 didn't find something useful by using discovery, the next  
14 time you come to Austin I will buy you a steak at  
15 Sullivan's on my Legal Services salary. Because I'll bet  
16 you every one of you have had a case where the other side  
17 said something about discovery and that it wasn't needed  
18 and you found a tidbit of information that helped, and I  
19 could go through a long laundry list of cases where that's  
20 the same.

21 And on Rule 743 you could just -- if you  
22 just limited it and said, "The justice has the discretion  
23 to allow reasonable discovery of limited scope which does  
24 not unduly delay the trial" and then put in a comment  
25 "Generally discovery is not appropriate," that would be



1 fine with me. Then the justice could say, "Well, do you  
2 really need discovery here," and that would be -- that  
3 would be I think a contraction of the existing rights, but  
4 it addresses the situation on the question of discovery  
5 that there seems to be some concern about on the parts of  
6 the JP.

7           With respect to the attachment of the  
8 documents, not attaching documents under Rule 741 that are  
9 going to be filed with the court when the trial can be six  
10 days after service and you've got a tenant who's working  
11 or disabled and has transportation problems, if they want  
12 to -- many of whom are nonrepresented, if they want to see  
13 the documents then they have to go miles to the court to  
14 see the documents that are on file that should have been  
15 attached to the petition; and quite honestly, I don't  
16 think it's burdensome to require that a lease and notices  
17 and a payment ledger be copied and attached to the  
18 petition that's served on a defendant who's threatened  
19 with loss of a home. To me it smacks of secrecy to have  
20 documents filed with the court that one side knows about  
21 that the other side doesn't know about.

22           MR. SUSMAN: Can I ask this question of  
23 people who know? Can a landlord provide in a lease that  
24 this is going to be subject to binding arbitration, no  
25 discovery? Is that enforceable? I suspect it is, and if

1 it is, I'm sold on the tenants' side because a landlord  
2 can protect themselves. If he provided in his lease, like  
3 most people do, this is -- any dispute we have here is  
4 subject to arbitration, there will be no discovery. It  
5 will be arbitrated before X within five days, and X's  
6 decision will be binding, and there will be no appeal.  
7 What do you need to protect landlords for?

8 MR. GILSTRAP: Because you still have to  
9 take the arbitration decree and get a JP to evict them.  
10 You need the power of the state to take them out. They  
11 won't leave just with an arbitration decree in their hand.

12 HONORABLE TOM LAWRENCE: I'm not sure you  
13 can --

14 MR. SUSMAN: Well, but if they have set out  
15 a lease with that kind of provision then they don't need  
16 discovery. I mean, to enforce an arbitration award, okay,  
17 you don't need discovery. Right? I mean, what is it,  
18 that the arbitrator is fraudulent? I mean, there are very  
19 limited grounds you can attack an arbitration award. You  
20 certainly are entitled to discovery on the merits.

21 MR. GILSTRAP: You still have to go through  
22 a forcible procedure, and that still does require --  
23 involve delay, sometimes substantial delay. That's been  
24 one of the constant themes the landlords have brought  
25 forward, is that these things get stretched out and

1 delayed.

2 CHAIRMAN BABCOCK: Larry and then Nina.

3 MR. NIEMANN: Steve, I'm the attorney for  
4 the Texas Apartment Association. Yes, it's theoretically  
5 possible to put an arbitration agreement in the lease. It  
6 would be stupid for a landlord to do so, and I have never  
7 seen a residential landlord do so. First of all, do you  
8 know how impossible it would be to get an arbitration in  
9 five days or six days? Secondly, you would have to pay an  
10 arbitrator, and what are you paying them now, \$2,000 a  
11 day? That's just an unworkable situation.

12 Eviction is our only practical solution, and  
13 I don't think a theoretical solution should be a bar to  
14 common sense, practical approach in the courthouse.  
15 Insofar as county court discovery is concerned, I  
16 represent the building owners and managers, the office  
17 building industry in Texas, and I think there needs to be  
18 a balance of speed and discovery of documents in very  
19 complicated cases. The commercial cases often involve  
20 defaults on remodeling, refinishing, very complicated,  
21 sophisticated issues where discovery is necessary.

22 I think the proposal for county court where  
23 reasonable discovery is allowed with limited scope would  
24 work. It does contemplate having to make a motion to the  
25 court, possibly a hearing before the court, to -- on

1 issues of relevancy and scope and the speed with which  
2 documents must be produced. The general language that  
3 Judge Lawrence and Professor Carlson have come up with  
4 will allow production of documents, request for  
5 admissions, interrogatories, and oral depositions as well  
6 as written depositions. All of those are absolutely  
7 needed in commercial cases.

8           Insofar as JP court is concerned, BOMA  
9 doesn't -- BOMA, that's Texas Building Owners and  
10 Managers, doesn't give a hoot about those tools in justice  
11 court because we have the de novo appeal to the county  
12 court, and that's where the battle is going to be fought.

13           Now, let's address residential cases. By  
14 virtue of the rule that you adopted yesterday where we  
15 have to attach the lease, the payment ledgers, the notice  
16 to vacate, you've got 99.9 percent of the information that  
17 Fred would ever need. How about the occasional case in  
18 which Fred wants more? I submit to you in those cases the  
19 normal gentlemenly approach of lawyers is going to produce  
20 what Fred needs.

21           There may be a small handful of cases that  
22 Fred is wanting to get something or see something that he  
23 deems is critical to his case. I think Fred and his  
24 cohorts have the eloquence to file an affidavit with the  
25 court showing good cause for a delay because he hadn't got

1 the information that he's gentlemenly requested, and I  
2 think the courts in their discretion have the ability to  
3 grant delay for that purpose, and I think any residential  
4 landlord is going to produce that information rather than  
5 run the risk of a delay. So I think the remedies are  
6 there because of the attachment you're making; and, by the  
7 way, having to go to the courthouse to see the lease and  
8 the notice to vacate that you've already had doesn't seem  
9 to be a very -- it's putting the penalty on the landlord  
10 rather than the tenant. The tenant lost or misplaced  
11 their lease and their notice to vacate, the landlord  
12 should not have to suffer for that.

13           So you've got the requirement of attachment  
14 of these critical documents. You've got the normal common  
15 sense cooperation between lawyers. You've got the ability  
16 to file an affidavit on one side, and on the other side if  
17 you put -- if you mention discovery in the rules, you're  
18 going to open up the courts and the landlords -- and, by  
19 the way, Judge Lawrence, there's no limitation on  
20 admissions or interrogatories or oral depositions or  
21 anything else. It's just wide open discovery at the  
22 discretion of the court. I would have full faith in Judge  
23 Lawrence's discretion. I do not have that faith in every  
24 JP in Texas, nor would you if you were sitting in my  
25 shoes.

1           If you put discovery in the rules, the pro  
2 se, crazy tenants are going to go to town big time. They  
3 are going to be harassing us, overburdening the courts.  
4 The Lawrence/Carlson rules requires there to be a motion  
5 to the court for the court to allow the discovery. It's  
6 not self-administered, so they are going to be inundated  
7 with more paper work, more hearing. It's going to  
8 inherently slow down the eviction process, and it's going  
9 to change the balance of power that Mr. Gilstrap was  
10 mentioning earlier, and we think that in view of those  
11 arguments it would be slowing down and actually imposing  
12 an impediment to the existing efficiency, judicial  
13 efficiency, and speed of the eviction process in Texas.

14           CHAIRMAN BABCOCK: Nina.

15           MS. CORTELL: I was trying to -- I just have  
16 a question. Why would we serve a complaint without  
17 exhibits when we never serve complaints without exhibits?  
18 I'm just -- is that what's contemplated, we would just  
19 serve the complaint, not the exhibits?

20           HONORABLE TOM LAWRENCE: Well, the complaint  
21 would --

22           MS. CORTELL: We say that it attaches all of  
23 these things in (e)(1) of Rule 741. I mean, in any  
24 lawsuit I'm in I get all the exhibits to the complaint.  
25 Is that what you-all envisioned? It's not -- A, it's not

1 clear. Let me say that.

2 HONORABLE TOM LAWRENCE: (e) (1)?

3 MS. CORTELL: If you look at 741(e)(1),  
4 you're going to attach all these things, and every little  
5 procedure I've always understood is that whatever gets  
6 filed with the court, I get --

7 HONORABLE TOM LAWRENCE: Yeah. That's a  
8 mistake.

9 MS. CORTELL: I'm in favor of it. I don't  
10 want to undo it.

11 HONORABLE TOM LAWRENCE: Well, let me  
12 explain. The original --

13 MS. CORTELL: Yeah.

14 HONORABLE TOM LAWRENCE: -- draft of this  
15 that we presented at the May meeting --

16 MS. CORTELL: Right.

17 HONORABLE TOM LAWRENCE: -- that was in  
18 there. And then we had our March 30th -- or May 30th  
19 meeting with all of the landlords and the tenant -- well,  
20 the tenants weren't there, but the landlords and the JPs.  
21 There was a lot of discussion from the JPs about that, the  
22 burden of, one, that's -- you know, that may be one or two  
23 extra copies that would have to be made that the constable  
24 would have to serve. Some of these are served by  
25 attaching to the door, and you're talking about the

1 citation and maybe a 10-page lease and a couple of pages  
2 of payment records. It just -- it seemed burdensome and  
3 unworkable to attach it to the citation, so that's why we  
4 made that change. That's the reason.

5 MS. CORTELL: Well, my thought is yesterday  
6 what we said was in this very expedited proceeding the  
7 landlord would be entitled not only to achieve a judgment  
8 for rent and eviction, but also for these contractual late  
9 charges and other things; and I thought one of the quid  
10 pro quos for allowing that to occur in this expedited form  
11 was that we would be giving to the tenant, you know, all  
12 of the requisite information so that they could be  
13 prepared in an expedited way for an expedited hearing.

14 So, I mean, and I'm sorry I wasn't here at  
15 the last meeting, but I would be in favor of absolutely  
16 that being served upon the tenant, and that is the only  
17 way it seems to me that there's any type of due process to  
18 this expedited proceeding in which they can be liable not  
19 just for rent but also for these other charges; and this  
20 would, as I understand it, allow them to determine whether  
21 these additional charges were correctly calculated or  
22 whatever.

23 And in terms of Fred's proposed language on  
24 discovery, it seems to me it's the same basic thought and  
25 it adopts Bill's concern about that introductory clause.



1 It doesn't change the meaning of it to say it's up to the  
2 justice of the peace as long as it doesn't unduly delay  
3 and then take the first clause and put it down in the  
4 comment I think would achieve the appropriate objective  
5 and probably do it in a slightly better way.

6 CHAIRMAN BABCOCK: By the way, there is an  
7 e-mail that was sent to me by Molly Mattis Burns.

8 PROFESSOR DORSANEO: She's sending you a lot  
9 of e-mails. You got another one?

10 CHAIRMAN BABCOCK: I got another one. This  
11 is on this subject, which is why I bring it up now, and  
12 we'll make it available to anybody in the committee that's  
13 interested. It's a lengthy e-mail, but basically, "Please  
14 allow this message to convey my extreme objection to the  
15 use of discovery in eviction cases filed in JP courts,"  
16 and it goes on to state a whole bunch of other reasons.

17 PROFESSOR CARLSON: Tom, is it fair to say  
18 that the JPs do not want any discovery?

19 HONORABLE TOM LAWRENCE: I think the JPs'  
20 position is that they would prefer to have no discovery.  
21 Their second position, alternate position, is that they  
22 could live with some limited discovery, but they would  
23 want limitations on it so it doesn't get too burdensome;  
24 and I think it's also fair to say that they want the rule  
25 settled. They don't want to just leave it alone. They

1 would prefer to have some resolution of it.

2           And the fourth point is that I think they  
3 would be very much opposed and the constables would be  
4 very much opposed to serving this with the citation,  
5 primarily because of the problem of attaching it to the  
6 door. I think that's going to be a problem.

7           JUSTICE HECHT: Use roofing nails.

8           HONORABLE TOM LAWRENCE: We're going to need  
9 bigger nails for some of that, and that's really -- it's  
10 not that they want to deprive somebody of getting this,  
11 but it's the physical problem of attaching all of this to  
12 the door in alternate service.

13           MR. GILSTRAP: And, Tom, that's a separate  
14 problem from the retention problem.

15           HONORABLE TOM LAWRENCE: Right.

16           MR. GILSTRAP: And you could say we're going  
17 to attach it to the citation and still throw it away in 30  
18 days, I guess.

19           HONORABLE TOM LAWRENCE: And the JPs are not  
20 going to be too much in favor of this 741 as it is because  
21 this means that they're going to have a lot more documents  
22 they're going to have to keep up with. Somebody is going  
23 to have to go into these files after 30 days or whatever  
24 the period is and discard them or call the landlord, and  
25 bear in mind that there are -- and I don't know the

1 number, but several hundred JPs that are just single JPs  
2 with no clerks, and it's the JP that functions as the  
3 judge and the clerk. So they're going to be -- you know,  
4 they're not totally happy with this as it is written.

5 PROFESSOR DORSANEO: Well, they have to read  
6 this stuff.

7 CHAIRMAN BABCOCK: Hang on. Mary.

8 MS. SPECTOR: I think the burdensomeness  
9 that's been articulated on the landlord and the constable  
10 is overstated. We're talking about the standard lease is  
11 double-sided six to eight pages. It may require that the  
12 lease be put on smaller paper that would help the files at  
13 the courthouse, but to file it with the court and not  
14 provide the tenant the simultaneous opportunity to look at  
15 it does raise the concerns that Nina said.

16 The tenant in most cases, if we're talking  
17 four to seven, four to six days to look at the documents,  
18 if they've had the opportunity to contact a lawyer, means  
19 taking off work, going to the courthouse, and whose hours  
20 may not be the same as the hours the tenant is working.  
21 Then the tenant is going to have to go back on appearance  
22 day. The burden on the landlord to copy six more pages  
23 and attach it to the complaint, excuse me, seems to me  
24 minimal in contrast to the burden on the tenant for not  
25 receiving the information.

1                   CHAIRMAN BABCOCK: Well, Larry's point,  
2 though, is that these documents are already in the  
3 possession of the tenant anyway, and I know that no lawyer  
4 in this room would rely upon documents that got filed with  
5 the court that they hadn't physically looked at, but  
6 because it might be different, the lease that the landlord  
7 is relying on may be different from the lease you have in  
8 your possession, so that is a problem, but you can remedy  
9 that by going down to the courthouse and looking at it.

10                   MS. SPECTOR: Well, often it's been my  
11 experience the tenant does not have the lease. The tenant  
12 may have been given at the time of signing a copy of the  
13 signature page alone, and it may not have the information  
14 in the subsidized housing contract that relates to the  
15 agreement between the landlord and the housing authority.

16                   Additionally, the tenant is not going to  
17 have the ledger sheets to indicate what the late charges  
18 are and how those have been allocated, and despite  
19 gentlemenly or ladylike requests to landlords, it's not  
20 always -- there's not always a lawyer on the other side,  
21 and so a request to a manager is often met with a hung up  
22 phone, and it's very difficult to obtain that information  
23 in a ladylike fashion otherwise.

24                   CHAIRMAN BABCOCK: Steve.

25                   MR. SUSMAN: I mean, I guess in most cases

1 the tenant has the information or should have their own  
2 lease, so it seems extra work just to attach all this  
3 paper. Why couldn't you do like -- have a little form  
4 that's on the front of the petition when it's served that  
5 says, "If you want the following documents, check here and  
6 fax," you know, request it. I mean, it couldn't be done  
7 by request and then the other side has an obligation to  
8 provide it?

9 PROFESSOR CARLSON: The time frame.

10 MR. SUSMAN: I mean, no one -- I mean,  
11 listen, you can even be with the largest law firm in the  
12 world and you don't want to go to the courthouse and look  
13 for documents. That's ridiculous. To require to have  
14 documents filed at the courthouse and make someone go look  
15 for them is no discovery at all. I would have no idea  
16 where to begin looking or even where to send anyone to  
17 look. I mean, you know, it's a problem to go look for  
18 documents in the courthouse.

19 I mean, why can't it be worked out so that  
20 if you need the documents you can send a fax to a certain  
21 -- you know, you can send a fax to the lawyer, whoever  
22 filed the petition. There's got to be a number, and they  
23 have a requirement in 24 hours to fax you back the  
24 documents, period. If they don't then that's ground for  
25 some kind of continuance.

1 MS. EADS: Some of them don't have  
2 refrigerators, let alone fax machines.

3 PROFESSOR DORSANEO: Why would you file a  
4 lawsuit in any circumstance where you wouldn't attach a  
5 six-page contract? I can't imagine doing that. I can't  
6 imagine not even from the landlord's standpoint. I mean,  
7 they should look at their own lease and their own  
8 documents before filing the lawsuit. Otherwise, you know,  
9 otherwise -- and the JP should read this stuff, too. I  
10 mean, that's just the way it should work. You know, but  
11 not just "You're out of here because we're fast."

12 MR. NIEMANN: I think maybe some members of  
13 the committee overlook the fact that 90 percent of these  
14 cases are filed by laypersons, not by lawyers, and that  
15 not every landlord has a fax and not every tenant has a  
16 fax, and it's easy for us --

17 CHAIRMAN BABCOCK: Yeah, but they have  
18 e-mail, right?

19 MS. EADS: Yeah, and BlackBerries.

20 MR. NIEMANN: Some of our people don't have  
21 telephones, much less fax machines.

22 MR. SUSMAN: Nevertheless, they have the  
23 ability to go to the courthouse and find the documents and  
24 understand them and get ready for a trial. That doesn't  
25 make any sense to me.

1 CHAIRMAN BABCOCK: Carl.

2 MR. HAMILTON: What is the current practice  
3 in this area that we're trying to fix?

4 HONORABLE TOM LAWRENCE: Well, the current  
5 practice is that there are two counties that Fred has  
6 testified about, Travis and Williamson County, that he has  
7 said that he pretty well gets the discovery he needs by  
8 making a request, and he gets the discovery. The practice  
9 in -- as far as I'm aware and as far as I'm able to  
10 ascertain, the practice in most of the other 252 counties  
11 in Texas is that there is no discovery in evictions  
12 because the time limits don't work, and so there is no  
13 Level 1 discovery control plan. There is no mechanism for  
14 timing. It doesn't fit.

15 Now, having said that there is no discovery,  
16 I think that unofficially there is a practice generally  
17 where if someone makes a request the judge typically will  
18 reset the trial and ask that that documentation be  
19 provided, and it's done informally, not in accordance with  
20 any rule. That's just the practice, and what we're trying  
21 to fix is the inconsistent application of discovery. I  
22 think the committee either needs to take the position  
23 there is no discovery, there is some discovery, but I  
24 don't think we can leave this alone because it's different  
25 depending on what court you go in, so nobody knows what's

1 going to be allowed until they actually get there and make  
2 the request. So I think we need to have some standard,  
3 whatever that is.

4 CHAIRMAN BABCOCK: Yeah, but the standard  
5 you propose doesn't change much of the status quo because  
6 the standard of what you propose is that, "Hey, go into  
7 court and ask the judge, and maybe he will give it to you,  
8 maybe he won't."

9 HONORABLE TOM LAWRENCE: I think now some  
10 judges take the position that there's no discovery because  
11 Rule 523 does not apply for discovery cases, and they say  
12 there is no discovery, so I think -- I think we're taking  
13 a small step toward trying to clarify that. This was a  
14 very difficult issue. I mean, we spent a lot of time  
15 wrestling with this.

16 Let me respond to one thing that Steve said  
17 about the problem of looking for the records. Generally  
18 these JP officers are in outlying courthouses, and you  
19 walk into a -- usually a small building or it may just be  
20 the courthouse itself and walk into the clerk. So it's  
21 not like wandering around in downtown Dallas or Houston  
22 trying to figure out which office you go to. So it's not  
23 really quite that difficult to locate it, but, anyway,  
24 that's -- I mean, we're trying to figure some way to allow  
25 some discovery where it's needed but not provide some huge



1 framework of discovery in most of the cases where there is  
2 no need for it.

3 CHAIRMAN BABCOCK: So what you're saying is  
4 Fred is accommodated well because in the areas where he  
5 practices, but if he waltzes down to Houston he's going to  
6 get the door slammed in his face because the JPs down  
7 there say, "No discovery."

8 HONORABLE TOM LAWRENCE: Well, that's right.  
9 Now, I'm not saying that individual judges throughout the  
10 state don't say, "Well, this seems reasonable. I'm going  
11 to reset this case and you need to provide that." I mean,  
12 that may happen on a case-by-case basis, but it's not  
13 going to happen uniformly. It's going to depend on that  
14 judge, and there's no framework really to do it. The  
15 judge is kind of going in uncharted territory by doing  
16 anything.

17 CHAIRMAN BABCOCK: Elaine.

18 PROFESSOR CARLSON: I think it's fair to say  
19 currently most of these cases are tried pro se. The first  
20 time the tenants see the documents are at the trial, trial  
21 by ambush. I've sat in on Judge Lawrence's FED docket.  
22 Most cases that I observed -- and it may have just been  
23 that day -- most tenants understand they didn't pay,  
24 that's the issue, that's it. Because Judge Lawrence asked  
25 them, "Do you understand that these are the allegations,

1 that you haven't paid this rent?"

2 "Yes."

3 "Do you have any response?"

4 "No."

5 I mean, really in most nonpayment of rent  
6 cases it's that simple, but that's not to say there aren't  
7 cases where discovery is appropriate.

8 MR. FUCHS: And those are the ones I'm  
9 really concerned about setting a standard -- I guess in  
10 most automobile cases, you know, you can say, "We know  
11 who's at fault. Why do we need any discovery? It's just  
12 going to be a money judgment for someone."

13 CHAIRMAN BABCOCK: Linda.

14 MS. EADS: It seems to me that the two  
15 issues are linked in that if we require the tenant to be  
16 served with the attachments that are a part of the  
17 complaint then that's going to be most of the discovery.  
18 I mean, that's going to be it, and it's going to be the  
19 unusual case where more is required. So taking a position  
20 where discovery is available when the judge thinks it's  
21 required will solve most problems; and this idea that  
22 there will be delay, if someone comes in and asks for  
23 discovery from a JP and attached to the complaint is the  
24 lease and the nonpayment record, the JP is going to say  
25 "Why do you need discovery?" And it would be very obvious

1 to the JP that this was just a motion to delay.

2           And, also, to me, it gives the idea that  
3 these tenants are enormously sophisticated, that they are  
4 now going to manipulate the discovery system of the courts  
5 when I think that's probably not true. In the vast  
6 majority of the cases they come in, they say they didn't  
7 pay the rent; and so I think the two are linked; and I  
8 think making -- requiring the attachment, although I  
9 understand that the sheriffs and the servers will not like  
10 it, I think most of those will be small, can be nailed to  
11 the door, and it just seems to me to be, as Steve said,  
12 most of us expect that anyway in the regular kind of  
13 practice, and I really think we should attempt that and  
14 see how it goes as a logical normal procedure.

15           CHAIRMAN BABCOCK: Carl.

16           MR. HAMILTON: Is this discovery to be  
17 requested, one that has to be requested by motion and  
18 notice to the other side in the hearing, or is it just an  
19 ex parte hearing before the judge?

20           HONORABLE TOM LAWRENCE: We talked about the  
21 framework for doing that, and that was one of the problems  
22 with this, and we left that -- we left that unanswered  
23 because to try to come up with some mechanism to handle  
24 all of these that would fit every situation just seemed --  
25 we couldn't come up with a way to do that, so we left it

1 at basically the same standard as administered now in the  
2 small claims court, which is that you can make an oral  
3 motion or you can make a written motion.

4 PROFESSOR DORSANEO: None of that's  
5 explained. It just says, "Generally discovery shall not  
6 be permitted," but maybe you can get some if you ask. So  
7 all of this discussion about motions is not something that  
8 you could find out about by reading the rule book.

9 PROFESSOR CARLSON: You could add the word  
10 "on motion." The judge has the discretion on motion to  
11 allow discovery.

12 CHAIRMAN BABCOCK: Richard.

13 MR. ORSINGER: You know, the last landlord  
14 dispute I had was so long ago I can barely remember it,  
15 but I represented an old surgeon who was in a dispute with  
16 his landlord because of past due charges for utilities on  
17 the commercial building where the office was located.  
18 This is the same procedure that would apply to evict an  
19 oral surgeon for the nonpayment of past due charges,  
20 right?

21 PROFESSOR CARLSON: Uh-huh.

22 MR. ORSINGER: Okay.

23 CHAIRMAN BABCOCK: Did you say "an oral  
24 surgeon"?

25 MR. ORSINGER: An oral surgeon, yes.

1 PROFESSOR DORSANEO: Dentist.

2 MR. ORSINGER: Yeah. He may have been an  
3 MD, but at any rate, he was a sophisticated businessman or  
4 as good as a doctor can get, but the point was we had this  
5 enormous dispute about past due charges that had been  
6 retained for five years and then some enormous bill was  
7 demanded to be paid immediately; and, anyway, if this  
8 applies to commercial evictions of going businesses then  
9 there are some cases where discovery might be appropriate  
10 and --

11 MR. SUSMAN: He says that it doesn't matter.  
12 That guy goes to county court anyway.

13 MR. NIEMANN: That's right.

14 MR. SUSMAN: The justice court is a throw  
15 away.

16 MR. ORSINGER: Okay. All right.

17 MR. SUSMAN: He's saying in county court  
18 your full rights are preserved.

19 MR. ORSINGER: And then you appeal to county  
20 court where you get discovery?

21 MR. SUSMAN: Yeah. Get it all over again.

22 MS. CORTELL: Except right here we have a  
23 proposed rule that's comparable for the county court.

24 CHAIRMAN BABCOCK: We've got to deal with  
25 that in a minute. Larry.

1 MR. NIEMANN: Many of you are practitioners  
2 in the county and district court, and you would be  
3 absolutely appalled at the idea of an ex parte discovery  
4 order without any opportunity for input. That is what is  
5 going to happen here, or if you contemplate motions then  
6 the other side is going to have to be notified of the  
7 motion, there's going to have to be a hearing set so they  
8 can have input, and if you're telling me that's not going  
9 to delay the eviction process, I respectfully submit that  
10 you're wrong.

11 99.9 percent of the information that the  
12 tenant needs is going to be -- either already has with the  
13 lease and the notice to vacate or will be attached under  
14 Rule 741, and the tail is going to be wagging the dog here  
15 if we just open it, and nobody has talked about  
16 depositions, nobody has talked about interrogatories,  
17 nobody has talked about admissions, and that's wide open  
18 in the Carlson/Lawrence proposal, discretion to allow all  
19 of those.

20 CHAIRMAN BABCOCK: Okay. It seems to me  
21 that here's the issues we have. We have three main issues  
22 and then a subsidiary issue depending on what we do on one  
23 of the main issues. We have the issue on 741 of whether  
24 we're going to require certain materials to be attached to  
25 the citation, and then if we do whether that's going to be

1 served on the party opponent. That's one set of issues  
2 under 741.

3 Under 743 we have the issue of whether we're  
4 going to put language in here regarding discovery, and  
5 then under 754(c) we have to decide whether we're going to  
6 put the comparable language into the county court  
7 proceeding. If we permit attached and served under 741  
8 then we've got a subsidiary issue under 739, which is what  
9 the citation is going to have on it. So let's see if we  
10 can focus our discussion in that fashion and take up 741  
11 first. I would propose that we vote on whether or not we  
12 should require these materials to be attached to the  
13 petition for the complaint.

14 MS. CORTELL: Can I just ask one question?

15 MR. SUSMAN: You mean could be filed  
16 somewhere, not to necessarily be served?

17 CHAIRMAN BABCOCK: Service is the second  
18 issue. The first issue is whether or not they're going to  
19 attach it at all.

20 MR. ORSINGER: If we don't attach them and  
21 don't serve them and don't have discovery --

22 MR. SUSMAN: I mean, this is --

23 CHAIRMAN BABCOCK: Well, I think -- this is  
24 a new one to me, too, and not to reveal my vote, if I were  
25 voting, but I would vote that if we're going to require

1 them to attach them then they have to serve them, but the  
2 first issue, the threshold issue, is whether we're going  
3 to require them to attach them at all, it seems to me.

4 HONORABLE TOM LAWRENCE: There's actually a  
5 little more to it, because the complaint is going to have  
6 to state the specific cause of action, which is -- I don't  
7 think is controverted too much and then it's going to have  
8 to attach the documents that support that.

9 CHAIRMAN BABCOCK: But you're requiring  
10 basically disclosure, is what this is.

11 PROFESSOR CARLSON: Uh-huh.

12 HONORABLE TOM LAWRENCE: Sort of.

13 CHAIRMAN BABCOCK: So we need to decide  
14 whether or not we think that's a good idea or not.

15 MR. ORSINGER: Can I also add that since so  
16 many of the plaintiffs are pro se apparently that there  
17 may be some confusion at the time of trial if the  
18 plaintiff doesn't have the necessary paper work and then  
19 the JP is going to have to either deny the relief or reset  
20 the hearing. If we make them attach it to the complaint  
21 then the JP just looks in his --

22 CHAIRMAN BABCOCK: So you would attach it?

23 MR. ORSINGER: I think you ought to attach  
24 it -- to help the JP, you ought to attach it to original  
25 pleading.



1 CHAIRMAN BABCOCK: Steve.

2 MR. SUSMAN: My question again to the  
3 practitioners is I'm hearing you say about 90 percent,  
4 maybe 80 percent of the cases these attachments are -- I  
5 mean, nobody even wants them because a tenant comes in,  
6 says, "What's wrong here? I didn't pay the rent? Oh,  
7 yeah. Okay. Bye." So why all this paper work and all  
8 this make people make all the copies, file them somewhere,  
9 maybe even serve them, if in 90 percent of the cases in JP  
10 court it's just a case of someone didn't pay rent, and  
11 they know they didn't pay the rent and the minute the  
12 judge says, you know, "Did you pay rent?"

13 "No. Goodbye."

14 PROFESSOR DORSANEO: The world is always  
15 more complicated than that.

16 MR. SUSMAN: Well, I know that we've got to  
17 deal with the other 10 percent of the cases or the other  
18 15 percent, but why create all the paper work in 80  
19 percent of -- or whatever the number is.

20 HONORABLE TOM LAWRENCE: Well, the documents  
21 should be presented at trial to justify the judgment. I  
22 mean, the judge needs to look at the lease agreement, he  
23 needs to look at the payment records. It's got to be  
24 proven up even if it's a default.

25 MR. SUSMAN: Oh, that answers that question.

1 You got me.

2 HONORABLE TOM LAWRENCE: So we're really  
3 asking that the documents that would be presented at trial  
4 of the case be attached to the petition earlier, so the  
5 burden on the landlords is going to be that they're going  
6 to have to make copies and produce that, and the burden is  
7 going to be on the constable -- the JPs to retain it, keep  
8 up with it, and the constables to serve it if we vote to  
9 do that.

10 CHAIRMAN BABCOCK: Bill, are you stretching  
11 or you've got you're hand up?

12 MR. EDWARDS: I'm just stretching.

13 CHAIRMAN BABCOCK: Got any thoughts?

14 MR. EDWARDS: On this?

15 CHAIRMAN BABCOCK: Yeah.

16 MR. EDWARDS: That the document is going to  
17 have to be presented at some point. I see no problem with  
18 getting it filed with the complaint.

19 MR. SUSMAN: I agree.

20 MR. EDWARDS: That gives it a --

21 CHAIRMAN BABCOCK: Okay. Any other comments  
22 on this before we vote? Okay. The first vote is whether  
23 or not under 741 we should require these materials to be  
24 attached to the complaint. We're going to deal with  
25 service in a minute.

1 MR. GILSTRAP: We're talking about attaching  
2 to the complaint right now.

3 CHAIRMAN BABCOCK: Right. We're going to  
4 deal with service in a minute. Ralph.

5 MR. DUGGINS: Are you talking about the  
6 materials under (e)(1)?

7 CHAIRMAN BABCOCK: Right.

8 MR. SUSMAN: This is the concept vote.

9 CHAIRMAN BABCOCK: Correct. This is the  
10 concept, so --

11 MR. DUGGINS: Well, I think that my only  
12 concern is that last sentence, "Any relevant written  
13 payment records." That could be read a lot of different  
14 ways. I'm a little concerned about that one sentence.

15 CHAIRMAN BABCOCK: Yeah. We will deal with  
16 the specific language in a minute. Relevance is in the  
17 eyes of the beholder, I suspect, but anyway, the idea is  
18 whether or not we're going to --

19 MR. DUGGINS: The concept.

20 CHAIRMAN BABCOCK: -- require something to be  
21 attached and then we will get to the details. So  
22 everybody in favor of the concept of 741 attaching the  
23 materials that ultimately are going to have to be  
24 presented at trial, raise your hand.

25 All opposed? The vote is 14 to nothing, the

1 Chair not voting, in favor of that.

2 Now, second question, are we going to  
3 require the materials that are attached to the petition to  
4 be served on the party opponent? Any discussion on that?  
5 We talked about it a lot, so any further discussion?  
6 Steve?

7 MR. SUSMAN: Again, my argument there is  
8 it's unneeded in 90 percent or 80 percent of the cases, so  
9 why require it? It's just a lot of paper work.

10 MR. ORSINGER: Can I ask this? It may not  
11 make a difference, but could you break down the vote  
12 between the lease and the payment records, because I'm  
13 less inclined to require service of the lease than I am  
14 payment records that we know the tenant has never seen?  
15 Do you not want to do that?

16 CHAIRMAN BABCOCK: No.

17 MR. MEADOWS: You should have done that  
18 yesterday when you had the Chair, Richard.

19 CHAIRMAN BABCOCK: Yeah. You had the Chair  
20 for three minutes yesterday.

21 PROFESSOR DORSANEO: He's having delusions  
22 now.

23 CHAIRMAN BABCOCK: Nina.

24 MS. CORTELL: I'm just appalled at the  
25 concept that in all of our other litigation we require

1 service of a complaint but that we would in this class of  
2 litigation where you have people under particularly  
3 difficult circumstances and say, "No, we're going to carve  
4 you out and not give you what we give every other litigant  
5 in our process." It may be more paper work, but it's  
6 certainly wrong not to provide it. I can't imagine  
7 carving them out.

8 CHAIRMAN BABCOCK: Okay. Bill.

9 MR. EDWARDS: Is there any -- I've heard  
10 that in big counties there's problems, in little counties  
11 there isn't problems with this service deal. Is there  
12 anything to be said for a bracket deal, counties in excess  
13 of X thousand, they have to serve them; counties less than  
14 X thousand, you don't have to serve them?

15 CHAIRMAN BABCOCK: Any enthusiasm for that?

16 HONORABLE TOM LAWRENCE: Well, I don't know  
17 that this is a --

18 MR. EDWARDS: I just heard that.

19 HONORABLE TOM LAWRENCE: -- problem that's  
20 related to population.

21 MR. EDWARDS: I heard it was a problem with  
22 big courthouses, somebody said. I don't know whether it  
23 was or wasn't. It's just a question, not a suggestion.

24 HONORABLE TOM LAWRENCE: I mean, the urban  
25 counties are going to have JPs that handle, you know, one

1 to 5,000 cases, eviction cases, a year; and that's not  
2 going to be the case in a lot of the smaller counties.  
3 They're not going to have the volume, but I don't know  
4 that this is going to -- I mean --

5 MR. EDWARDS: We're talking about the ease  
6 with which the papers can be retrieved by the person  
7 served if they're not served with the citation. That's  
8 the issue I was addressing.

9 HONORABLE TOM LAWRENCE: Well, most -- you  
10 know, except for the courthouses, there's always a  
11 courthouse in every county that is downtown or near  
12 downtown for a JP; but, otherwise, all of the other  
13 courthouses are in the suburbs in smaller buildings. You  
14 walk in the door, and it's -- you've got the JP court  
15 right there, and you walk in, and you ask the clerk. In  
16 some cases it's just one big office. So I don't think  
17 getting the documents, except in the -- you know, the  
18 precinct that happens to be downtown is going to be a big  
19 problem, and that's only going to be a problem in the big  
20 counties, finding the courthouse and finding the  
21 documents.

22 CHAIRMAN BABCOCK: Anything more on the  
23 issue of service of what we're going to require to be  
24 attached under 741? Everybody who is in favor of serving  
25 the documents that we are requiring to be attached

1 pursuant to Rule 741 raise your hand.

2 All those opposed? That carries by a vote  
3 of 10 to 3, the Chair not voting. Okay. That is going to  
4 necessarily require, Judge and Elaine, a change in 739  
5 because you have provided otherwise in 739.

6 Let's go to 743, which is the issue of the  
7 discovery, limited discovery, in JP court as distinguished  
8 from county court; and the language that is proposed is  
9 "Generally discovery is not appropriate in eviction  
10 actions. However, the justice has the discretion to allow  
11 reasonable discovery of a limited scope which does not  
12 unduly delay the trial." Fred suggested some  
13 wordsmithing, but let's just talk about first about this  
14 concept, without regard to whether or not we're going to  
15 wordsmith this a little bit and put something in a comment  
16 or whatever. Carl.

17 MR. HAMILTON: Is it generally true from  
18 your perspective, Fred, that the cases that require  
19 discovery go to the county court at law anyway?

20 MR. FUCHS: No. That's not necessarily true  
21 at all. If you can get a favorable verdict or judgment in  
22 justice court, that oftentimes settles the case. If there  
23 is an appeal then it's likely to be settled before there's  
24 a -- the odds are high it's likely to be settled before  
25 there is a retrial. There are some appeals, but that

1 justice court judgment is important, there's no question  
2 about it, in parties re-evaluating their positions.

3 CHAIRMAN BABCOCK: Okay. Judge.

4 HONORABLE TOM LAWRENCE: I don't know that I  
5 agree that the JP court is a throw away necessarily,  
6 because when I have a major mall that's trying to evict an  
7 anchor tenant, which I've had, you know, the four lawyers  
8 on each side that make me try that thing for half a day  
9 don't seem to treat it like a throw away.

10 MR. SUSMAN: Because they're getting paid by  
11 the hour.

12 HONORABLE TOM LAWRENCE: And not all  
13 commercial cases are appealed.

14 CHAIRMAN BABCOCK: Yeah.

15 HONORABLE TOM LAWRENCE: So I don't know  
16 that I agree it's a throw away at the JP court level.

17 CHAIRMAN BABCOCK: Nobody was casting any  
18 aspersions, I'm sure. Okay. Any other comments about  
19 743? And we can talk about whether we're going to  
20 manipulate the language a little bit, but this is the  
21 concept. So everybody in favor of having language like  
22 this in 743 raise your hand.

23 All those opposed? By a vote of 13 to 0,  
24 the Chair not voting, that passes. Now let's go to  
25 754(c).



1                   PROFESSOR DORSANEO: "Language like that"  
2 meant generally --

3                   CHAIRMAN BABCOCK: We're going to get back  
4 to the language in a minute. We're going to take our  
5 concept votes here first.

6                   MR. HAMILTON: 750 what?

7                   CHAIRMAN BABCOCK: 754(c), which is the  
8 exact language being injected now into the county court  
9 scheme. We've had some discussion on this. Bill thinks  
10 that that's not appropriate. Nobody else -- neither do I,  
11 by the way. Anybody else? Richard.

12                  MR. ORSINGER: I would be concerned if we  
13 made discovery optional in the JP on the county court  
14 level, which is a court of record, and it would presumably  
15 be the court of appeals on the outcome of this hearing?

16                  CHAIRMAN BABCOCK: Right.

17                  MR. ORSINGER: For the commercial tenants  
18 who actually are serious about trying to keep their doors  
19 open, I don't think discovery should be discretionary with  
20 the judge.

21                  CHAIRMAN BABCOCK: Yeah. Anybody else?

22                  MR. GILSTRAP: This is kind of a one size  
23 fits all problem. I would certainly agree in a commercial  
24 setting you ought to be able to go in and get discovery in  
25 the county court. At the same time, you know, and maybe

1 this -- maybe I don't have a quite correct understanding  
2 of this, but my impression is that if you give discovery  
3 in every eviction case, there is an abuse that's possible  
4 in the county court in, you know, your run of the mill  
5 failure to pay rent apartment case; and so, you know, you  
6 know, that's where we really have the one size fits all  
7 problem. It seems to me the only way to deal with that is  
8 through the discretion of the court. Otherwise, you're  
9 going to have to have almost two proceedings, and how do  
10 you distinguish between the two?

11                   CHAIRMAN BABCOCK: Well, the thing is,  
12 though, that Judge Lawrence identified an ambiguity or a  
13 variation of practice in the JP courts regarding discovery  
14 because there wasn't clear direction in the rule as to  
15 whether discovery was or was not permitted. There is no  
16 such ambiguity with respect to county court. The  
17 discovery rules apply, and things have been moving along  
18 quite nicely as far as we can tell. I mean, there's no  
19 clamoring of county court judges saying, "We need  
20 clarification on this," that the system is amuck.

21                   Now, Larry, is county court a problem? I  
22 mean, is that where you're seeing abuses by tenants just  
23 dragging things out by the discovery process? I mean, is  
24 that an issue for you?

25                   MR. NIEMANN: No. It's really not.

1 MR. GILSTRAP: Okay.

2 MR. NIEMANN: We are having difficulty in  
3 one area; and that is because the county courts, county  
4 court judges, unfortunately look down upon eviction cases  
5 as being second class citizens on their docket. We have a  
6 great deal of difficulty in enforcing the Court's mandate  
7 that they take precedence in county court, and there needs  
8 to be a balance between precedence and discovery, and if  
9 there is a way you could get the attention of the county  
10 court judges to -- with more language about precedent, it  
11 would help us a lot on discovery.

12 MR. GILSTRAP: That certainly answers my  
13 concern about the delay issue.

14 CHAIRMAN BABCOCK: Yeah. Okay. Any other  
15 discussion about this? All right. Those in favor of  
16 including the subcommittee's language in 754(c) which  
17 parallels the language we just voted on in the JP court.  
18 If you're in favor of that --

19 HONORABLE TOM LAWRENCE: Okay. Let me ask  
20 you, if you say you're not in favor of it then is there  
21 going to be something to substitute or are we just going  
22 to leave that silent and assume they are going to apply  
23 the standard trial rules?

24 CHAIRMAN BABCOCK: That's the intent of my  
25 vote.

1 MR. ORSINGER: But this makes discovery  
2 discretionary, doesn't it?

3 CHAIRMAN BABCOCK: Well, you're going to  
4 vote against it.

5 MR. ORSINGER: Okay. That needs to be  
6 clear. If you want guaranteed discovery, you've got to  
7 vote "no."

8 (Justice Hecht gesturing.)

9 MR. EDWARDS: Can we put the camera over  
10 here, please?

11 MR. NIEMANN: What you're saying is you can  
12 trust the JPs, but you can't trust the county court  
13 judges.

14 CHAIRMAN BABCOCK: All right. Those in  
15 favor of the subcommittee's proposal on 754(c) --

16 HONORABLE TOM LAWRENCE: I'm sorry. I want  
17 to make sure I understand. So if you vote "no" for  
18 this --

19 CHAIRMAN BABCOCK: This is coming out.

20 HONORABLE TOM LAWRENCE: -- then actually  
21 it's going to be presumed that the county court judges  
22 would apply the normal discovery for a trial in county  
23 court to evictions.

24 MS. CORTELL: That's right.

25 CHAIRMAN BABCOCK: Just as they have been

1 for years. If you're in favor of 754(c) as the  
2 subcommittee has proposed, raise your hand. The  
3 subcommittee.

4 MR. GILSTRAP: Solidarity of the  
5 subcommittee.

6 CHAIRMAN BABCOCK: Those opposed? That  
7 fails by a vote of 11 to 3, 3 in favor, 11 against, the  
8 Chair not voting. The subcommittee speaks, but is  
9 overruled.

10 Okay. Those are the major things we've got  
11 to talk about conceptually. 739 is an easy word change  
12 that the subcommittee can work on, given the direction.  
13 741, however, Ralph has some comments about the specific  
14 language given our vote; and so, Ralph, why don't you turn  
15 to that and tell us what your concerns are about 741?

16 MR. DUGGINS: Well, my concern is that we  
17 keep it simple, and I believe that last sentence in  
18 particular --

19 CHAIRMAN BABCOCK: (e) (1)?

20 MR. DUGGINS: Yes, (e) (1), the last sentence  
21 about the relevant written payment records can mean  
22 different things to different people.

23 CHAIRMAN BABCOCK: Do you have a proposed  
24 change?

25 MR. DUGGINS: No, I don't.

1           PROFESSOR CARLSON: I think we can just take  
2 out "relevant" everywhere you see it.

3           MR. SUSMAN: Where?

4           CHAIRMAN BABCOCK: We're on (e)(1) right  
5 now, 741(e)(1).

6           MR. EDWARDS: Maybe say "copies of the  
7 relevant sections of any written documents upon which the  
8 plaintiff relies or will rely," something like that.

9           MR. DUGGINS: Why couldn't it just be attach  
10 the lease and not have all the language about --

11           MR. EDWARDS: There may be other stuff.  
12 There may be other stuff.

13           PROFESSOR CARLSON: We were told, Ralph,  
14 that a lot of commercial leases are huge, so, I mean, that  
15 could be a 50-page document.

16           MR. EDWARDS: I'm messing with one now that  
17 the dispute has to do with offsets against money out of  
18 pocket for construction on a long-term lease. The lease  
19 payment is based in part on a percentage of gross sales  
20 after gross sales reach a certain level, and it's a  
21 long-term lease, and my client has got her life savings in  
22 supporting a disabled husband with a public entity, so,  
23 you know --

24           CHAIRMAN BABCOCK: I hear the beginnings of  
25 a jury argument.

1 MR. EDWARDS: That's not a jury argument. I  
2 don't plan on trying it. Somebody else will do that.

3 MR. ORSINGER: I wish I had brought my  
4 violin.

5 CHAIRMAN BABCOCK: Richard.

6 MR. ORSINGER: If we take the the word  
7 "relevant" out of there, doesn't that fix the problem,  
8 because then it's not discretion, it's just any written  
9 record? And I think -- I may be wrong, but I would assume  
10 that some of these disputes are going to have to do with  
11 late charges, in which event you need to know when the  
12 payment was made.

13 MR. JACKSON: Or cash charges.

14 MR. EDWARDS: And my point was there are a  
15 lot of things that aren't just in the lease.

16 MR. ORSINGER: Well, you're raising the  
17 issue of there may be issues besides payment.

18 MR. EDWARDS: Well, and that's what we're  
19 talking about when we get down to (5).

20 MR. ORSINGER: Well, written payment records  
21 isn't going to help your case.

22 MR. EDWARDS: No. On (5) is what he's  
23 talking about, and that's where it's based on something  
24 other than (1), (2), (3), and (4).

25 MR. ORSINGER: On (e) (1)?

1                   MR. SUSMAN: How difficult would it be -- I  
2 mean, I don't understand. (1), (2), (3), (4), and (5)  
3 sounds just repetitive to me. I mean, how difficult would  
4 it be here just to say you must attach relevant documents,  
5 period, whether it be a lease or something else, it could  
6 be relevant if it forms the basis of your complaint or  
7 not. It may be correspondence with the tenant about some  
8 breach or cure something, get something fixed, may give  
9 you 10 days to, you know, fix something. I mean, relevant  
10 documents in 90 percent of the cases are going to be just  
11 nothing, the lease and checks or something like that. So,  
12 I mean, it's only in these big commercial cases where the  
13 relevant documents are going to be more bulky, and they  
14 should be provided, right, probably?

15                   HONORABLE TOM LAWRENCE: Well, we --

16                   MR. SUSMAN: Why not just say "relevant  
17 documents"?

18                   PROFESSOR CARLSON: "Relevant" is not a good  
19 choice of words. Sorry, Tom. For the pro se person they  
20 have no idea what that means, so it would be better to  
21 specify the lease and any copy of documents upon which you  
22 rely to establish your case or establish the grounds of  
23 the complaint.

24                   MR. SUSMAN: Why couldn't you say it for all  
25 of these? I mean, the lease --



1 PROFESSOR CARLSON: Could be.

2 MR. SUSMAN: You know --

3 MR. HAMILTON: Is it the pro se people that  
4 are generally going to be filing these?

5 PROFESSOR CARLSON: Some of them are. I  
6 mean, some of them are like a guy who owns a house,  
7 townhouse, not a huge landlord.

8 HONORABLE TOM LAWRENCE: The reason (2),  
9 (3), and (4) weren't combined, I guess, and that's kind of  
10 your question, is that these are all separate causes of  
11 actions, so we tried to put in (c) -- I'm sorry, in (e)  
12 all the different causes of action and then (5) would be  
13 everything else that's not the normal standard causes of  
14 action to try to specify what needed to be brought. I  
15 suppose you could just say, "Bring all documents with you  
16 to prove your case," but we were trying to give as much  
17 guidance as possible to the pro se landlord that's  
18 unsophisticated, that's not sure, and that was the reason  
19 that they are listed (1) through (5) instead of just  
20 combining them.

21 MR. GILSTRAP: If you're vague then that  
22 creates a situation where there's more opportunity to have  
23 them say, "Well, look, you didn't bring a relevant  
24 document. We've got to reschedule this thing." It seems  
25 important that the people need to have a list that if they

1 bring these documents they've met the requirements and the  
2 hearing can go forward. In most cases.

3 CHAIRMAN BABCOCK: Yeah. I think, if I can  
4 just speak for a second, I think that the word "relevant"  
5 in (e)(1), the second time you use it when you're talking  
6 about the payment records, that ought to go. But you need  
7 the word "relevant" earlier in the sentence in the section  
8 because you're talking about sections of the lease that  
9 are relevant to the dispute.

10 MR. ORSINGER: Didn't we vote that you had  
11 to attach the whole lease?

12 CHAIRMAN BABCOCK: No.

13 PROFESSOR DORSANEO: Just the relevant  
14 parts.

15 CHAIRMAN BABCOCK: We haven't voted yet on  
16 that.

17 MS. CORTELL: Why don't we just say the  
18 lease? I mean, aren't most of these court documents -- I  
19 mean, isn't that really the exception, the 50-page  
20 commercial lease? Most of the time it's going to be, as I  
21 understand, a 5- to 10-page document. Here I would say  
22 it's easier to say "Attach the lease." You know, if it's  
23 for nonpayment, payment records. I mean, I think we could  
24 probably shorten it that way and then it's not burdensome.

25 MR. EDWARDS: The TAA lease is long and

1 complicated, and you're really just relying on a very  
2 minor portion of it.

3 CHAIRMAN BABCOCK: Yeah. Mary.

4 MS. SPECTOR: The standard TAA lease is six  
5 pages. It's front and back of three, and so if -- there  
6 may be other provisions, there may be some strikeouts, or  
7 there may be special provisions added as an addenda. So  
8 the entire lease may actually be something that the tenant  
9 does not have.

10 MS. CORTELL: I just think it's a lot  
11 simpler.

12 CHAIRMAN BABCOCK: Elaine.

13 MR. NIEMANN: We are not in favor of what  
14 you're doing, but I agree with you, you are setting up a  
15 trap for the landlord if he picks out what he thinks is  
16 relevant and if he's chosen wrong, he's dead. And these  
17 are laypersons. And we would rather attach the whole  
18 blooming lease than have you trap us into missing the  
19 target on a relevant portion.

20 CHAIRMAN BABCOCK: Okay. Fred, is there any  
21 problem with that?

22 MR. FUCHS: I think all six pages should be  
23 attached.

24 CHAIRMAN BABCOCK: So then you would change  
25 that "If the suit is a possession case for nonpayment then

1 the plaintiff must attach the complaint, a copy of the  
2 written lease, if any." Right?

3 PROFESSOR CARLSON: You could even do it  
4 more broader, as Steve suggested, and just keep the first  
5 introductory sentence of (e) and say, "and attach a copy  
6 of the lease and any documents relied upon to establish  
7 the grounds for the right to possession or for the claimed  
8 right to possession."

9 CHAIRMAN BABCOCK: How does that grab  
10 everybody? Nina.

11 MS. CORTELL: But then we have the problem  
12 that there are extra charges or it's not just possession,  
13 or are you just saying that in one of the sections?

14 PROFESSOR CARLSON: For possession or  
15 damages.

16 MS. CORTELL: Right. Right.

17 CHAIRMAN BABCOCK: Larry.

18 MR. NIEMANN: Mr. Chairman, even any  
19 documents that you're relying on, because some layperson  
20 is going to think, "Well, I'm relying on the lease. I've  
21 attached it," but Judge Lawrence says, "You didn't attach  
22 the notice to vacate, and that's essential to your case,  
23 so you lose."

24 HONORABLE TOM LAWRENCE: Well, that's in a  
25 different section of this rule.

1 MR. NIEMANN: Well, what I'm saying, the  
2 notice to vacate, aren't you wanting the notice to vacate  
3 to be attached to the petition?

4 HONORABLE TOM LAWRENCE: Well, that's (c).  
5 If you read (c), that's what it says.

6 MS. CORTELL: Could you do something like  
7 this, say -- in your global say "attach the lease," you  
8 know, "attach the lease and, one, if you're seeking late  
9 charges then X; if you're seeking," you know, and it be  
10 one-liners, pretty easy to read.

11 CHAIRMAN BABCOCK: Yeah. it seems to me  
12 this is -- that this is akin to disclosures --

13 MS. CORTELL: Right.

14 CHAIRMAN BABCOCK: -- under our district  
15 rules, which are pretty specific about what they are.  
16 You've got to give insurance, and you've got to do this,  
17 and you've got to do that, and so why don't we just say  
18 under (e) (1) you've got to give them the lease and you've  
19 got to give them the written payment records in dispute?  
20 Those are the two things you've got to give them. There's  
21 certainty to it. There may be other documents, but that's  
22 -- just going to have to deal with that.

23 PROFESSOR DORSANEO: I agree. I agree with  
24 that.

25 MR. DUGGINS: We have to be precise on this

1 because we're dealing with laypeople.

2 CHAIRMAN BABCOCK: Yeah. We're dealing with  
3 laypeople, and it's disclosure, and we've burdened the  
4 citation with having to be served now, so let's keep it  
5 simple.

6 MR. GILSTRAP: If we're going to keep it  
7 simple, I mean, don't we attach a copy of the lease in  
8 every case? I mean, isn't that where we're going with  
9 this thing, and doesn't that simplify our verbiage a whole  
10 lot?

11 MS. CORTELL: But lease plus what else is  
12 the --

13 MR. GILSTRAP: In other words, you just have  
14 a separate -- you know, section (e) becomes the lease and  
15 former (e), it can be a whole lot simpler than what it is  
16 right now. I mean, if that's where we're going, to attach  
17 the lease, and I think that's where we're going.

18 CHAIRMAN BABCOCK: Yeah. Elaine and Judge,  
19 do you agree with that?

20 HONORABLE TOM LAWRENCE: I'm not sure I  
21 understand what he's proposing.

22 CHAIRMAN BABCOCK: What he's proposing is  
23 that to -- it's following up with what Steve said. If you  
24 collapse (1) through (5) into you're going to give the  
25 lease and you're going to give payment records for the

1 period in dispute and anything else that is in here,  
2 although I don't --

3 MR. FUCHS: Notice to vacate.

4 MS. EADS: That's already there.

5 CHAIRMAN BABCOCK: That's in (c), so --

6 PROFESSOR CARLSON: Not every case is going  
7 to have a lease.

8 HONORABLE TOM LAWRENCE: Well, that's why we  
9 say "if any" because there aren't written leases in all  
10 cases. You want to collapse (1) through (5)? I mean, you  
11 just want to have (e) as being a larger paragraph and not  
12 have subsections?

13 CHAIRMAN BABCOCK: That's what the proposal  
14 is.

15 HONORABLE TOM LAWRENCE: Well, I think we  
16 can do that.

17 CHAIRMAN BABCOCK: In order to cover (3) you  
18 might say "attach a copy of the lease or any contract  
19 which forms the basis for the suit in possession."

20 HONORABLE TOM LAWRENCE: I think it's going  
21 to have to be a long paragraph because you still need to  
22 get some of these items in, like in (3), which is a  
23 termination of executory contract or foreclosure; and you  
24 still need to make sure that you get that language in  
25 there.

1 I think (4) could be collapsed in easily and  
2 (2) and obviously (1). I mean, I think you could do it.  
3 It's just going to have to be rewritten. We can do that  
4 if that's what everybody wants.

5 CHAIRMAN BABCOCK: Do we have a consensus  
6 that it ought to be, you know, the full lease, payment  
7 records, and any -- if it's -- if possession is not based  
8 on a -- if possession is not based on a lease but some  
9 other contract or some other document, you've got to  
10 attach that, because that's basically the three documents  
11 that we're requiring disclosure on, right?

12 MR. ORSINGER: Well, subdivision (3), or one  
13 of these has to do with foreclosure of the -- in other  
14 words, you've acquired the premises by foreclosure and  
15 you're evicting the tenant; isn't that right?

16 HONORABLE TOM LAWRENCE: That's right.

17 MR. ORSINGER: So we probably need to at  
18 least ask ourselves do we want the landlord to document  
19 that they have acquired control of the premises or not?

20 CHAIRMAN BABCOCK: Right.

21 HONORABLE TOM LAWRENCE: Well, yeah, you're  
22 going to have to do that.

23 CHAIRMAN BABCOCK: If there's a document  
24 you're claiming gives you right to possession then that  
25 document ought to be attached, document or documents.



1 HONORABLE TOM LAWRENCE: I mean, I think we  
2 can write this as one big paragraph, if that's what you  
3 want to do.

4 CHAIRMAN BABCOCK: Well, is that what  
5 everybody wants to do? I sense that it is.

6 MR. SUSMAN: I mean, I think that it looks  
7 simpler. I mean, the idea here is to simplify things, and  
8 it is limited discovery. It looks here like a lot.

9 MR. GILSTRAP: I don't think we can, you  
10 know, tell the subcommittee exactly how to write it. I  
11 mean, I think what we're telling them is --

12 CHAIRMAN BABCOCK: We can criticize them  
13 after they do it.

14 MR. GILSTRAP: -- is that we want them to  
15 include a separate -- a copy of the written lease, if any,  
16 and then that is going to simplify (e)(1) through (5) a  
17 whole lot, and to the extent they can collapse that down  
18 and make that simpler, do so; but I think what the  
19 committee is telling us is, you know, attach copies of the  
20 lease.

21 CHAIRMAN BABCOCK: Yeah.

22 PROFESSOR DORSANEO: And any other documents  
23 which form the basis for the suit for possession. That  
24 pretty much covers it, but you might want to -- you might  
25 know that there is one other thing in addition to a lease

1 that could be identified more clearly.

2 HONORABLE TOM LAWRENCE: The logic I guess  
3 behind why it was drafted like this was I'm thinking about  
4 my clerk who has to explain to some landlord that comes in  
5 to file, and say, "Well, okay, it's nonpayment. You need  
6 to look at (e)(1). That's what you have to comply with."  
7 So it's a little simpler to have a small subparagraph that  
8 applies to each individual cause of action than one big  
9 paragraph, which is a little bit more complicated, but  
10 it's not a big deal. We can rewrite it.

11 CHAIRMAN BABCOCK: Richard.

12 MR. ORSINGER: I'm a little bit concerned  
13 about "any relevant document or any document you're going  
14 to rely upon" being attached to the complaint because of  
15 the argument over relevancy, number one; and, number two,  
16 I can envision a situation where illegal activity is the  
17 basis for the eviction and the basis for proving illegal  
18 activity are police incident reports and, you know, things  
19 of that nature; and I don't think we want to require  
20 supporting proof to be attached to the complaint other  
21 than the written records of payment.

22 HONORABLE TOM LAWRENCE: Yeah. And you're  
23 also looking at a deed of trust, a substitute trustee's  
24 deed, if that's what you're suing for. It's one thing to  
25 have it in the courthouse, but it's another to attach it

1 to the door.

2 MR. ORSINGER: Well, see, we had discussions  
3 a moment ago that if you're asserting that you're a new  
4 owner and the old lease is wiped out by the elimination of  
5 the old ownership that you should document that to the  
6 tenant, who may not have any idea, may be fully complying  
7 or something.

8 CHAIRMAN BABCOCK: But in six days you're  
9 going to have to go to court and introduce a document that  
10 gives you -- that says you win, so all we're requiring is  
11 people to attach that to the petition, and the same  
12 document that they're going to have to six days later say,  
13 "By the way, Judge, this is why I win."

14 HONORABLE TOM LAWRENCE: Well, would you  
15 consider carving out an exception for attaching it to the  
16 citation for suits under (3) because you're looking at a  
17 substitute trustee's deed, a deed of trust, all attached  
18 -- that may be simply attached to an apartment door.

19 PROFESSOR DORSANEO: Still not very many  
20 pages.

21 HONORABLE TOM LAWRENCE: Well, I mean, is  
22 that what we want?

23 MR. FUCHS: Mr. Chairman?

24 CHAIRMAN BABCOCK: Yeah.

25 MR. FUCHS: If I might comment on that, in

1 the foreclosure cases that I generally see, the mortgage  
2 company that's bought it back or the bank that's bought it  
3 back at foreclosure is represented by a law firm, and the  
4 practice generally is for those law firms to attach these  
5 documents under existing law, just generally what I see.

6 HONORABLE TOM LAWRENCE: I know, and I'm not  
7 saying it shouldn't be filed with the petition, but do we  
8 really want that -- those documents attached to the door?

9 CHAIRMAN BABCOCK: Well, from what I hear  
10 Fred saying is that those typically aren't going to be  
11 attached to the door.

12 HONORABLE TOM LAWRENCE: Well, they're not  
13 now, but they will be. If everything filed with the  
14 complaint is going to be attached to the door then that  
15 means the substitute trustee's deed, the deed of trust, a  
16 copy of the executory contract is all going to be on  
17 somebody's door now.

18 MR. SUSMAN: Revote on attach it to the  
19 door. Reconsideration.

20 MR. ORSINGER: That is a small percentage of  
21 cases.

22 CHAIRMAN BABCOCK: Yeah. This is not much.  
23 Larry.

24 MR. NIEMANN: Let's assume that the landlord  
25 isn't a lawyer or the layman guesses wrong on what's

1 relevant or what he plans to rely on. I suppose each one  
2 of you can go into the courtroom not planning to introduce  
3 something but deciding that it is relevant. I see that in  
4 (f) the failure to attach does not allow dismissal. My  
5 question is, is does the failure to attach prevent you  
6 from introducing it into evidence? If the answer is "no,"  
7 then I suppose the comments would say that, because that's  
8 going to be a very touchy, arguable issue.

9 HONORABLE TOM LAWRENCE: Well, there is no  
10 intent on the part of subcommittee to preclude it from  
11 being introduced into evidence, something else.

12 MR. NIEMANN: Could we put that into (f)  
13 then?

14 MR. MARTIN: It's in the comment.

15 HONORABLE TOM LAWRENCE: Yeah. That's a  
16 different issue. It's a grounds for a continuance if  
17 something that's required by 741 is not attached. He's  
18 asking an evidentiary question, which is, if it's not  
19 required by 741 and somebody didn't attach it because they  
20 didn't know they were going to need it and then suddenly  
21 the defense says, "Well, but so-and-so happened." The  
22 plaintiff says, "Well, that's not true, and I have this  
23 document here." Is there anything in 741 that precludes  
24 that from being introduced, and the subcommittee certainly  
25 had no intention to preclude the introduction of any

1 evidence at trial.

2 MR. NIEMANN: And I'm not saying that -- or  
3 arguing that again. I've lost that battle. Okay. But I  
4 do think there is going to be arguments and hard feelings.  
5 "Hey, you didn't attach this to your petition. You're  
6 blindsiding me now," and I would want it either in the  
7 rules or in the commentary that the failure to attach does  
8 not prevent the introduction of the document as evidence.

9 CHAIRMAN BABCOCK: Well --

10 MR. HAMILTON: Chip?

11 CHAIRMAN BABCOCK: Yes, Carl.

12 MR. HAMILTON: Is the intent here to require  
13 the attachment of every document that would be needed at  
14 the time of trial or just to give the defendant some  
15 documents?

16 HONORABLE TOM LAWRENCE: I think the intent  
17 is everything the plaintiff is going to rely on to prove  
18 his case at trial would be attached.

19 MR. HAMILTON: Everything.

20 HONORABLE TOM LAWRENCE: I think that's the  
21 intent.

22 MR. NIEMANN: In commercial evictions that's  
23 going to be a very heavy burden.

24 CHAIRMAN BABCOCK: It seems to me that  
25 that's broader than the way it's written now.

1 HONORABLE TOM LAWRENCE: How so?

2 CHAIRMAN BABCOCK: Well, because under (1)  
3 you basically require two documents, which is the lease  
4 and the payment records. I mean, you could go down to  
5 trial and say, "Judge, here's Exhibit 1. That's the  
6 lease. Here's Exhibit 2. That's the payment records, and  
7 by the way, here's Exhibit 3, which is a letter I wrote  
8 the guy and said, you know, repeatedly he's been late and  
9 that's why I want late charges, and here's the letter he  
10 wrote back to me that said, you know, 'I admit that I am  
11 not paying on time, but my dog's sick.'" And so that's an  
12 admission from him that he hadn't paid on time, and that's  
13 a document, but you're not required to attach it. Steve.

14 MR. SUSMAN: I mean, I don't see anything  
15 wrong with saying you've got to attach everything you  
16 intend to rely on. If you don't attach it, you can't rely  
17 on it. There's got to be some sanction. You can't say,  
18 "Attach it, but if you want to, but if you want to just  
19 bring it in and introduce it into evidence, that's fine,  
20 too." I mean, the whole purpose is this is like a  
21 mandatory disclosure of documents that back up the  
22 plaintiff's case that you want to take place in lieu of  
23 any other discovery. So what's wrong with that?

24 MR. NIEMANN: Mr. Susman, the sanction that  
25 Judge Lawrence --

1 MR. SUSMAN: Huh?

2 MR. NIEMANN: The sanction that Judge  
3 Lawrence and Professor Carlson contemplate is the risk of  
4 having the case continued. That's in the rules. That's  
5 the proposed rules, but for a sanction that you are  
6 stopped from introducing it into evidence is a far  
7 departure from the simplicity --

8 MR. SUSMAN: Oh, I see.

9 MR. NIEMANN: -- that this committee was  
10 trying to --

11 MR. SUSMAN: I understand. You're going to  
12 just continue it until you produce the documents.

13 CHAIRMAN BABCOCK: Yeah. Well, it seems to  
14 me what we're embarking on here is mandatory disclosure;  
15 and, Justice, with the district court discovery rules, the  
16 mandatory disclosure rule doesn't give you everything; and  
17 given the burden that we're going to place on the system  
18 of having to attach now documents, you know, hundreds and  
19 hundreds in 118,000 cases a year, that now we're going to  
20 have additional pages of documents that are going to have  
21 to be served and tacked onto doors and put under the door,  
22 that type of thing. We've got to keep it simple, and  
23 we've got to keep it -- we've got to keep the volume of  
24 paper work down. So if we broaden it outside very narrow  
25 classes, identifiable classes of documents, so we don't



1 get into fights once we get to court then I think we're  
2 violating the spirit of what I think the subcommittee was  
3 trying to propose.

4 MR. GILSTRAP: Yeah. I think you're right,  
5 Chip. I mean, we need to make clear that the only  
6 sanction for not attaching a document is continuance, and  
7 we need to make the class of documents extremely narrow.

8 CHAIRMAN BABCOCK: Right.

9 MR. GILSTRAP: For example, in a commercial  
10 case there's no point in trying to attach all the  
11 documents. I think even in a foreclosure case there may  
12 not be a point, because there are just so few of them.  
13 Maybe we start with the lease. You know, we all can agree  
14 the lease should be attached. Then any other thing that  
15 has to be attached kind of has to be justified. We need  
16 to retreat away from the notion that we're going to attach  
17 all relevant documents and kind of say the lease and what  
18 other things are absolutely required enough to burden the  
19 system with requiring it in every case.

20 CHAIRMAN BABCOCK: Right. I agree with  
21 that. Yeah, Richard.

22 MR. ORSINGER: As I said earlier, my  
23 priority is different. I think you could take the lease  
24 as a given. What I'm concerned about is the payment  
25 record, but I would be concerned that all we do is the

1 lease because that's what we already know, and what we  
2 don't know is what we're accused of having paid three days  
3 late.

4 CHAIRMAN BABCOCK: Well, we have got two  
5 identifiable things here. We've got the written lease, if  
6 any. We've got the written payment records. Those are  
7 two identifiable things.

8 MR. GILSTRAP: If any.

9 HONORABLE TOM LAWRENCE: For nonpayment of  
10 rent.

11 CHAIRMAN BABCOCK: Huh?

12 HONORABLE TOM LAWRENCE: For nonpayment of  
13 rent cases.

14 PROFESSOR CARLSON: For nonpayment of rent.

15 MR. GILSTRAP: For nonpayment of rent cases.

16 CHAIRMAN BABCOCK: Right. So now we're down  
17 to three, and it seems to me that a written document -- or  
18 I don't know how you say it, but a written document which  
19 gives the plaintiff the right to possession is  
20 identifiable enough, but maybe not.

21 MS. CORTELL: We have in this room --

22 CHAIRMAN BABCOCK: Maybe that's too broad.

23 MS. CORTELL: We have in this room such  
24 expertise. I mean, could those who practice in this area  
25 tell us what the routine documents are? I mean, is there

1 not a set -- can we not define it?

2 MR. FUCHS: In a nonpayment of rent case?

3 MS. CORTELL: Right. Well, go through all  
4 of the categories.

5 MR. FUCHS: Okay. In the nonpayment of rent  
6 case it would be the lease. Oftentimes there are in  
7 subsidized and public housing -- private housing there are  
8 also a set of rules that's incorporated as that. The  
9 notice to vacate. In public and subsidized housing  
10 there's also going to be a notice of proposed lease  
11 termination before the notice to vacate is issued. And if  
12 you were doing a mandatory disclosure with at least the  
13 lease, the notice to vacate or termination notice, and  
14 then leaving it to discretion of the judge whether  
15 additional discovery is necessary, I think that would be  
16 satisfactory.

17 MR. ORSINGER: You have no concern for the  
18 payment record? You better mention that because we're  
19 making a list.

20 MR. FUCHS: No, no. That's right. I  
21 overlooked that. The payment record is generally  
22 computerized with big complexes.

23 CHAIRMAN BABCOCK: Okay. We've got the  
24 notice to vacate in (c). So now we're talking about the  
25 written lease, if any, and the written records as defined.

1 MR. DUGGINS: And that's it.

2 HONORABLE TOM LAWRENCE: Well, for  
3 nonpayment of rent that's it.

4 MR. ORSINGER: Yeah. In a nonpayment of  
5 rent case.

6 HONORABLE TOM LAWRENCE: I mean, there are  
7 other documents that can come to light that might be  
8 relevant in some cases.

9 PROFESSOR DORSANEO: Leave those for  
10 discovery.

11 MS. CORTELL: Yeah. I mean, there's  
12 something to the simplicity, as you said. I mean, your  
13 clerk could say, "This is a nonpayment case, so you must  
14 attach the lease, the payment record, the notice to vacate  
15 or the lease termination" or whatever. There is something  
16 very appealing to just --

17 CHAIRMAN BABCOCK: Isn't nonpayment -- what  
18 percentage of your cases are nonpayment of rent cases?

19 HONORABLE TOM LAWRENCE: At least 90  
20 percent.

21 CHAIRMAN BABCOCK: Yeah. So why don't we  
22 just leave it at that and leave the rest of them for  
23 discovery because the rest of them are going to be more  
24 complicated, they are going to be a higher caliber of  
25 lawyers -- not caliber. There could be more lawyers who

1 are more into this.

2 MS. CORTELL: They are paid by the hour, as  
3 Steve says.

4 CHAIRMAN BABCOCK: Paid by the hour, as  
5 Steve says.

6 MS. SPECTOR: There may be lawyers there.

7 CHAIRMAN BABCOCK: There may be lawyers  
8 there. So why don't we just leave it at that? Do we have  
9 an appetite for that?

10 MR. SUSMAN: Good idea. I'm for it.

11 MR. GILSTRAP: I've got an appetite for it.  
12 It makes our job easier.

13 CHAIRMAN BABCOCK: Yeah. All right. So  
14 with that direction can you rewrite this?

15 HONORABLE TOM LAWRENCE: Well, are you still  
16 -- you're wanting us to leave basically requests the same  
17 things that are in here now but just making --

18 MS. CORTELL: No. No.

19 HONORABLE TOM LAWRENCE: Well, I guess I  
20 don't understand then.

21 MS. CORTELL: Organize it the way you've got  
22 it now, I think. (1), (2), (3), but then for (e)(1), all  
23 you're going to say is "the lease, the written payment  
24 record, and the notice to vacate or notice of a lease  
25 termination."

1 CHAIRMAN BABCOCK: We've already got notice  
2 to vacate.

3 HONORABLE TOM LAWRENCE: Well, isn't that  
4 what (1) says now?

5 CHAIRMAN BABCOCK: We're going to eliminate  
6 (2) through (5) is what it boils down to.

7 MS. CORTELL: Oh, we are?

8 HONORABLE TOM LAWRENCE: Okay. So (1)  
9 stays, and then (2) through (5) we're going to do what  
10 with?

11 CHAIRMAN BABCOCK: Eliminate.

12 MR. SUSMAN: Eliminate.

13 HONORABLE TOM LAWRENCE: How are you going  
14 to do that?

15 MS. CORTELL: If you have other documents  
16 that --

17 MR. SUSMAN: This 10 percent of the cases  
18 should be handled by some other form of discovery.

19 MR. GILSTRAP: See, what we're going to do  
20 is -- I think what we're going to do is --

21 HONORABLE TOM LAWRENCE: Well -- all right.  
22 Let's look at (2) then.

23 MR. SUSMAN: Now, maybe if you're doing  
24 that, it may not -- it may be the right way to do that is  
25 to limit this mandatory disclosure to nonpayment of rent

1 cases, which is 90 percent of the cases. Okay. Then your  
2 ban on discovery, which is later on, should also be  
3 limited to those cases. I mean, why should you ban  
4 discovery in cases where you may have no voluntary -- and  
5 in 10 percent of the cases.

6 CHAIRMAN BABCOCK: We don't ban discovery.

7 MR. SUSMAN: Yeah, but, you know...

8 CHAIRMAN BABCOCK: We say it's unusual.

9 MR. SUSMAN: You say there should not be  
10 discovery and you say that it applies to all cases. I  
11 mean, I guess my point is --

12 CHAIRMAN BABCOCK: Whether we get to --

13 MR. SUSMAN: I thought what you were saying  
14 is make the mandatory disclosure to these 90 percent of  
15 nonpayment cases and then leave everything else for normal  
16 discovery, i.e., not that provision you've now put in that  
17 says there shall be no discovery.

18 CHAIRMAN BABCOCK: Right.

19 MR. SUSMAN: What's wrong with that kind of  
20 concept?

21 CHAIRMAN BABCOCK: When we get to 740 -- if  
22 we do this then we can in 743 say that, but it is  
23 interrelated, so...

24 HONORABLE TOM LAWRENCE: We're still going  
25 to leave the first sentence of (e) that says, "The

1 complaint must state facts that entitle the plaintiff to  
2 possession authorized under Chapter 24 of the Texas  
3 Property Code." We're still leaving that.

4 CHAIRMAN BABCOCK: I think so.

5 MR. ORSINGER: That has nothing to do with  
6 attachments. That has to do with what you allege, right?

7 CHAIRMAN BABCOCK: Right.

8 HONORABLE TOM LAWRENCE: Yes. That's  
9 correct. So we're going to have a complainant on a  
10 foreclosure or a termination of executory contract  
11 alleging that the cause of action is based on foreclosure  
12 or termination of executory contract, but it's not going  
13 to be attached to the petition, correct?

14 CHAIRMAN BABCOCK: That's what the proposal  
15 is right now. And what do you think about that, Judge?

16 HONORABLE TOM LAWRENCE: Well, I mean, I  
17 think that it's not going to put the -- there's not going  
18 to be any notice, really, to the tenant on that. The  
19 executory contract, that would have had to have been a  
20 signed, written document; but some of these foreclosures  
21 -- and I am not saying very many, but some of these  
22 foreclosures tend to be cases where someone has bought the  
23 house from somebody or is renting the house from somebody  
24 and that person that they rented it from has been  
25 foreclosed on. All of the sudden they get a notice to



1 vacate without a clue as to what's going on.

2 I mean, that's fine if you want to do that.  
3 It's not a large number of cases, but I think it -- on  
4 those, my personal feeling is they ought to be attached to  
5 the petition, but I don't know that they need to be served  
6 with the citation. I guess that's why I would like to  
7 carve that out. But whatever the committee wants to do.

8 CHAIRMAN BABCOCK: Bill.

9 PROFESSOR DORSANEO: The more I listen to  
10 this, he knows -- we voted that it needs to be attached  
11 and served. Tom knows what documents are the pertinent  
12 documents. Executory contract, you know, then it's  
13 obviously the executory contract. It's termination of  
14 executory contract. Foreclosure, there will be certain  
15 documents in the foreclosure context. They are not going  
16 to be ordinarily any more lengthy than the six-page lease.

17 HONORABLE TOM LAWRENCE: No. They are going  
18 to be substantially more lengthy.

19 PROFESSOR DORSANEO: You think so? Deed of  
20 trust?

21 HONORABLE TOM LAWRENCE: You've got  
22 substitute trustee's deed, you've got the deed of trust,  
23 executory contract, the notice of termination.

24 PROFESSOR DORSANEO: Trustee's deed is going  
25 to be one page or two pages.

1 HONORABLE TOM LAWRENCE: Well, that's true.  
2 That's only two pages. The deed of trust is -- I guess  
3 it's not usually that long.

4 PROFESSOR DORSANEO: Or you could just do --  
5 for the deed of trust maybe you could do relevant  
6 provisions of the deed of trust. They tend to be standard  
7 form documents.

8 HONORABLE TOM LAWRENCE: Well, that was  
9 pretty much what we had in here.

10 PROFESSOR DORSANEO: I would say let him do  
11 it, but make him do it the way we want it, identify what  
12 these things are and attach them to the complaint and  
13 serve them.

14 PROFESSOR CARLSON: He's saying relevant to  
15 something and that they'd like the necessity items  
16 itemized.

17 CHAIRMAN BABCOCK: Well, here's the tension  
18 I see, is that it looks to me like, if you think about it,  
19 we're doing something fairly dramatic here because we're  
20 requiring a lot of paper. I mean, if you multiply all the  
21 pieces of paper times 118,000 cases and the dislocation  
22 that's going to cause the plaintiff in the first instance  
23 to make additional copies and then for the constable to  
24 have to serve that, you know, we're doing something pretty  
25 dramatic. So while we take this step, you know, we can

1 take 90 percent of the cases and make it pretty darn  
2 simple. I mean, the lease, everybody knows the lease is  
3 going to be central. The payment records, everybody knows  
4 that's pretty central, and not require this for the 10  
5 percent of the cases where the documentation is going to  
6 be, A, open to interpretation as to what's relevant, and,  
7 B, potentially more bulky.

8 PROFESSOR DORSANEO: Well, in foreclosure  
9 cases I submit we can identify what the pieces of paper  
10 ordinarily will be, and they will not be more bulky  
11 ordinarily.

12 CHAIRMAN BABCOCK: Okay.

13 PROFESSOR DORSANEO: Termination of  
14 executory contract cases, I don't really know what that's  
15 about. It could be about a whole bunch of different  
16 things, and that could be a pretty big thing.

17 MR. EDWARDS: It could be a contract for  
18 deed most of the time.

19 HONORABLE TOM LAWRENCE: Yeah. And  
20 sometimes those are short and sometimes they're long.  
21 They're always homegrown, and there's not a standard  
22 format. But if you attach the lease and the payment  
23 records then you're going to cover nonrent breaches,  
24 you're going to cover the rent breaches of the lease, and  
25 that's not 90 percent. That's probably more like 97

1 percent of all the cases, and the other three percent are  
2 going to fall in these other categories, which are  
3 executory contract terminations, foreclosures, and, you  
4 know, other things. Holding over.

5 MR. EDWARDS: Tax sales.

6 MR. GILSTRAP: In those cases the issue of  
7 delay may not be quite the big thing. I mean, it's not  
8 like a guy has an income producing piece of property out  
9 there he's losing income on. I mean, we're talking about  
10 kicking somebody out after a foreclosure or after a tax  
11 sale or something like that, and, you know, you expect  
12 those to be lengthy. You know, you don't expect to get  
13 the kind of instant relief you do with a nonpayment of  
14 rent case. Maybe "instant" isn't the right word.

15 MR. ORSINGER: Instanter.

16 CHAIRMAN BABCOCK: Well, if we're now up to  
17 97 percent of the cases --

18 HONORABLE TOM LAWRENCE: That's a guess, but  
19 pretty close.

20 MR. ORSINGER: Closer to 99.

21 CHAIRMAN BABCOCK: Doesn't it make a little  
22 bit of sense to the extent we're doing something dramatic  
23 here just to limit it to the lease and the payment  
24 records?

25 HONORABLE TOM LAWRENCE: The constables will

1 no longer need those lumbar support belts to serve  
2 citations in forcibles.

3 CHAIRMAN BABCOCK: Yeah. I mean, that just  
4 makes sense to me.

5 PROFESSOR DORSANEO: I like Steve's  
6 suggestion that if we're going to do that, let's handle  
7 those other cases in the discovery.

8 MR. SUSMAN: Arthur Anderson has just been  
9 convicted.

10 MR. ORSINGER: You-all are mixing the  
11 question now of what's served --

12 MR. SUSMAN: The charge did it.

13 JUSTICE HECHT: Yeah, the charge did it.

14 MR. ORSINGER: -- and the paperwork and  
15 those are --

16 HONORABLE TOM LAWRENCE: No, we're not. I  
17 mean, we're cutting out what's going to be required. It's  
18 only going to be basically the lease and the rent  
19 agreement.

20 MR. SUSMAN: Arthur Anderson was just  
21 convicted.

22 HONORABLE TOM LAWRENCE: Payment records.  
23 That's all that's going to be filed now, as I understand  
24 it. Right? What you're proposing is the only thing filed  
25 with the petition now is the lease and the written payment

1 records.

2 CHAIRMAN BABCOCK: Well, and the written  
3 notice to vacate.

4 HONORABLE TOM LAWRENCE: Well, yeah, in (c),  
5 but I mean under (e) we're just going to have those two.

6 MR. GILSTRAP: That's what we're talking  
7 about.

8 CHAIRMAN BABCOCK: That's what we're talking  
9 about. Yeah.

10 MR. ORSINGER: Let me say that we should not  
11 be talking about yet what we serve and that you can say we  
12 don't want to serve 12 documents and nail it to somebody's  
13 apartment door, but we're also saying that they're filed  
14 with the original complaint, they're in the JP's file,  
15 they will be there, it will be easy for the --

16 CHAIRMAN BABCOCK: We already voted on that  
17 one.

18 PROFESSOR DORSANEO: You were out of the  
19 room.

20 HONORABLE TOM LAWRENCE: Everything filed is  
21 going to be served now.

22 MR. ORSINGER: Oh, you tied the two  
23 together. That was not smart. I wish I had been here.

24 PROFESSOR DORSANEO: It was smart.

25 HONORABLE TOM LAWRENCE: Change that to a

1 four vote now.

2 MR. EDWARDS: Could I ask for some  
3 information?

4 CHAIRMAN BABCOCK: Yeah, Bill.

5 MR. EDWARDS: Tom, of these cases that are  
6 out there that are nonpayment of rent cases, how many of  
7 them are residential and as opposed to commercial?

8 HONORABLE TOM LAWRENCE: Oh, almost every  
9 one is residential. The commercial, I just don't get that  
10 many commercial, not a lot of those.

11 MR. EDWARDS: Can we get there -- can we get  
12 there with this business of getting the information in the  
13 hands of the people, the public, if you will, if we make  
14 it in cases of residential property or manufactured homes  
15 or whatever is necessary, that we give the lease and the  
16 payment; and in the others you're going to assume that if  
17 it's a serious commercial problem, both sides are going to  
18 be represented, and what we're doing here is really  
19 perfunctory.

20 HONORABLE TOM LAWRENCE: Well, the Property  
21 Code distinguishes between residential and commercial, but  
22 none of the rules have ever distinguished between those.

23 MR. EDWARDS: But we're talking about adding  
24 stuff to -- in a usual residential situation your lease is  
25 normally about the size of the Texas Apartment Association

1 lease or smaller and your rental payments are -- records  
2 are not very long, so you're not talking about all that  
3 much paper, and you could eliminate those cases where the  
4 paper might be big and large.

5 MR. GILSTRAP: Let me say this. I don't  
6 know that that would really be kind of effective because  
7 there are so few of those cases. I think it's just  
8 simpler to require the same thing to be attached in every  
9 one; and, you know, you've got one case, one case a year  
10 in which you have a long lease, it's attached. Well, it's  
11 just more trouble.

12 CHAIRMAN BABCOCK: Yeah. I sort of like the  
13 simplicity of that myself. Well, do we have a consensus  
14 that that's the way we ought to go, or do we need to vote  
15 on this?

16 MR. SUSMAN: What is the proposal now?

17 CHAIRMAN BABCOCK: The proposal is that in  
18 addition to what is required to be attached to the  
19 petition in 741(c), which is the written notice to vacate,  
20 that there also be a requirement that the written lease,  
21 if any, be attached and the written payment records  
22 relating to the -- for the period in dispute be attached.

23 MR. HAMILTON: Only on a nonpayment of rent  
24 case.

25 MR. GILSTRAP: Well, that's in all cases,



1 but the written payment records -- well, I guess we have  
2 to -- we have to limit it for nonpayment of rent. You're  
3 right.

4 HONORABLE TOM LAWRENCE: Well, but if it's a  
5 nonrent breach then you're going to have the lease  
6 attached, so that's not covered -- most of the nonrent  
7 breach, except for those situations where there's a  
8 violation of community rules that are incorporated by  
9 attachment, and that's going to have to be a subject for  
10 743 discovery, I guess, but those are not -- I mean, I  
11 know that that's all Fred handles, but from the standpoint  
12 of the 118,000, there's not a significant number of those.

13 MR. GILSTRAP: But Carl is saying we don't  
14 have to attach the payment records in nonrent cases. I  
15 think that's what you're saying, right?

16 HONORABLE TOM LAWRENCE: Okay.

17 CHAIRMAN BABCOCK: Okay. Do you understand  
18 what we're doing?

19 HONORABLE TOM LAWRENCE: Yeah, okay. So the  
20 payment records are only going to be for nonrent cases  
21 then.

22 MR. NIEMANN: You mean for rent cases.

23 HONORABLE TOM LAWRENCE: Nonpayment of rent  
24 cases. Excuse me.

25 CHAIRMAN BABCOCK: Okay. Is everybody okay

1 with that? Anybody disagree with that? Bill.

2 PROFESSOR DORSANEO: I'm okay with that, but  
3 Bill mentioned contract for deed cases. Are there enough  
4 of those that are like lease cases to use that  
5 terminology, too? I mean, the contract for deed is kind  
6 of halfway between a lease and --

7 HONORABLE TOM LAWRENCE: Well, the reason we  
8 said "executory contract" is that's the Property Code  
9 termination for that. I mean, a contract for deed is an  
10 executory contract, and that's how the Property Code  
11 refers to it.

12 PROFESSOR DORSANEO: I would like for you to  
13 put "lease or executory contract between the plaintiff and  
14 defendant get payment records," if that gets us up another  
15 notch or two up to 99 percent.

16 MR. EDWARDS: When you get into those things  
17 haven't they -- I don't do any of that work, but I thought  
18 there were some changes made where the getting the right  
19 to possession under a contract of deed in residential  
20 property was similar to foreclosure.

21 HONORABLE TOM LAWRENCE: It's more. There's  
22 a lot more to it now. The Legislature changed that,  
23 effective this past session. There's a lot more to it  
24 now. All of those cases the -- I mean, I've never had a  
25 tenant coming in under that that didn't have a copy of it.

1 PROFESSOR DORSANEO: Okay.

2 HONORABLE TOM LAWRENCE: And there's so many  
3 notices that have to be given under --

4 PROFESSOR DORSANEO: Yeah. I think  
5 something like a foreclosure.

6 HONORABLE TOM LAWRENCE: There's a series of  
7 notices that have to be given. There is -- I mean, I  
8 can't imagine a tenant coming in and saying they didn't  
9 know anything about it because they signed it, there are  
10 notices. I mean, it could happen, but I would think that  
11 would be such a small number that 743 would handle it.

12 MR. EDWARDS: And there is a pile of papers  
13 on a contract of deed, too.

14 CHAIRMAN BABCOCK: Mary.

15 MS. SPECTOR: One last issue I want to speak  
16 about is in Chapter 5 of the Property Code, and it does  
17 provide for special notice provisions to the --

18 PROFESSOR DORSANEO: Okay. Forget that  
19 then. It's not necessary.

20 MS. SPECTOR: And it also is one of the  
21 areas where a foreign language requirement is required on  
22 the notice if the contract is --

23 CHAIRMAN BABCOCK: Bill withdrew his  
24 comment. You beat him down.

25 MS. SPECTOR: No, but I would -- no, I'm not

1 beating Bill down. I'm supporting Bill, because I think  
2 that the Legislature has made provisions for special  
3 disclosures and, you know, more articulate disclosures to  
4 tenants under those situations; and for that reason the  
5 FED provision should mirror those and provide those same  
6 disclosures attached to the complaint, so I'm supporting  
7 Bill there.

8 CHAIRMAN BABCOCK: I don't think he wants to  
9 be supported anymore.

10 PROFESSOR DORSANEO: My point was a simple  
11 one. If we could add two words and cover one percent more  
12 of the cases without complicating things, add them; but  
13 otherwise, just let it be.

14 CHAIRMAN BABCOCK: Right. Yeah, Tom.

15 HONORABLE TOM LAWRENCE: Do we want to put  
16 language in a comment or somewhere that says that -- I  
17 mean, is it necessary to put any language in that says  
18 that this does not preclude either party from filing any  
19 documents at trial as evidence? Is that going to be  
20 addressed?

21 MR. HAMILTON: That's what Larry wants to  
22 put in there.

23 MR. GILSTRAP: Or introducing it into  
24 evidence.

25 MR. ORSINGER: You wouldn't say "filing."

1 You would say either "offering" or "introducing."

2 "Introducing" is better probably.

3 HONORABLE TOM LAWRENCE: You want to do that  
4 in a comment?

5 MS. CORTELL: Why is that necessary? Is  
6 there a presumption overriding that?

7 HONORABLE TOM LAWRENCE: Well, I'm just  
8 trying to address Larry's concern.

9 CHAIRMAN BABCOCK: Well, what Larry is  
10 trying to say, that that's okay, that comment -- what was  
11 motivating that an hour ago was that we were going to have  
12 ambiguity in terms of what was -- what had to be attached.  
13 We have eliminated that ambiguity, so it seems to me we  
14 don't need to say that because that is just an invitation  
15 to, as Steve says, just to say, "Well, I'll attach it if I  
16 want or not, because if I don't, there's no sanction other  
17 than continuance," which as Larry points out is a severe  
18 sanction, but --

19 HONORABLE TOM LAWRENCE: The Rules of  
20 Evidence do apply here, in other words.

21 CHAIRMAN BABCOCK: Yeah. The Rules of  
22 Evidence apply. If the judge thinks there's been unfair  
23 surprise he will continue it or maybe exclude it if he's  
24 real mad, but I don't think we need to address that given  
25 what we've done.

1 MR. EDWARDS: Well, there's a historical  
2 reason to worry about that, because back before the  
3 sanction rules got to where they are now, you know, there  
4 was some case law that develops in sanctions, you're  
5 required to disclose and you don't disclose, you don't get  
6 to use.

7 CHAIRMAN BABCOCK: Right.

8 MR. EDWARDS: Morrow vs. HEB was I think the  
9 start of all that good stuff, and I can see a reason for  
10 worry.

11 MR. NIEMANN: Well, if the layperson does  
12 forget to attach the notice to vacate, and if the ruling  
13 is it cannot be introduced under the case law then it's  
14 automatic loss. That's what you're discussing.

15 MR. EDWARDS: What I'm suggesting is that  
16 there maybe needs to be something in there that  
17 specifically says that it isn't the end of the line if you  
18 don't attach.

19 HONORABLE TOM LAWRENCE: I guess I don't see  
20 how 741 would preclude anybody from filing whatever they  
21 want at trial, and also, let me point out if you read (f),  
22 clearly it says the trial may be postponed. I mean, it's  
23 up to the trial judge. If the trial judge decides that  
24 whatever wasn't provided is not something that's critical  
25 then he doesn't have to postpone the trial.

1 CHAIRMAN BABCOCK: I think particularly  
2 since we've dumbed this down so much.

3 HONORABLE TOM LAWRENCE: You want to change  
4 that then?

5 CHAIRMAN BABCOCK: No. No. I think that  
6 should be in there.

7 HONORABLE TOM LAWRENCE: Oh, okay.

8 MR. GILSTRAP: We still have the provision  
9 in the last sentence in (f), "Failure by the complainant  
10 to attach any information required by this rule is not  
11 grounds for dismissal."

12 CHAIRMAN BABCOCK: Right. No. I think we  
13 ought to leave that in. That's fine.

14 HONORABLE TOM LAWRENCE: Okay. Good.

15 MR. FUCHS: Mr. Chairman, where were you on  
16 the lease termination notice, which is often different  
17 than the notice to vacate? Is that going to be included  
18 in the laundry list of lease, payment record, and notice  
19 to vacate?

20 CHAIRMAN BABCOCK: Yeah. Judge Lawrence,  
21 Fred raised that earlier. Should that go into (c), if  
22 instead of a written notice to vacate there's a lease  
23 termination notice?

24 MR. HAMILTON: Put both of them, vacate or a  
25 termination.

1 HONORABLE TOM LAWRENCE: I mean, you've got  
2 to have a notice to vacate under the Property Code, so  
3 that's one that's going to have to be there. So you want  
4 to add --

5 MR. FUCHS: The termination notice is  
6 required in subsidized housing cases, and it lists the  
7 specific reasons for the eviction and gives the tenant  
8 notice before they give the notice to vacate.

9 HONORABLE TOM LAWRENCE: Okay. But that's a  
10 HUD requirement, right?

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

12 HONORABLE TOM LAWRENCE: So that's not a  
13 Texas requirement.

14 MR. FUCHS: It's also in the lease.

15 HONORABLE TOM LAWRENCE: I think that's --  
16 yeah, but I think that's -- I would not attach it to this.  
17 I mean, I think that's something that if challenged the  
18 landlord is going to have to produce.

19 MR. FUCHS: Okay.

20 HONORABLE TOM LAWRENCE: Like a lot of other  
21 things, but it's not something required by the Property  
22 Code or Texas rules. It's sort of a condition precedent  
23 to even starting, isn't it? Isn't that how you interpret  
24 it?

25 MR. FUCHS: That's correct. That's correct.



1 And if there will be discovery allowed then I think we  
2 could live with that.

3 CHAIRMAN BABCOCK: Well, not only that.  
4 Your guy ought to have it.

5 MR. FUCHS: Right.

6 CHAIRMAN BABCOCK: Your guy ought to have  
7 it.

8 HONORABLE TOM LAWRENCE: And if he doesn't,  
9 he asks for it under 743. I mean, the penalty to the  
10 landlord, if they get horsy and don't provide some of this  
11 stuff then they run the risk of having the trial delayed  
12 for seven days. So there is not any incentive for them to  
13 withhold stuff that's important.

14 PROFESSOR CARLSON: Fred, is that a problem  
15 now?

16 MR. FUCHS: On the termination notices?

17 PROFESSOR CARLSON: Yeah.

18 MR. FUCHS: A lot of landlords already  
19 attach it. I mean, it would be nice to be mandatory, but  
20 if there is going to be some discretion of the JP to still  
21 give it to you if your client doesn't have it, that will  
22 be fine.

23 CHAIRMAN BABCOCK: Okay. You-all -- the  
24 subcommittee has its direction on subparagraph (e) on how  
25 to rewrite it. Are there any comments on the preamble or

1 sections (a) through (d)?

2 MR. HAMILTON: Why are we requiring the  
3 paper size in here?

4 CHAIRMAN BABCOCK: I bet Judge Lawrence has  
5 an answer for that.

6 HONORABLE TOM LAWRENCE: Well, I just -- the  
7 first thing I did when the committee told us to draft this  
8 was to go to the complaint rules for the county and  
9 district court and just parallel that. That's the only  
10 reason. We can take that out if it's -- if you want. I  
11 was just trying to make things consistent. That was the  
12 only reason.

13 CHAIRMAN BABCOCK: So that's in the rules  
14 for the county?

15 HONORABLE TOM LAWRENCE: I believe so.  
16 Chris, do you know where that is? I don't remember which  
17 one it is.

18 MR. ORSINGER: Well, are people filing  
19 documents smaller than that or larger than that?

20 HONORABLE TOM LAWRENCE: Larger.

21 MR. ORSINGER: Well, that means that's  
22 people with, you know, the old legal-sized paper work in  
23 their files where you have to fold all this stuff over.  
24 We ought to just eliminate that.

25 MR. EDWARDS: Well, how big are the -- what

1 size paper are the Texas Apartment Association leases on,  
2 which is thousands?

3 MR. NIEMANN: Legal size.

4 MR. ORSINGER: There are so few pages to  
5 fold.

6 HONORABLE TOM LAWRENCE: No, I'm saying the  
7 complaint. The eight and a half by eleven doesn't apply  
8 to anything attached. It's just the complaint itself.

9 MR. EDWARDS: What I'm saying is you're  
10 going to have a bunch of documents attached to the  
11 complaint that are going to be odd-sized. What difference  
12 does it make what size the complaint is?

13 HONORABLE TOM LAWRENCE: 45(d) is what I  
14 relied on, but it's not a big deal.

15 MR. EDWARDS: You've got pro se people, and  
16 somebody probably doesn't even -- many of them don't know  
17 what you mean.

18 HONORABLE TOM LAWRENCE: I know the Court  
19 went to this, I mean, years ago. Wasn't that something  
20 that the Court went to, is --

21 MR. ORSINGER: Sure.

22 HONORABLE TOM LAWRENCE: -- letter size, so  
23 that was the only reason I --

24 CHAIRMAN BABCOCK: You've got pro se  
25 litigants in district court, too.

1 MR. EDWARDS: It's a different problem in  
2 county and district court because every paper that's filed  
3 is retained and there's a lot of papers filed.

4 MR. JACKSON: What happens when the clerk  
5 won't accept it, though, because it's not the right size?

6 MR. ORSINGER: Well, Tom, are your manila  
7 folders eight and a half by eleven dimension or are --

8 HONORABLE TOM LAWRENCE: Yes.

9 MR. ORSINGER: -- they eight and a half by  
10 fourteen?

11 HONORABLE TOM LAWRENCE: Eight and a half by  
12 eleven.

13 MR. ORSINGER: Okay.

14 MR. FUCHS: All the justice courts furnish  
15 form complaints.

16 HONORABLE TOM LAWRENCE: Yeah. People do  
17 things differently, though. I mean, others may be  
18 different. Some just use what are called shucks, which  
19 are big envelopes. The typical complaint form used now in  
20 a lot of JP courts is legal size, so this would be a  
21 change; but, again, you're going to have to change the  
22 form anyway. There's going to be a lot of changes to the  
23 form.

24 CHAIRMAN BABCOCK: Yeah.

25 MS. SPECTOR: The experience in Dallas and

1 Tarrant Counties is that it's eight and a half by eleven,  
2 and the JPs have a form that you pretty much fill in the  
3 blank for the plaintiff to --

4 CHAIRMAN BABCOCK: Do they still have  
5 envelopes in Dallas and Tarrant County?

6 MS. SPECTOR: Envelopes?

7 CHAIRMAN BABCOCK: Yeah. Where they stick  
8 all the files in --

9 MS. SPECTOR: Sure.

10 MR. ORSINGER: The court uses envelopes  
11 instead of folders.

12 MS. SPECTOR: It varies court to court.

13 PROFESSOR DORSANEO: It's just an idea.  
14 Would it be a good idea to include a form of complaint if  
15 you're going to have to change it anyway, to do one for  
16 everybody?

17 HONORABLE TOM LAWRENCE: That was -- the  
18 landlords came up with a form based on the Texas Apartment  
19 Association, which really was a form, but it didn't -- I  
20 mean, it specified what you have to have -- what you state  
21 you're suing for, but there weren't any attachments or  
22 disclosure or anything else. I think that that form would  
23 be good for the Apartment Association Redbook. It would  
24 be good for the JPs to put in their manual. I just don't  
25 know if we necessarily need to put that in the rules.

1                   PROFESSOR DORSANEO: Okay. Because I was  
2 looking at Chapter 24 of the Texas Property Code; and it's  
3 not, you know, unlike a trespass to try title, there's no  
4 real place you could find what it's supposed to say.

5                   HONORABLE TOM LAWRENCE: The JPs have a form  
6 book, and I would anticipate that this complaint form is  
7 going to be revised and redone if the Court adopts this  
8 rule.

9                   CHAIRMAN BABCOCK: Let's stick on eight and  
10 a half by eleven. Is everybody okay with that? Anybody  
11 violently opposed to eight and a half by eleven?

12                  MR. EDWARDS: I just hate to get in this  
13 business at this level of kicking papers out because they  
14 are not on -- I deal with that all the time. The book is  
15 scant of any lawyer that can get a paper filed in Federal  
16 court the first time.

17                  CHAIRMAN BABCOCK: Point well-taken.

18                  MR. EDWARDS: Maybe I'm just a victim of my  
19 own experience in that regard, but I just hate to see us  
20 putting that kind of requirements on --

21                  CHAIRMAN BABCOCK: Okay. Anybody -- does  
22 the majority of the committee here share Bill's view on  
23 this, on the eight and a half by eleven? David Jackson  
24 does, so that's one more vote. Anybody else?

25                  PROFESSOR DORSANEO: I do, but I don't

1 know --

2 CHAIRMAN BABCOCK: That's three.

3 MR. EDWARDS: I'm not going to --

4 CHAIRMAN BABCOCK: Three noted dissenters.

5 PROFESSOR CARLSON: Go either way.

6 Whatever.

7 MR. SUSMAN: Are we abandoning the eight and  
8 a half by eleven? That's the issue?

9 CHAIRMAN BABCOCK: That's the issue.

10 MR. SUSMAN: I abandon it.

11 CHAIRMAN BABCOCK: You abandon it?

12 MS. EADS: Yeah, me, too.

13 CHAIRMAN BABCOCK: All right. We'll vote on  
14 this. How many people want to abandon eight and a half by  
15 eleven?

16 How many people want to retain eight and a  
17 half by eleven? Six. Abandon it by a vote of 7 to 6, the  
18 Chair not voting.

19 PROFESSOR DORSANEO: How would you have  
20 voted?

21 MR. ORSINGER: The Chair can vote to create  
22 a tie, you know.

23 MR. GILSTRAP: What happens when the Chair  
24 votes to create a tie, Richard?

25 CHAIRMAN BABCOCK: Justice Hecht breaks the

1 tie.

2 PROFESSOR DORSANEO: I think he breaks the  
3 tie all the time.

4 CHAIRMAN BABCOCK: He breaks the substantial  
5 one.

6 Okay. What else on either the preamble or  
7 (a) through (d)? Yeah, Mary.

8 MS. SPECTOR: Mr. Chairman?

9 MR. EDWARDS: What is the -- oh, I'm sorry.

10 MS. SPECTOR: There is some inconsistency in  
11 the language that's used in the rule. It in some places  
12 refers to it as a complaint and the last line of (d)  
13 refers to it as a petition.

14 PROFESSOR DORSANEO: Uh-huh.

15 CHAIRMAN BABCOCK: Yeah.

16 MS. SPECTOR: So I would urge the committee  
17 to err towards consistency.

18 CHAIRMAN BABCOCK: Yeah. Thank you. We'll  
19 change that. What else? Carl.

20 MR. HAMILTON: I guess I have a question  
21 about the phrase "how the late charges are calculated."  
22 Is that some kind of a verbal explanation or a  
23 mathematical formula or what is that?

24 HONORABLE TOM LAWRENCE: Well, the leases  
25 typically say that late charges -- there are no late



1 charges up until the third day or the fifth day of the  
2 month or something similar and then after that they are so  
3 much a day, and what we're trying to do is to get them to  
4 put in the complaint exactly the formula for how the late  
5 charge is calculated in that lease.

6 MR. HAMILTON: The formula then.

7 HONORABLE TOM LAWRENCE: Well, I think I  
8 didn't use the word "formula," but that's what I was  
9 trying to get.

10 CHAIRMAN BABCOCK: Does that cause any  
11 heartburn for any of the practitioners in the room? Do  
12 you have any trouble alleging how the late charges are  
13 calculated? I don't hear anybody saying anything. Steve.

14 MR. SUSMAN: (a), (b), (c), and (e) should  
15 be put into one paragraph. Because every complaint must  
16 state the following factors. Okay. Every complaint must  
17 state (a), (b), (c), and (e). I mean, that's the way it's  
18 written. It's just -- I mean, you-all are trying to make  
19 it easy for somebody who doesn't have a lawyer to  
20 understand what they're supposed to do, and this is so  
21 complicated with so many subdivisions and subsections and  
22 "if this, then that" and "if this, then that." I mean,  
23 it's not simple.

24 PROFESSOR CARLSON: It's not simple.

25 MR. SUSMAN: And, I mean, I don't know why

1 you don't write it in a simple way. I mean, the simplest  
2 way would be just to have a form petition.

3 MR. ORSINGER: Yes, it would. Sure would.

4 MR. SUSMAN: Right? A form petition would  
5 solve your problem, and say, "If you want to file in  
6 justice court an eviction case or a forcible entry case,  
7 here's what you have to say in the petition. You've got  
8 to use it," period, and it says you've got to attach the  
9 following. That makes it easy for people.

10 This is totally hard for people to get into.  
11 Well, "The complaint must state" -- okay, that, and then I  
12 just don't think it accomplishes the purpose.

13 MR. NIEMANN: Mr. Chairman, was the  
14 committee given a copy of the form of complaint that  
15 Mr. Susman is asking for that Judge Prindle and I prepared  
16 after many weeks?

17 HONORABLE TOM LAWRENCE: It was on the  
18 website.

19 MR. NIEMANN: I thought Chris had passed it  
20 out. What you're asking for has been done, but it did not  
21 fly.

22 CHAIRMAN BABCOCK: Okay. Well, Steve's  
23 point is that maybe there should be some consolidation of  
24 the subparts and --

25 MR. SUSMAN: I didn't understand that.

1 MR. NIEMANN: It was submitted by Judge  
2 Prindle and I to the subcommittee, but it was --

3 MR. SUSMAN: And why didn't they do this?

4 HONORABLE TOM LAWRENCE: Well, it doesn't  
5 address discovery. I mean, that's the reason.

6 MR. NIEMANN: It did address the content --

7 MR. SUSMAN: Now, wait a second. It's easy  
8 to make it address discovery by just putting another  
9 thing, "You must attach (a), (b), and (c)," and why  
10 doesn't that solve your problem?

11 MR. NIEMANN: It did attach the checklist  
12 idea. In our cover letter to you the other day our  
13 concern was the checklist was more difficult for a layman  
14 to follow, but a form was much easier to fill in, and  
15 that's why we prepared this in lieu of the checklist.

16 MR. SUSMAN: What's wrong with this form,  
17 guys?

18 MR. GILSTRAP: Chip, let me suggest this.

19 HONORABLE TOM LAWRENCE: We got it Monday.

20 MR. SUSMAN: Oh, I see. Well, can we  
21 consider this as a possibility?

22 PROFESSOR CARLSON: We don't do 24-hour  
23 turnaround.

24 PROFESSOR DORSANEO: I have got a lot of  
25 experience in forms. I would be happy to look at it.

1 MR. ORSINGER: This is going to be in Bill's  
2 next book. I hope you put a copyright on that, Larry.

3 CHAIRMAN BABCOCK: Frank.

4 MR. GILSTRAP: Maybe this will help get us  
5 down the road. I think we've taken a huge step towards  
6 simplification by basically reducing (e) to about two  
7 lines.

8 CHAIRMAN BABCOCK: Right.

9 MR. GILSTRAP: And I think we can come back  
10 and we can make this thing simpler and easier to  
11 understand.

12 PROFESSOR CARLSON: Sure.

13 MR. GILSTRAP: I think what we need to get  
14 through is basically the substance of the language in the  
15 rest of this rule, and -- but we're going to have to  
16 redraft the rule anyway. We can make it simpler to look  
17 at.

18 CHAIRMAN BABCOCK: Yeah. I think that's a  
19 good idea. Why don't we -- why don't we take (a) through  
20 (e) and work on redrafting it and consider the form  
21 complaint idea that Larry sent to us and incorporate that?

22 PROFESSOR CARLSON: Larry, I just got that  
23 earlier this week.

24 MR. SUSMAN: Why don't we take a vote from  
25 this group on a concept?

1 CHAIRMAN BABCOCK: Hey, hey, guys. The  
2 court reporter can't hear if everybody is talking.

3 MR. SUSMAN: Why don't we take a vote of the  
4 group on the concept as a form as opposed to a rule that  
5 sets out a bunch of things, and, you know, that way we'll  
6 give the subcommittee some guidance. I mean, maybe people  
7 think a form is good, maybe they don't think it's good. I  
8 don't know.

9 CHAIRMAN BABCOCK: Well, what did the -- the  
10 form come in when, Monday?

11 PROFESSOR CARLSON: I just got it on Monday.

12 MR. NIEMANN: I submitted it a week ago  
13 Wednesday.

14 CHAIRMAN BABCOCK: Okay.

15 MR. SUSMAN: Not necessarily this form, but  
16 the concept of a form.

17 CHAIRMAN BABCOCK: I understand. What did  
18 you -- did the subcommittee consider doing a form?

19 PROFESSOR CARLSON: We've talked about long  
20 range trying to come up with forms for the entire -- but  
21 we don't do 24-hour turnaround. Sorry.

22 HONORABLE TOM LAWRENCE: The form was  
23 discussed at the May 30th meeting, and the form was -- the  
24 purpose of the form was to be a substitute. There weren't  
25 any attachments to it. There wasn't any discovery. It

1 was just it meant that the pleadings were going to have to  
2 be specific as to what exactly was asked for. That was  
3 not what the committee told us to do in January. The  
4 committee in January told us to draft 741 like it is, so,  
5 you know, and I mentioned that earlier today that that  
6 form was provided, but the subcommittee didn't think that  
7 was what the committee wanted. Now, if you want a form --

8 CHAIRMAN BABCOCK: Well, you can't know what  
9 to put into the form until you know what's in 741.

10 PROFESSOR CARLSON: Right.

11 CHAIRMAN BABCOCK: So it seems to me you've  
12 got to do -- that step's the first step before you can  
13 create the form. What Steve is saying is that is it a  
14 good idea to have a form, and I think we've always thought  
15 that at some point once we get the elements of what should  
16 go in the form that a form is a good idea.

17 HONORABLE TOM LAWRENCE: Uh-huh.

18 PROFESSOR CARLSON: Yeah.

19 CHAIRMAN BABCOCK: But --

20 HONORABLE TOM LAWRENCE: Now, whether or not  
21 you have the form as a part of the rules, I guess the  
22 subcommittee didn't think that was needed, but we could do  
23 that.

24 CHAIRMAN BABCOCK: We'll we've got -- don't  
25 we have forms in the other parts of these rules?

1 HONORABLE TOM LAWRENCE: For bonds, for  
2 appeal bonds.

3 CHAIRMAN BABCOCK: But we have other forms  
4 in the rules, right?

5 HONORABLE TOM LAWRENCE: Would this mean  
6 that a lawyer couldn't draft their own? Would they have  
7 to use this form?

8 PROFESSOR DORSANEO: No. There are many  
9 statutes that say, "You can use this form." You know,  
10 "These are the rules requirements and if you use this form  
11 you're okay," and I would think in this kind of business  
12 where there are so many JPs and they're spread all over  
13 the place that it would be good to provide that kind of  
14 assistance to all the people involved in these types of  
15 proceedings.

16 MR. NIEMANN: I think the proposal we made  
17 was that the form would have to be substantially in  
18 compliance and the lawyers could do their own.

19 CHAIRMAN BABCOCK: Yeah.

20 MR. SUSMAN: I'm in no quarrel here today  
21 with the content of (a), (b), (c). I mean, we kind of  
22 always say the complaint must include. No one has argued  
23 against, right?

24 PROFESSOR DORSANEO: The difficulty is the  
25 general reference to the Chapter 24 of the Property Code.

1 When I'm reading that and then I go look at Chapter 24 of  
2 the Property Code, and I'm beginning to wonder whether I  
3 need to talk about motions to vacate in some detailed way,  
4 etc., etc. There are some choices to be made about what's  
5 included in the forms.

6 CHAIRMAN BABCOCK: Yeah. Well, since we are  
7 changing to some degree the practice, it probably would be  
8 helpful to particularly laypeople trying to proceed here  
9 to have a form, and I don't see any intellectual reason to  
10 keep it out of the rules. Do you, Judge Lawrence?

11 HONORABLE TOM LAWRENCE: No. If that's what  
12 you want to do, that's fine.

13 MR. ORSINGER: Well, I mean, I think you  
14 would probably put a form in a comment to the rule rather  
15 than the rule itself.

16 CHAIRMAN BABCOCK: Well, we have forms in  
17 the rules.

18 MR. ORSINGER: That would actually be part  
19 of the rule?

20 CHAIRMAN BABCOCK: Yeah. I mean, we  
21 approved two of them yesterday, one of them while you were  
22 Chair.

23 MR. ORSINGER: We need to be sure that we  
24 have appropriate flexibility.

25 MR. NIEMANN: Our proposal to the



1 subcommittee was exactly that. It is a long form, but it  
2 has to be a long form to cover a number of different  
3 circumstances, and we recommended in specific language  
4 that the rule be short, but that the commentary contain  
5 the -- a sample form.

6 CHAIRMAN BABCOCK: Yeah. Justice Hecht.

7 MR. NIEMANN: And I think that would give a  
8 great deal of guidance not only to the JPs, many of whom  
9 are using 19th century forms, but also to the litigants  
10 who are unknowledgeable about the law.

11 CHAIRMAN BABCOCK: Justice Hecht.

12 JUSTICE HECHT: And, you know, parental  
13 notification cases we adopted forms by order so that we  
14 would have flexibility to change the forms, which we had  
15 to do a couple of times. You know, the Department of  
16 Health or whatever it's called tested those forms in the  
17 field, but even so, after we started using them there were  
18 a couple of problems. So that way you can change them  
19 quickly, don't have to go through this process.

20 MR. NIEMANN: Yes.

21 JUSTICE HECHT: And everybody has them, and  
22 we're all kind of on the same page.

23 CHAIRMAN BABCOCK: So is that arguing  
24 against putting them in the rule?

25 MR. ORSINGER: Yeah.

1 JUSTICE HECHT: Well, I wonder if you should  
2 put them in the rule where the --

3 PROFESSOR CARLSON: 226a.

4 JUSTICE HECHT: Yeah.

5 MR. ORSINGER: On the instructions to the  
6 jury findings.

7 JUSTICE HECHT: Where the rule says that the  
8 court will prescribe by order the forms to be used, that  
9 can be used or whatever, and then you can set them out in  
10 the rules. That's fine. But just so that it's not a part  
11 of the text of the rule itself, that under the Enabling  
12 Act then you've got to come back and go through all of  
13 this process, give public notice, and let the Legislature  
14 know.

15 MR. NIEMANN: We would agree. That's why we  
16 didn't think the proper place was the rule. You need the  
17 flexibility of changing the statute or the case law, but,  
18 nonetheless, Judge Hecht, there is a serious need for  
19 knowledge on the forms by the rural and some of the urban  
20 JPs.

21 JUSTICE HECHT: Oh, that's --

22 MR. NIEMANN: The tragedy I see is that most  
23 justices, particularly in rural areas, are using the same  
24 forms that were used in 1920 because that's what they  
25 inherited.

1 JUSTICE HECHT: Well, that's exactly the  
2 reason that we did that in parental notification cases.  
3 Now, the downside of it is that once you put out a form it  
4 never goes away. It's the law of Meads and Persians.  
5 It's just there forever. You put out subsequent forms,  
6 but nobody -- maybe people pay attention to them, maybe  
7 they don't, but you just have to work with that problem,  
8 and the education group helps get the word out to the  
9 people.

10 PROFESSOR CARLSON: Yeah. But that's the  
11 preference, to do it like 226a?

12 JUSTICE HECHT: Yeah.

13 CHAIRMAN BABCOCK: Does that --

14 PROFESSOR CARLSON: Got it.

15 CHAIRMAN BABCOCK: Got it? Okay. And by  
16 the way, can you have this Monday?

17 PROFESSOR CARLSON: No.

18 CHAIRMAN BABCOCK: I'm glad we're paying you  
19 guys so good, getting all the great service we're getting  
20 out of you. Richard.

21 MR. ORSINGER: I just wanted to make a  
22 comment here about Larry's form. It's supposed to be a  
23 sworn complaint; but the actual oath, jurat, is on  
24 personal knowledge or information and belief; and I think  
25 that the affidavit case law indicates information and

1 belief makes it no longer sworn.

2 MR. NIEMANN: Well, that's exactly what I  
3 wanted to bring up because at the last meeting that you  
4 didn't attend Gregory Hitt came. He represents the  
5 Housing Authority for the City of Austin, and he has been  
6 constantly hit about the sworn complaint defense, "Well,  
7 your manager cannot swear to the criminal contact that she  
8 didn't see, so you can't introduce anything that -- your  
9 sworn complaint is defective on the face, and you can't  
10 proceed."

11 And I thought that there was a sympathy on  
12 the part of the committee to allow the complaint to be  
13 sworn either on personal knowledge or on information and  
14 belief, and that's why I put it in the form, and that's  
15 another thing that I was going to ask you-all at the tail  
16 end of your 741 discussions to please clarify what you  
17 mean by "sworn complaint," because if you strongly think  
18 it has to be on personal knowledge, we're dead in some  
19 cases.

20 MR. HAMILTON: Why does it have to be sworn  
21 to?

22 MR. NIEMANN: I think --

23 PROFESSOR DORSANEO: It doesn't. According  
24 to 741 it doesn't.

25 MR. NIEMANN: Probably for default judgment

1 cases, which you've eliminated now because you're  
2 requiring a trial, no longer an answer date in default  
3 judgments. So there is no need for personal knowledge  
4 anymore. There is no need for swearing anymore, as long  
5 as you swear the witness in who testifies at the default  
6 trial.

7 CHAIRMAN BABCOCK: Okay. So where we are on  
8 741, eight and a half by eleven is history in terms of the  
9 requirement for the size of the paper. The subcommittee  
10 is going to work on consolidating (a) through (e), and (e)  
11 in the way that we've talked about today. So that leads  
12 us to --

13 MR. EDWARDS: Can I ask something on (b)?

14 CHAIRMAN BABCOCK: Yeah.

15 MR. EDWARDS: What is it contemplated will  
16 be learned from the allegation in (b)?

17 MR. ORSINGER: Well, the defendant needs to  
18 know where to show up for trial, doesn't he?

19 CHAIRMAN BABCOCK: No, (b) is jurisdiction.

20 MR. ORSINGER: Just -- oh, just an  
21 allegation of jurisdiction.

22 CHAIRMAN BABCOCK: Why must there be an  
23 allegation of jurisdiction?

24 MR. EDWARDS: What I'm saying is does the  
25 property have to be within the precinct or --

1 CHAIRMAN BABCOCK: Well, that's (a):

2 MR. EDWARDS: Huh?

3 CHAIRMAN BABCOCK: That's (a).

4 MR. EDWARDS: Yeah. What's (b), other than  
5 just boilerplate?

6 PROFESSOR DORSANEO: Boilerplate.

7 MR. GILSTRAP: Take it out?

8 PROFESSOR DORSANEO: We normally don't  
9 allege jurisdiction in a separate paragraph.

10 PROFESSOR CARLSON: We may want to include  
11 venue.

12 MR. ORSINGER: Is (a) venue?

13 MR. EDWARDS: You've got it in (a).

14 MR. ORSINGER: Is (a) venue?

15 CHAIRMAN BABCOCK: (a) is venue, isn't it?

16 PROFESSOR CARLSON: Yeah.

17 MR. EDWARDS: I mean, by definition doesn't  
18 the justice court have jurisdiction of a -- I mean, what  
19 can you put in other than just say you have jurisdiction?

20 PROFESSOR CARLSON: As long as it's not  
21 determinative of title issues.

22 MR. NIEMANN: It's the only court that has  
23 jurisdiction is the JP. There is a 5,000-dollar  
24 jurisdictional limit, but I don't suppose you're getting  
25 into --

1 MR. EDWARDS: I know, but just telling  
2 somebody out there that's going to file his own complaint  
3 to state that the justice court has jurisdiction, they are  
4 going to maybe state it, but they don't know what they're  
5 doing. I don't know what it means.

6 CHAIRMAN BABCOCK: Yeah, Mary.

7 MS. SPECTOR: It may be perhaps it's to make  
8 clear that the damages sought or back rent sought is  
9 within the jurisdiction.

10 MR. EDWARDS: I don't think it makes any  
11 difference. I don't think the amount of rent -- I mean,  
12 you may have a default on something that is a million  
13 dollars a month rent and you've still got --

14 MS. SPECTOR: That's not been the practice.

15 PROFESSOR CARLSON: If all you're seeking is  
16 possession, it doesn't matter whether you paid \$5,000 in  
17 rent or a half a million, but if they're seeking rent --

18 MR. NIEMANN: The only time it could apply  
19 is if you're also suing for rent and in this case late  
20 charges and possibly attorneys fees and the amount exceeds  
21 \$5,000. It would not -- it would be beyond the  
22 jurisdiction.

23 CHAIRMAN BABCOCK: Can anybody think of a  
24 good reason to leave jurisdiction in?

25 PROFESSOR DORSANEO: No.

1 MR. EDWARDS: But that takes care of itself  
2 by the allegation of what you're asking --

3 CHAIRMAN BABCOCK: Objection, nonresponsive.  
4 Can anybody think of a good reason to leave jurisdiction  
5 in?

6 MR. GILSTRAP: Take it out.

7 HONORABLE TOM LAWRENCE: Are we talking  
8 about (a)?

9 PROFESSOR CARLSON: (b).

10 CHAIRMAN BABCOCK: No, (b). We're talking  
11 about (b). I hear silence. Good catch, Bill. Yeah.

12 MR. ORSINGER: Did you mean to skip over the  
13 use of the word "sworn" there in the fourth line? Or is  
14 that something that we can consider today?

15 PROFESSOR CARLSON: Yeah. I'd like to have  
16 the sense of the committee.

17 MR. ORSINGER: There may be some ground  
18 swell if we're going to require evidence be given at a  
19 default judgment --

20 CHAIRMAN BABCOCK: I did not mean to skip  
21 over it. Maybe even hadn't skipped over it. He didn't  
22 catch that. He was too busy. What about "sworn"?  
23 Justice Hecht, should it be "sworn"?

24 JUSTICE HECHT: I'm generally not for  
25 "sworn," but I yield to the experts.



1 MR. NIEMANN: It doesn't need to be "sworn"  
2 now because you're requiring everybody to have a  
3 designated trial date on default judgments. I don't think  
4 it needs to be sworn.

5 MR. ORSINGER: Well, is testimony required?

6 CHAIRMAN BABCOCK: Fred.

7 MR. FUCHS: I don't have have a problem with  
8 eliminating the requirement that it be sworn.

9 CHAIRMAN BABCOCK: Okay. Anybody got a good  
10 reason to make it "sworn"? Let's eliminate "sworn." See,  
11 Richard.

12 MR. SUSMAN: This form is going to be a  
13 blank piece of paper when we finish.

14 CHAIRMAN BABCOCK: That's right. We're  
15 minimalists.

16 MR. NIEMANN: It's going to be 10 blank  
17 pages of paper.

18 CHAIRMAN BABCOCK: And the attachments are  
19 going to make up for it.

20 MR. ORSINGER: They are going to be eight  
21 and a half by eleven.

22 CHAIRMAN BABCOCK: No, they're not.

23 MR. ORSINGER: Oh, they're not?

24 CHAIRMAN BABCOCK: No, no.

25 MR. NIEMANN: You weren't imposing the eight

1 and a half by eleven on exhibits?

2 CHAIRMAN BABCOCK: That was seven to six  
3 then. Okay. Anybody else got anything on the preamble or  
4 (a) through (e)?

5 PROFESSOR DORSANEO: (e), you know, when you  
6 go (e) (1), etc., but the (e) is pretty okay.

7 CHAIRMAN BABCOCK: Yeah, well, they're going  
8 to fix that.

9 PROFESSOR DORSANEO: "Chapter 24 of the  
10 Texas Property Code," and I would rather say what it is  
11 that is in Chapter 24 that needs to be covered in the  
12 complaint --

13 HONORABLE TOM LAWRENCE: It's going to be a  
14 much longer rule then.

15 PROFESSOR DORSANEO: -- instead of Chapter  
16 24 that don't need to be.

17 MR. NIEMANN: Well, it forces a layman to  
18 read a very long chapter. The lawyers know --

19 PROFESSOR DORSANEO: You can take care of  
20 that by -- I mean, your form no doubt selects from Chapter  
21 24.

22 MR. NIEMANN: Well, we had recommended  
23 specific sections of Chapter 24, but we think that would  
24 be preferable. Now, the argument on the other side that  
25 Judge Lawrence gave us is, well, what if the Legislature

1 amends the chapter?

2 CHAIRMAN BABCOCK: Yeah. We went through  
3 that once before in this meeting. In fact, I remember  
4 Judge Lawrence saying that, and that's the reason we  
5 didn't have the subparagraphs in there.

6 PROFESSOR DORSANEO: Can't we take out of  
7 what's in Chapter 24 and describe it in English rather  
8 than just cross-referring to it?

9 MR. NIEMANN: It's way too complicated for  
10 that. Even the notice provisions, there's alternative  
11 notice provisions that are that long in there. It would  
12 be very unwieldy to try to summarize substantively the  
13 law, and even then you would be subject to legislative  
14 change where you would have to summarize it differently.

15 HONORABLE TOM LAWRENCE: You can put a  
16 period after "possession" and delete everything else.

17 CHAIRMAN BABCOCK: Judge Lawrence has got a  
18 proposal, which is to put a period after "possession" and  
19 leave the "authorized under Chapter 24."

20 HONORABLE TOM LAWRENCE: Delete. Put a  
21 period after "possession" and delete everything after  
22 that. The only reason we put in "authorized under Chapter  
23 24" is that that is the only -- the only statute in the  
24 section that talks about why you can file a forcible. So,  
25 I mean, that's the only reason we put it in, but it's not

1 necessary language.

2 PROFESSOR DORSANEO: The other thing about  
3 it is -- and this is kind of more than a quibble, "The  
4 complaint must state the facts." I mean, do we want to --  
5 stating facts is predecessor code pleading kind of system  
6 or kind of a hybrid code state. We give fair notice of  
7 the claim involved, not stating facts. Should we use  
8 language that's similar to Rule 45 rather than this  
9 language that's similar to a predecessor version of 45?

10 HONORABLE TOM LAWRENCE: Well, that "facts"  
11 is actually in the current Rule 741.

12 PROFESSOR DORSANEO: But probably because it  
13 was not changed when the county and district level rules  
14 were changed a long time ago.

15 MR. SUSMAN: Wait a minute. I mean, to the  
16 extent that these things are being drafted by lawyers, let  
17 the regular pleading rules apply. I mean, to the extent  
18 that you're trying to get a lot of people to do without  
19 lawyers and do it on their own then give them a form.

20 MR. FUCHS: What they will say then is  
21 "violation of lease" instead of stating the particular way  
22 in which the lease is supposedly violated, and we need  
23 some protection.

24 PROFESSOR CARLSON: 47(a) says "a short  
25 statement of the facts is sufficient to give fair notice

1 of the claim involved." I think they want the facts.  
2 They want more specificity in this. Remember, it's an  
3 expedited --

4 PROFESSOR DORSANEO: Maybe that's right.  
5 Maybe state the facts is better, but give the form. I  
6 think give the form to indicate what stating the facts  
7 means because it doesn't --

8 CHAIRMAN BABCOCK: Yeah, I think --

9 MR. NIEMANN: And our form says briefly  
10 state the facts, because in all fairness everybody needs  
11 to know what the facts are.

12 CHAIRMAN BABCOCK: What's next? All right.  
13 Let's go to (f) then. 741(f).

14 MR. HAMILTON: Why do we have to refer to  
15 Rule 745? Why don't we just say it can be postponed?

16 HONORABLE TOM LAWRENCE: Well, 745 is the  
17 postponement rule, continuance rule. That's the only  
18 reason we put that in there.

19 MR. HAMILTON: Yeah, but all Rule 745 says  
20 is "for good cause the trial can be postponed."

21 HONORABLE TOM LAWRENCE: No.

22 CHAIRMAN BABCOCK: No.

23 PROFESSOR DORSANEO: "Not exceeding seven  
24 days."

25 HONORABLE TOM LAWRENCE: We voted on a new

1 745. It's different now.

2 MR. SUSMAN: Why is it "may" rather than  
3 "shall"? I mean, if he failed to --

4 MR. GILSTRAP: What if the tenant has the  
5 lease in his hand? I mean, you see what I'm saying? In  
6 other words, the mere fact that the plaintiff left  
7 something off the lease may not have harmed the defendant.

8 MR. SUSMAN: Okay.

9 CHAIRMAN BABCOCK: Ralph.

10 MR. DUGGINS: I think there is an  
11 inconsistency between (f) and 745 because (f) says that it  
12 can be postponed on the court's -- "on the court's  
13 initiative," but 745 says "for good cause shown supported  
14 by affidavit."

15 PROFESSOR CARLSON: We also have under --  
16 maybe I'm not looking at the right copy.

17 CHAIRMAN BABCOCK: No. I think that 745  
18 also has "on the court's own initiative."

19 MR. DUGGINS: But that's an exceptional  
20 circumstances.

21 CHAIRMAN BABCOCK: No, "upon a showing of  
22 exceptional circumstances the court may" --

23 MR. DUGGINS: For a longer period.

24 CHAIRMAN BABCOCK: "Or on the court's own  
25 initiative."

1 MR. DUGGINS: "For a longer period." That  
2 seems -- that's -- I read that as a second postponement.

3 PROFESSOR DORSANEO: Yeah, me, too.

4 HONORABLE TOM LAWRENCE: Well, the intent is  
5 that the judge postpone it as long as it's needed to get  
6 that document in, whatever time that is. I mean, that's  
7 what the subcommittee wanted to do, I think.

8 CHAIRMAN BABCOCK: Yeah. We had a long  
9 discussion about that, but Ralph's point is that that is  
10 inconsistent here.

11 PROFESSOR DORSANEO: It says, "In accordance  
12 with Rule 745." We don't know what that's talking about.  
13 Does that mean not exceeding seven days or in accordance  
14 with all of 745?

15 MR. HAMILTON: Does it mean you have to have  
16 an affidavit? Normally you get to the court and you find  
17 there's a petition and you ask for postponement.

18 PROFESSOR CARLSON: Yeah. Why don't we just  
19 strike that out?

20 HONORABLE TOM LAWRENCE: Yeah. We can just  
21 strike "in accordance with Rule 745," if you want to.  
22 Would that work?

23 PROFESSOR CARLSON: I think it could be at  
24 the trial.

25 MR. GILSTRAP: That leaves open-ended how

1 long.

2 HONORABLE TOM LAWRENCE: Uh-huh. It does.

3 PROFESSOR CARLSON: We need to --

4 CHAIRMAN BABCOCK: Why wouldn't you  
5 reference 745? 745 is something we talked about at length  
6 and was heavily negotiated in terms of how long it could  
7 be postponed for, and so you wouldn't want to create an  
8 ambiguity in 741 and say, "Well, this is a 741  
9 continuance, and we're going to do this for a month  
10 because" --

11 MR. HAMILTON: Just say "for the time period  
12 stated in Rule 745."

13 HONORABLE TOM LAWRENCE: Well, you could say  
14 -- what if you just said "court's own initiative for a  
15 period not to exceed seven days"? I mean, that should be  
16 -- there's no reason for it to ever go more than seven  
17 days, and that gives the court the ability to do it less  
18 than that. Would that be satisfactory?

19 MR. DUGGINS: I think you can fix it in 745  
20 after "party" if you just inserted "or upon the court's"  
21 or "at the court's initiative" or "on the court's  
22 initiative."

23 PROFESSOR DORSANEO: Uh-huh.

24 MR. DUGGINS: Just to make clear that the  
25 court didn't have to have an affidavit to postpone it for



1 up to seven days.

2 CHAIRMAN BABCOCK: Okay.

3 HONORABLE TOM LAWRENCE: Well, now, the way  
4 -- I thought the way we had this worded now is that "Upon  
5 a showing of exceptional circumstances supported by  
6 affidavit of either party or on the court's own  
7 initiative."

8 PROFESSOR CARLSON: But that's for a longer  
9 period. We're talking the first sentence.

10 HONORABLE TOM LAWRENCE: Oh, I'm sorry. The  
11 first sentence. Excuse me.

12 PROFESSOR DORSANEO: Of 745.

13 HONORABLE TOM LAWRENCE: And how would you  
14 propose to do that?

15 PROFESSOR CARLSON: A period after "party or  
16 on the court's own initiative."

17 MR. HAMILTON: Well, I propose that we just  
18 have it read "upon motion of any party or on the court's  
19 own initiative it can be postponed for a period not to  
20 exceed seven days."

21 PROFESSOR CARLSON: And strike the  
22 affidavit?

23 MR. HAMILTON: No, no. I'm talking about in  
24 (f).

25 PROFESSOR CARLSON: Oh, okay.

1 CHAIRMAN BABCOCK: That's what we're trying  
2 to get at by the reference to 745.

3 MR. HAMILTON: See, (f) is a specific  
4 situation where they're short on documents.

5 PROFESSOR CARLSON: Right.

6 MR. HAMILTON: So they don't really need a  
7 lot of time to cure the problem. Seven days may be too  
8 long.

9 MR. EDWARDS: And the good cause in 745 is  
10 self-explanatory.

11 CHAIRMAN BABCOCK: Right. Right. Makes a  
12 lot of sense. So the sentence would read, "If plaintiff  
13 fails to attach any information required by this rule then  
14 the trial may be postponed on motion of any party or on  
15 the court's own initiative for a period not to exceed  
16 seven days," period. Is that okay with everybody?

17 Okay. What else on (f)? Okay. What about  
18 (g)?

19 MR. EDWARDS: I think you've got the same  
20 thing there. Do you need a sworn motion if there's an  
21 amendment?

22 MR. FUCHS: Mr. Chairman, with the second to  
23 last sentence on (g) I have a concern that says "the  
24 complaint may be amended by the plaintiff at any time  
25 prior to trial." I think you need to add after "trial,"

1 "so long as served on the defendant prior to trial."

2 I'm concerned about the case where the  
3 landlord sues only for possession, shows up. The tenant  
4 doesn't show up, and the landlord says, "Oh, I'm amending,  
5 Judge, to add a 5,000-dollar claim for rent," gets a  
6 default judgment. The tenant had moved out, thinking,  
7 "Oh, I'm only being sued for possession. I owe the rent.  
8 I didn't show up. There's no rent claim by the landlord,"  
9 and all of the sudden finds that there's a 5,000-dollar  
10 judgment.

11 MR. NIEMANN: I have no problem with that.

12 CHAIRMAN BABCOCK: Okay. So read that  
13 again.

14 MR. FUCHS: I suggested adding "so long as  
15 served on the defendant prior to trial."

16 MR. EDWARDS: That doesn't really do you  
17 much good if they give it to the defendant three hours  
18 before trial and then run over there and take a  
19 5,000-dollar default.

20 MR. FUCHS: I understand. I'm just trying  
21 to get at least some protection in notice.

22 HONORABLE TOM LAWRENCE: Well, if the tenant  
23 doesn't show up, I mean, he's been served with the initial  
24 lawsuit, then he's been served with this amendment, so if  
25 he chooses not to show up -- but if he does show up he can

1 always get a continuance.

2 MR. EDWARDS: Yeah, but you see, on the  
3 original complaint that person has got whatever that time  
4 is that we've got in here, seven days, six days, whatever  
5 it is. If you go over there and you amend it, it may be  
6 an entirely different lawsuit by the amendment, as he  
7 pointed out, the difference between moving out and getting  
8 a 5,000-dollar judgment later on; and it seems to me that  
9 if the amendment is going to make a change in remedy, that  
10 there ought to be the same amount of time that there is --  
11 you know, you can't get a default on something like that  
12 without the time for the defendant to react.

13 HONORABLE TOM LAWRENCE: Well, I mean, isn't  
14 the defendant protected because he can ask for a  
15 continuance?

16 MR. EDWARDS: Only if he's there and if he  
17 gets that -- you know, we get into what's service of an  
18 amended pleading?

19 MR. HAMILTON: It seems to me that --

20 MR. EDWARDS: Served at his address?

21 CHAIRMAN BABCOCK: Carl.

22 MR. HAMILTON: It seems to me that if we're  
23 going to talk about the judgment on the amended complaint,  
24 that ought to be over in Rule 748 instead of here, and it  
25 ought to be left as it is. You ought to be entitled to

1 amend any time prior to trial, but then if we're going to  
2 say over in the judgment area that you can't have a  
3 judgment on an amended complaint unless it's served on the  
4 defendant, if you change something in it.

5 CHAIRMAN BABCOCK: Yeah.

6 MR. NIEMANN: I don't know that I have the  
7 solution, but I'd like to pose the typical dilemma that I  
8 see all the time. You have a -- someone who is really  
9 running a prostitution or a drug ring or is strongly  
10 suspected to be the rapist or the burglar or the molester,  
11 and the lay plaintiff will file a lawsuit on that, and  
12 that's a very difficult case. And when it comes to me I  
13 say, "Well, are they late on the rent?"

14 "Yes, they're late on the rent."

15 "Well, why don't you amend to try to get  
16 them out on a simple late rent thing?" But this is after  
17 the lawsuit is already filed, so it -- we really do --  
18 and, also, these other conduct things tend to crescendo  
19 between the time of filing and the time of trial, so we  
20 desperately need the ability to amend, and I don't mind  
21 giving notice, and I think the circumstances vary so much  
22 that it ought to be within the judge's discretion on  
23 whether to continue if there is prejudice or surprise, and  
24 I don't think this committee can dictate whether prejudice  
25 is going to occur in any particular case.

1 MR. EDWARDS: It looks to me like if you're  
2 going to amend that they ought to get the same notice on  
3 amended complaint that they get on original complaint.

4 MR. NIEMANN: That's like filing a new  
5 complaint in --

6 MR. EDWARDS: That's right. That's what  
7 you're doing.

8 MR. NIEMANN: A lot of paper work and  
9 service.

10 MR. GILSTRAP: Maybe we could actually -- I  
11 think there's a difference between amending, you know,  
12 with someone who's in court who's going to be in there and  
13 a default judgment. In fact, that also applies in regular  
14 district court case. If you're going to try to get a  
15 default judgment on someone on an amended complaint,  
16 you've got to serve them with the amended complaint.

17 CHAIRMAN BABCOCK: Right.

18 MR. GILSTRAP: So maybe we put some kind of  
19 proviso in there just saying that you can't get a default  
20 judgment on an amended complaint unless they have been  
21 served with it.

22 MR. NIEMANN: That's fine.

23 MR. GILSTRAP: So far -- so much prior to  
24 the judgment or something like that.

25 MR. EDWARDS: Yeah. You have to have the

1 time between the service of the amended complaint and the  
2 judgment or it's not fair.

3 MR. NIEMANN: I don't mind being restricted  
4 at all to the original complaint as filed if it's being  
5 relied on for a default judgment, but we've just got to  
6 have the ability to amend for before trial and not slow  
7 down unless we're really blindsiding the defendant.

8 MR. EDWARDS: I'm not suggesting you  
9 shouldn't -- there shouldn't be the right to amend, and I  
10 don't have a problem if the amendment occurs any time  
11 before trial if the defendant is present and can exercise  
12 his or her rights to ask for more time if something  
13 happens in the complaint, but I have a problem with an  
14 amended complaint that results in a default judgment  
15 without an equal amount of time as original complaint.

16 MR. NIEMANN: I share with you. That's why  
17 I go with the default judgment thing.

18 CHAIRMAN BABCOCK: Yeah. I think we have  
19 consensus on that. Anything else about (g)?

20 And the reason why I'm trying to keep this  
21 going is because we've got a whole other subject matter  
22 area to talk about in half an hour, so -- less than half  
23 an hour. So anything else on (g)?

24 How about (h)? Anything on (h) that people  
25 want to --

1 HONORABLE TOM LAWRENCE: I'm sorry, I had to  
2 step out. Are we adding Fred's language, "as long as it's  
3 served on the defendant prior to trial"?

4 CHAIRMAN BABCOCK: Well, and incorporating a  
5 default concept. You can't default somebody --

6 HONORABLE TOM LAWRENCE: You got that?

7 CHAIRMAN BABCOCK: Yeah. Elaine's got it.

8 Okay. (h). Anybody got anything on (h)?  
9 On the 30-day disposal, would it -- Judge Lawrence, would  
10 it be correct to add a phrase that says "after the  
11 expiration of the 30-day period the exhibits may be  
12 returned to the plaintiff or disposed of by the justice  
13 court unless there is a pending request to inspect those  
14 documents pursuant to Rule 76a"?

15 HONORABLE TOM LAWRENCE: Sure.

16 MR. GRIESEL: Do-gooder.

17 CHAIRMAN BABCOCK: Huh?

18 MR. GRIESEL: Do-gooder.

19 MR. HAMILTON: If I'm not mistaken -- and,  
20 John, you may remember -- in Court Rules Committee we  
21 dealt with this problem at the request of Judge Prindle,  
22 and I think that what we came down to was that the  
23 exhibits are something that needs to go back to the  
24 lawyers because they are going to be used again in the  
25 county court at law in a trial de novo and they're not



1 something that the JPs wanted to mess with keeping custody  
2 of and having to be sure that they got to the county  
3 court. So I think we had a provision that in X number of  
4 days that they be returned to the lawyers and the lawyer  
5 is responsible for the exhibits.

6 CHAIRMAN BABCOCK: That is the -- that is  
7 the scheme of 76a with respect to unfiled discovery. It's  
8 subject to 76a. The lawyer is the custodian.

9 HONORABLE TOM LAWRENCE: But if you're going  
10 to have an appeal which is going to go up five days after  
11 the trial, surely you would want all of these documents  
12 forwarded up to the county court.

13 CHAIRMAN BABCOCK: He's talking about when  
14 there's no appeal.

15 MR. HAMILTON: No. I'm talking about when  
16 there is an appeal.

17 CHAIRMAN BABCOCK: This rule covers that  
18 then.

19 MR. EDWARDS: Everything goes to county  
20 court.

21 MR. HAMILTON: I'm just saying that I think  
22 Judge Prindle didn't want to have that responsibility. He  
23 wanted the lawyers. He wanted the exhibits to go back to  
24 the lawyers because there is a trial de novo in the county  
25 court and those exhibits may or may not be used again.

1 CHAIRMAN BABCOCK: "If there is an appeal  
2 all exhibits must be sent to the county court along with  
3 the other papers."

4 MR. ORSINGER: Carl's talking about instead  
5 of that you give them back.

6 CHAIRMAN BABCOCK: You can't do that. You  
7 have them attached to the complaint. You can't disrupt  
8 the court file.

9 MR. ORSINGER: No, couldn't do that for  
10 sure.

11 MR. HAMILTON: Well, I'm not talking about  
12 the exhibits that are attached to the complaint. I'm  
13 talking about other exhibits.

14 HONORABLE TOM LAWRENCE: This doesn't have  
15 anything to do with that.

16 CHAIRMAN BABCOCK: This doesn't have  
17 anything to do with that.

18 MR. HAMILTON: This is just the ones on the  
19 complaint?

20 PROFESSOR CARLSON: Yeah.

21 MR. HAMILTON: Oh, okay. Well, that's fine.

22 MR. GILSTRAP: Although it is somewhat  
23 ambiguous. It says "all exhibits." I guess that could  
24 include ordinary exhibits. Say, "All exhibits attached to  
25 the complaint."

1 HONORABLE TOM LAWRENCE: Well, the first  
2 sentence is clear. Maybe the second sentence needs to be  
3 clearer.

4 MR. HAMILTON: The second sentence says "all  
5 exhibits will be sent to the county court."

6 HONORABLE TOM LAWRENCE: How about just  
7 saying "all exhibits" --

8 PROFESSOR CARLSON: "Attached to the  
9 complaint."

10 HONORABLE TOM LAWRENCE: -- "attached to the  
11 complaint"? Will that fix it?

12 MR. EDWARDS: What's the intention? You  
13 don't want the whole record in the county court? I  
14 thought the whole record went.

15 HONORABLE TOM LAWRENCE: No. The intention  
16 is to have these exhibits -- these things filed with the  
17 complaint to not be considered court papers and, thus,  
18 having to be kept for 10 years.

19 MR. EDWARDS: But I thought on appeal --

20 MR. GILSTRAP: No, because it's trial de  
21 novo. See, you don't have a record. You're going up  
22 on --

23 MR. EDWARDS: What gets sent to the county  
24 court automatically?

25 HONORABLE TOM LAWRENCE: Well, the

1 transcript of the case. I mean, you're going to have the  
2 complaints; any moneys paid into the registry of the  
3 court; the answer, if there is one.

4 MR. GILSTRAP: Judgment.

5 HONORABLE TOM LAWRENCE: The judgment.

6 MR. HAMILTON: The docket sheet.

7 HONORABLE TOM LAWRENCE: Docket sheet.

8 PROFESSOR DORSANEO: The exhibits, during  
9 the trial are the exhibits filed with you? That would be  
10 part of the transcript, wouldn't it?

11 PROFESSOR CARLSON: Parties take them back.

12 HONORABLE TOM LAWRENCE: Well, the  
13 transcript is -- "transcript" is a term that probably  
14 shouldn't be used in JP court, although that's how the  
15 rule refers to it. I mean, there is no court reporter.

16 PROFESSOR DORSANEO: Transcript there meant  
17 what we used to call a transcript, meaning --

18 MR. ORSINGER: Clerk's record.

19 PROFESSOR DORSANEO: -- clerk's record.

20 PROFESSOR CARLSON: They take them back.  
21 They give them back.

22 PROFESSOR DORSANEO: What?

23 PROFESSOR CARLSON: They give the exhibits  
24 back at the end of the trial.

25 HONORABLE TOM LAWRENCE: That's the typical

1 practice in many JP courts.

2 PROFESSOR CARLSON: Bye-bye.

3 MR. ORSINGER: Well, it's not a court of  
4 record, so that's a very logical thing to do.

5 PROFESSOR CARLSON: Yeah. Sure.

6 PROFESSOR DORSANEO: Better than throwing  
7 them away.

8 HONORABLE TOM LAWRENCE: You've got a comity  
9 between small claims court cases and justice court  
10 decisions, and these rules, you know, technically don't  
11 apply to small claims court cases for the most part. So  
12 there -- I know. I hate to even mention that.

13 PROFESSOR CARLSON: Don't go there.

14 CHAIRMAN BABCOCK: Yeah, don't go there. So  
15 you're going to clear up the ambiguity about the -- we're  
16 talking about the exhibits that are -- the exhibits we're  
17 talking about are the exhibits that are attached to the  
18 complaint and not to the --

19 MR. NIEMANN: Would it be easier to just  
20 delete the first sentence and in the second sentence say,  
21 "if it's appealed, all attachments to the complaint shall  
22 go up"?

23 CHAIRMAN BABCOCK: I'm sorry. I couldn't  
24 hear.

25 MR. NIEMANN: Instead of confusing things by

1 calling these mandatory attachments "exhibits," would it  
2 be easier to blow off the first sentence and simply say  
3 "if there is an appeal all attachments shall" --

4 HONORABLE TOM LAWRENCE: No.

5 CHAIRMAN BABCOCK: No, because Judge  
6 Lawrence has got a 10-year archive problem.

7 HONORABLE TOM LAWRENCE: I've got to have  
8 that sentence in there.

9 CHAIRMAN BABCOCK: By the way, I don't know  
10 who the scrivener was, but the --

11 HONORABLE TOM LAWRENCE: Depends on whether  
12 you like it or not.

13 CHAIRMAN BABCOCK: The language that I have  
14 proposed for the fourth sentence, "After the expiration of  
15 this 30-day period the exhibits may be returned to the  
16 plaintiff or disposed of by the justice court," and I  
17 suggested adding "unless there is a pending request to  
18 inspect those documents pursuant to Rule 76a," and I would  
19 add "or the common law," because there is a common law  
20 right of access to court records, so the request might be  
21 under the common law.

22 HONORABLE TOM LAWRENCE: Justice Hecht, if  
23 we say -- do we need to reference Judicial Administration  
24 in the rules?

25 MR. GRIESEL: No. Because these will be

1 adjudicative records and clearly exempted from RJA-12.

2 MR. GILSTRAP: Let's just say "unless  
3 there's a pending request to examine the records."

4 CHAIRMAN BABCOCK: Just say that. "Unless  
5 there's a pending request to inspect the records."

6 MR. ORSINGER: Well, shouldn't you have some  
7 kind of authority to throw it away after that?

8 CHAIRMAN BABCOCK: Yeah. This is only --  
9 they have authority to throw it away unless there's a  
10 pending request.

11 MR. ORSINGER: I know that. And so let's  
12 say 30 days comes and goes and there's a pending request  
13 and somebody comes down and copies everything and then  
14 just disappears. Now, can they throw it away?

15 CHAIRMAN BABCOCK: Probably.

16 MR. GILSTRAP: No longer pending.

17 MS. CORTELL: It's no longer pending.

18 Mr. ORSINGER: What?

19 CHAIRMAN BABCOCK: No longer pending.

20 MR. ORSINGER: No longer pending?

21 CHAIRMAN BABCOCK: And that's --

22 MR. ORSINGER: I can live with that.

23 CHAIRMAN BABCOCK: That's just a balance  
24 between -- I mean, if this is something that --

25 MR. ORSINGER: I'm not fighting about it. I

1 just want to be sure they can throw it away after the  
2 request is no longer pending. Since no one declares it  
3 pending or nonpending, how do we know that it's not  
4 pending?

5 CHAIRMAN BABCOCK: Well, because somebody  
6 has requested it, and they either get it or they don't.  
7 Once they get it then it's not pending anymore.

8 MR. ORSINGER: Okay.

9 CHAIRMAN BABCOCK: That's what I would say.

10 MR. EDWARDS: I guess if the justice denies  
11 it, it's not pending anymore.

12 MR. ORSINGER: Yeah. I guess when the  
13 justice throws it away it's not pending.

14 CHAIRMAN BABCOCK: Okay. Yeah, Bill.

15 MR. EDWARDS: I think the thing that was  
16 maybe confusing to me is that 749(b) says that the  
17 original papers will be sent to the court of appeals.  
18 What are original papers?

19 HONORABLE TOM LAWRENCE: The original  
20 complaint and answer, the citation.

21 MR. EDWARDS: Are they exhibits?

22 HONORABLE TOM LAWRENCE: No. That's why I  
23 want the first sentence of (h) in here so it's considered  
24 to be an exhibit and, thus, comes under the archives  
25 ruling that let's the Supreme Court allow it to be



1 destroyed.

2 MR. EDWARDS: I just have problems with what  
3 means "original papers." I mean, you know, maybe the  
4 exhibits are original papers if I put in a lease or I put  
5 in --

6 PROFESSOR DORSANEO: They're looking like  
7 they're original papers since they're right there in the  
8 beginning.

9 HONORABLE TOM LAWRENCE: Well, I would  
10 really like them not to be considered original papers,  
11 because that means I've got to keep them 10 years.

12 MR. EDWARDS: I'm just suggesting maybe  
13 there's a better word than "original papers."

14 HONORABLE TOM LAWRENCE: Well, "original  
15 papers" is the existing language, and that's -- I mean,  
16 that is known to everybody that's in this business. I  
17 mean, all the clerks and JPs and the county clerks know  
18 what that means.

19 MR. EDWARDS: What are they doing with the  
20 exhibits now?

21 HONORABLE TOM LAWRENCE: Well, typically  
22 they are --

23 MR. EDWARDS: Sending them to the county  
24 court?

25 HONORABLE TOM LAWRENCE: No. They would be

1 typically given back to the parties.

2 MR. ORSINGER: Even the ones that are  
3 attached to the complaint?

4 HONORABLE TOM LAWRENCE: There are none  
5 attached to the complaint.

6 MR. ORSINGER: Nobody does that now.

7 HONORABLE TOM LAWRENCE: If somebody  
8 attaches something to the complaint now then, yeah, it  
9 probably stays with it. But that -- and that does happen  
10 some. We get some documents attached to the complaints  
11 now, but a typical -- I would say in vast majority of the  
12 cases a typical complaint is just the document, the  
13 complaint itself. There's nothing attached. If something  
14 is attached, yeah, that does stay with it now.

15 MR. EDWARDS: I just had a problem with what  
16 meant "original papers," I guess.

17 CHAIRMAN BABCOCK: Okay. Anything else on  
18 (h)?

19 MR. HAMILTON: Current Rule --

20 HONORABLE TOM LAWRENCE: Well, the second  
21 sentence.

22 MR. HAMILTON: 574 says when appeal is  
23 perfected the justice shall immediately make out a true  
24 and correct copy of all entries made on the docket,  
25 certify it and officially send it with a certified copy of

1 the bill of costs and original papers. Is that different?

2 MR. EDWARDS: No, that's what it says now.

3 That's what it says in here. I think they tracked the  
4 language.

5 HONORABLE TOM LAWRENCE: There is a comment  
6 about the second sentence of (h). Do we need to do  
7 something there?

8 PROFESSOR CARLSON: Yeah, exhibits attached  
9 with the complaint.

10 HONORABLE TOM LAWRENCE: All right. So we  
11 decided to do that? All right. Got it.

12 MR. HAMILTON: Did we decide on (g) what  
13 we're going to do with the exhibits?

14 PROFESSOR CARLSON: I couldn't hear you,  
15 Carl.

16 MR. HAMILTON: Did we decide what we were  
17 going to do with the exhibits not attached to the  
18 complaint?

19 PROFESSOR CARLSON: No.

20 HONORABLE TOM LAWRENCE: Well, these rules  
21 don't address it now. I guess we hadn't addressed it in  
22 the proposed changes.

23 MR. GILSTRAP: But has that ever been a  
24 problem?

25 HONORABLE TOM LAWRENCE: Not that I know of.

1                   CHAIRMAN BABCOCK: All right. Anything else  
2 on (h)? How about the notes and comments?

3                   HONORABLE TOM LAWRENCE: Well, I need the  
4 third sentence -- I need to take out the strike-through  
5 there.

6                   CHAIRMAN BABCOCK: You need to take out  
7 the --

8                   HONORABLE TOM LAWRENCE: In the third  
9 sentence it's struck through "which the court would then  
10 be required to attach citations," so I need to remove the  
11 strike-through so that language is back in.

12                   CHAIRMAN BABCOCK: I don't follow you.

13                   HONORABLE TOM LAWRENCE: Okay. The third  
14 sentence --

15                   CHAIRMAN BABCOCK: Oh, you're in the notes  
16 and comments. I'm sorry.

17                   HONORABLE TOM LAWRENCE: I thought that's  
18 what we were talking about.

19                   CHAIRMAN BABCOCK: Yeah, we are. I thought  
20 you retreated. Glad you didn't. Full speed ahead.

21                   PROFESSOR DORSANEO: What do you call your  
22 case file? Why don't you just send your file instead of  
23 the original papers, if it's the case file? Do you have a  
24 thing that's in one of these shucks or whatever? Why not  
25 just send that? Why have original papers, whatever that

1 meant?

2 HONORABLE TOM LAWRENCE: Well, we would have  
3 -- for example, we would print out notes from the  
4 computer, case history notes about it. That would be in  
5 the file, but it's not a paper. It's not an official  
6 document. That would not be sent up with the transcript,  
7 for example, and there may be other things. Nothing is  
8 coming to mind, but there may be other things that might  
9 happen to be put in there that's not really an official  
10 paper or something that's filed.

11 MR. GILSTRAP: The bottom line is it ain't  
12 broke.

13 PROFESSOR DORSANEO: It is broken. We say  
14 "original papers." We don't know what that means, and  
15 then we talk about these other things that are kind of  
16 something or kind of not, and it's some arcane, confused,  
17 not looked at or worked on for many years concoction of  
18 old stuff that people used to know what it meant and new  
19 stuff, and we don't know either at this point.

20 PROFESSOR CARLSON: Where's your sense of  
21 nostalgia?

22 CHAIRMAN BABCOCK: Nina.

23 MS. CORTELL: On the comment, it seems we  
24 could delete the third sentence, and on the fourth  
25 sentence we need to take out the word "relevant" to make

1 it conform to our earlier thinking. I don't even think  
2 you need it, but --

3 HONORABLE TOM LAWRENCE: Okay. That's  
4 because it's stated in the failure of the plaintiff to  
5 attach? Take that out?

6 CHAIRMAN BABCOCK: Yeah.

7 MS. CORTELL: Well, the third sentence is  
8 that the plaintiff is also required to attach copies of  
9 documents relevant. That third sentence could come out.

10 CHAIRMAN BABCOCK: Yeah, I agree.

11 MS. CORTELL: The fourth sentence could also  
12 come out, but if you keep it in, you've got to take out  
13 the "relevant" phrase.

14 MR. GILSTRAP: It's already in the rule.

15 CHAIRMAN BABCOCK: It's already in the rule,  
16 right?

17 HONORABLE TOM LAWRENCE: I don't see  
18 "relevant" in the third -- in the fourth --

19 MS. CORTELL: "The failure of the plaintiff  
20 to attach relevant documents."

21 HONORABLE TOM LAWRENCE: Oh, I'm sorry.  
22 You're right. Yeah.

23 CHAIRMAN BABCOCK: Does that sentence come  
24 out or does the word "relevant" come out?

25 MS. CORTELL: Well, I would take sentence

1 three out. You could also take sentence four out.

2 MR. EDWARDS: The sentence just repeats  
3 what's up above.

4 MS. CORTELL: And so does three. I don't  
5 think you need three, either.

6 HONORABLE TOM LAWRENCE: How about sentence  
7 five? We've got "relevant" in there.

8 MS. EADS: No. That should stay.

9 MS. CORTELL: You could just say, "If the  
10 required documents were not" --

11 HONORABLE TOM LAWRENCE: Well, I mean, we  
12 could take that out because that also restates the rule.

13 CHAIRMAN BABCOCK: Yeah. I'd take that all  
14 out.

15 MS. CORTELL: Yeah. That's fine. That's  
16 fine.

17 HONORABLE TOM LAWRENCE: All right.

18 CHAIRMAN BABCOCK: Take it all out.

19 HONORABLE TOM LAWRENCE: Done.

20 CHAIRMAN BABCOCK: Now, rather than go to --  
21 rather than go to the language on 743, what I'd like to  
22 see happen between now and September 20 is for Fred and  
23 Larry and Judge Lawrence and Elaine to see if they can  
24 come up with language that would be acceptable to  
25 everybody, recognizing the full committee has already

1 voted in favor of the concept of this. Fred's suggested  
2 language doesn't strike me as a bad idea, but that's for  
3 everybody to think about.

4 HONORABLE TOM LAWRENCE: Well, his  
5 suggestion is to take the first -- everything up to the  
6 colon and put it in a comment. Right? I don't have any  
7 problem with doing that.

8 PROFESSOR DORSANEO: That will work for you.

9 MS. CORTELL: You would take out "however"  
10 also?

11 HONORABLE TOM LAWRENCE: No. I would start  
12 the sentence with "justice," I guess.

13 CHAIRMAN BABCOCK: Right.

14 HONORABLE TOM LAWRENCE: That's fine with  
15 me.

16 MR. GILSTRAP: I think we could agree on  
17 that now.

18 CHAIRMAN BABCOCK: Okay. Particularly since  
19 Larry is out of the room, right?

20 PROFESSOR DORSANEO: He said he agreed with  
21 that.

22 PROFESSOR CARLSON: We're hoping for  
23 closure.

24 HONORABLE TOM LAWRENCE: Yeah. I am not  
25 interested in any more meetings really.



1 CHAIRMAN BABCOCK: Everybody in favor of  
2 that? Nina, you are.

3 That's unanimous.

4 Okay. And now -- so that gets us through  
5 743. That's helpful. 754(c) we're going to take out.

6 HONORABLE TOM LAWRENCE: Right.

7 CHAIRMAN BABCOCK: And so that gets us  
8 through the discovery issue.

9 HONORABLE TOM LAWRENCE: Right.

10 CHAIRMAN BABCOCK: So what's this other  
11 thing we've got to talk about?

12 HONORABLE TOM LAWRENCE: 747a. No, 749(a),  
13 excuse me, and 749 subparagraph (a), not 749a, affidavit  
14 of indigence, page 16. It's the problem with motions for  
15 new trial. The current rule says no motions for new trial  
16 may be filed. It doesn't specifically say anything about  
17 motions to set aside defaults or DWOPs. The -- this was a  
18 contentious -- bone of contentious argument at the May  
19 30th meeting.

20 The landlords' position is, you know, very  
21 emphatically no motions for new trial, no nothing, no  
22 motion to set aside. DWOPs are dismissals. Their new  
23 trial is an appeal. If you're late, if somebody is late,  
24 too bad. Then either the plaintiff needs to appeal or the  
25 defendant needs to appeal. Of course, the plaintiff can

1 appeal by posting a notice of appeal. The defendant has  
2 to post a supersedeas bond to appeal, so it's not quite an  
3 even playing field.

4           The subcommittee, there was no agreement.  
5 The landlords want to have -- or the tenants don't  
6 disagree with the idea of no motion for new trial where  
7 there's been a full trial and everybody has been there,  
8 but they would like to preserve the opportunity to have a  
9 default set aside in particular. The subcommittee's  
10 proposal is, "In eviction cases in which there has been an  
11 evidentiary trial on the merits no motions for new trial  
12 may be filed"; and the last sentence is, "A justice may  
13 set aside a default judgment or dismissal for want of  
14 prosecution as justice requires any time before the  
15 expiration of five days from the date the judgment was  
16 signed."

17           We had a long discussion about the problem  
18 of the standard set in Craddock vs. Sunshine Bus as to the  
19 type of notice to be given, opportunity, what type of --  
20 can it be a decision by submission, does it have to be a  
21 hearing. There is a lot of discussion about that. Elaine  
22 can probably expound on that if necessary. This gives the  
23 judge an opportunity to set aside a default or dismissal,  
24 and that's it. That's just where the -- somebody gets  
25 there late or doesn't show up for some reason, there is

1 some good cause for that -- for trial, yes, for trial,  
2 that's a reason to set it aside. So that's really what it  
3 says.

4 CHAIRMAN BABCOCK: Discussion on this?  
5 Ralph.

6 MR. DUGGINS: Does "evidentiary trial" mean  
7 contested? I mean, don't you have to -- to get a default  
8 do you still have to put on evidence?

9 HONORABLE TOM LAWRENCE: Yes. Well,  
10 notwithstanding the comment, at the last meeting that  
11 some -- well, never mind, I don't want to get into that,  
12 but, yes, you're supposed to put on evidence to get a  
13 default.

14 PROFESSOR CARLSON: "Contested evidentiary."

15 PROFESSOR DORSANEO: "Contested case" would  
16 be the the right jargon from Rule 245.

17 HONORABLE TOM LAWRENCE: Do you say  
18 "contested evidentiary" or just "contested"?

19 MR. EDWARDS: Aren't you talking about a  
20 trial where the defendant has appeared?

21 HONORABLE TOM LAWRENCE: Yeah, exactly.

22 MR. EDWARDS: Why don't you just say it? I  
23 mean, somebody might understand it, but we could say it  
24 anyway.

25 HONORABLE TOM LAWRENCE: Well, do you want

1 to say "in which both the plaintiff and defendant have  
2 appeared"? Is that what you want?

3 MR. EDWARDS: Well, the plaintiff doesn't  
4 appear.

5 PROFESSOR CARLSON: Well, we're dealing with  
6 DWOPs, too.

7 HONORABLE TOM LAWRENCE: Well, we're talking  
8 about DWOPs, too, so, I mean, you have to --

9 MR. EDWARDS: You're talking about here  
10 where both parties appear at the trial.

11 HONORABLE TOM LAWRENCE: That's the first  
12 sentence, yes.

13 MR. EDWARDS: Yeah.

14 CHAIRMAN BABCOCK: "In eviction cases in  
15 which there has been a trial on the merits where" --

16 MR. EDWARDS: "Both parties appear."

17 CHAIRMAN BABCOCK: "Both parties appear."

18 MR. EDWARDS: Or "all parties appear."

19 CHAIRMAN BABCOCK: Or "all parties appear."

20 MR. EDWARDS: Or "are represented." But I  
21 guess they're --

22 CHAIRMAN BABCOCK: If they're represented,  
23 they make an appearance.

24 PROFESSOR CARLSON: Yeah. They've appeared.

25 CHAIRMAN BABCOCK: All right. "Where all

1 parties appeared, no motions for new trial may be filed."

2 Okay.

3 PROFESSOR DORSANEO: Why not start it -- why  
4 not say, "No motion for new trial" -- evaluate which of  
5 these clauses needs to go in what order.

6 CHAIRMAN BABCOCK: So you would say, "No  
7 motions for new trial may be filed in evictions cases in  
8 which there has been a trial on the merits where all  
9 parties appeared." That's how you'd do it?

10 PROFESSOR DORSANEO: Probably. I'd say I  
11 would look at it and consider doing it that way.

12 CHAIRMAN BABCOCK: So you would do a  
13 side-by-side comparison and --

14 PROFESSOR DORSANEO: Pick out the one I  
15 like.

16 CHAIRMAN BABCOCK: -- pick out which one?

17 PROFESSOR CARLSON: Are you in touch with  
18 your karma to go with one or the other?

19 PROFESSOR DORSANEO: You get to the point  
20 where you know what the main thought is, and that needs to  
21 go first.

22 CHAIRMAN BABCOCK: I think we ought to  
23 illustrate both these sentences, too.

24 Okay. The last sentence.

25 HONORABLE TOM LAWRENCE: So what is the

1 language for --

2 CHAIRMAN BABCOCK: Well, depending on how  
3 Bill feels after he's slept on it.

4 PROFESSOR DORSANEO: Well, the main thought  
5 is, "No motions for new trial may be filed."

6 CHAIRMAN BABCOCK: Either way is fine. Are  
7 you stretching, or are you holding your hand up? Larry.

8 MR. NIEMANN: Our official position is  
9 against everything.

10 CHAIRMAN BABCOCK: But unofficially?

11 MR. NIEMANN: Every now and then I am given  
12 the freedom to actually interject something that because  
13 they haven't -- I haven't been instructed. I think that  
14 giving someone five days to come to the judge and say,  
15 "Gosh, Judge, I missed my bus" is not fair. Also, even if  
16 the judge does think it's fair to have that -- to be  
17 blindsided with that on the fifth day and then have to  
18 reset the case at the judge's next regular weekly hearing,  
19 that's another seven-day delay on top of the five-day  
20 delay; and if you're going to have sympathy for the guy  
21 that missed the bus, have sympathy for the landlord who is  
22 having to take it on the chin because the tenant missed  
23 the bus or forgot.

24 So I would request that you limit in default  
25 judgment cases the motion for set aside to two days and

1 require the trial within five days, within three days  
2 thereafter, because it's just not fair to be blindsided  
3 like that.

4 CHAIRMAN BABCOCK: Okay. What does  
5 everybody think about that?

6 HONORABLE TOM LAWRENCE: I don't have any  
7 problem with requiring the motion within two days or one  
8 day, but I have a big problem with requiring the trial  
9 within three days. That's just -- that's going to be a --  
10 the JPs I don't think are going to be for that because  
11 you're going to have to reschedule your whole docket to  
12 try to fit this in somewhere, and I just don't think  
13 that's going to --

14 MR. NIEMANN: Then I'll go for the  
15 compromise of one day if you put a seven-day limit on the  
16 retrial.

17 MR. FUCHS: One day is too short in the  
18 default cases, and in Larry's example I think the justices  
19 where the tenant has waited 'til the fifth day and said,  
20 "I missed the bus," I think that JP is going to deny that  
21 motion for new trial as a practical matter. And this is  
22 going to take care of those -- the egregious case where  
23 someone has come in at the Legal Services office late on  
24 the fourth day and you see a meritorious defense and you  
25 say, "You've got a meritorious defense. We can win this."

1                   And I've had landlords say to me, even  
2 though the rule now says, "No motions for new trial," they  
3 have agreed to have the case retried, saying "I'd rather  
4 have it retried in justice court and have a decision made  
5 than just take it up de novo on appeal." This is a  
6 reasonable compromise.

7                   MR. NIEMANN: That option ought not be taken  
8 away from the landlords.

9                   CHAIRMAN BABCOCK: What does everybody feel?  
10 We've got the two competing positions here.

11                   MR. EDWARDS: How about up to five days but  
12 the trial has to be within seven days of the first trial?  
13 Because that's the next docket.

14                   MR. NIEMANN: That works.

15                   MR. FUCHS: That's good.

16                   CHAIRMAN BABCOCK: How would you say that,  
17 Bill?

18                   MR. EDWARDS: That before the expiration of  
19 five -- I'd put another sentence in there that says,  
20 "Trial on the case after a new trial shall be held no" --

21                   MR. NIEMANN: "No later than."

22                   MR. EDWARDS: -- "no later than the seventh  
23 day."

24                   MR. NIEMANN: "As soon as possible," comma,  
25 no -- "as soon as practicable," comma, "no later than,"



1 because if the request is on Monday and his next regular  
2 docket for evictions is on Thursday, it ought to be on  
3 Thursday, not seven days from Monday.

4 MR. EDWARDS: I said it -- I didn't say  
5 seven days. I said "within seven days."

6 MR. NIEMANN: Well, no, I'd like to add the  
7 phrase "as soon as practical," comma, "no later than seven  
8 days."

9 MR. GILSTRAP: How about "in no event no  
10 later than seven days"?

11 MR. NIEMANN: Right. But "as soon as  
12 practical" is important, too.

13 MR. EDWARDS: I had one other comment on the  
14 sentence that we just added this after, and that is on the  
15 new trial I think we need a proviso in there that says  
16 "provided appeal to the county court has not been  
17 perfected."

18 PROFESSOR DORSANEO: Why?

19 MR. EDWARDS: I don't know.

20 PROFESSOR DORSANEO: You don't do that in --  
21 we don't do that in the county and district courts.

22 MR. EDWARDS: Well, I'm trying to speed them  
23 up over there.

24 MR. NIEMANN: What is the practice in the  
25 county and district courts? Can you ask for a motion for

1 new trial after you get --

2 MS. CORTELL: Yes. Yes.

3 MR. NIEMANN: Then I would -- if 523 gives  
4 you that right, I'd like to have Bill's rule.

5 MR. EDWARDS: I'm just trying to help you  
6 speed it up.

7 CHAIRMAN BABCOCK: Okay. Anything else on  
8 this subpart (a)?

9 HONORABLE TOM LAWRENCE: So we want the  
10 motion to be filed within how many days?

11 MS. CORTELL: Five.

12 CHAIRMAN BABCOCK: Five days.

13 HONORABLE TOM LAWRENCE: All right. So then  
14 no limit on when the motion is filed.

15 MS. EADS: Five days.

16 CHAIRMAN BABCOCK: Five days. The limit  
17 that you've got in the rule.

18 HONORABLE TOM LAWRENCE: I thought he said  
19 he wanted two days.

20 MR. EDWARDS: No. No.

21 CHAIRMAN BABCOCK: We've compromised that.

22 HONORABLE TOM LAWRENCE: Did we do away with  
23 that?

24 MR. EDWARDS: We've compromised that.

25 HONORABLE TOM LAWRENCE: Okay. All right.

1 MR. NIEMANN: Five-day motion, seven-day  
2 trial, as soon as practical, no later than seven. Is that  
3 what -- did I understand right?

4 MS. CORTELL: Yes.

5 CHAIRMAN BABCOCK: Okay. What else about  
6 this subsection? Anything?

7 All right. What else do we have to do on  
8 these rules? Anything?

9 HONORABLE TOM LAWRENCE: This would be it.

10 CHAIRMAN BABCOCK: Man.

11 MR. EDWARDS: Send it back to subcommittee.

12 HONORABLE TOM LAWRENCE: 190. We need to  
13 vote on 190. I'm sorry.

14 190 just says or excludes -- excepts  
15 eviction cases from 190.1 discovery control plans.

16 CHAIRMAN BABCOCK: I don't even have 190.

17 MR. EDWARDS: What does it say?

18 HONORABLE TOM LAWRENCE: 190, on 190.1 it  
19 says "except in eviction cases" that every case must be  
20 governed by the discovery control plan.

21 MS. CORTELL: Which version is this?

22 PROFESSOR CARLSON: That is on a separate  
23 set of pages.

24 HONORABLE TOM LAWRENCE: It's version 7.8.

25 CHAIRMAN BABCOCK: So we're amending 190.1?

1           PROFESSOR CARLSON: Didn't we say that in  
2 county court there was going to be full discovery?

3           HONORABLE TOM LAWRENCE: Well, then we need  
4 to say "except in eviction cases in justice court," I  
5 guess maybe. Yeah. That's right.

6           CHAIRMAN BABCOCK: Yeah. Okay.

7           MR. GILSTRAP: Well, let me ask you this,  
8 and I may be barring trouble, but by inference are we  
9 saying that noneviction cases in justice courts are -- you  
10 know, have got to be governed by a discovery control plan.

11           HONORABLE TOM LAWRENCE: Yeah.

12           PROFESSOR DORSANEO: Yes. Why not?

13           MS. EADS: Yes. That's what we voted for.

14           PROFESSOR DORSANEO: They would be the  
15 perfect cases. They would be Level 1.

16           HONORABLE TOM LAWRENCE: That's the way I do  
17 it now.

18           PROFESSOR DORSANEO: But that raises an  
19 issue to me as to whether these eviction cases in county  
20 level court may be Level 2 cases because they're not just  
21 monetary relief, and I guess we don't need to get into all  
22 of that, but they wouldn't be a simple level.

23           CHAIRMAN BABCOCK: Yeah, but nobody has told  
24 us they present a problem with that, but, Larry, you got  
25 something else?

1                   MR. NIEMANN:  If I'm not mistaken, there  
2 have been some changes in 745 since the last time you-all  
3 voted on them.  In the second sentence it says that the  
4 trial may be postponed for a longer period, and you've  
5 left that unlimited.  In my memo to you yesterday and  
6 Judge Prindle's memo to you we strongly plead with you to  
7 put a seven-day limit.  In other words, instead of saying  
8 "a longer period," but say, comma, "which shall not exceed  
9 seven days."

10                   So you've got seven days on an affidavit of  
11 good cause of the parties.  Then you can get another seven  
12 days for exceptional circumstances from the parties or the  
13 judge unilaterally, but to leave it open-ended like that  
14 in an eviction case is seriously causing an imbalance  
15 again, and I'm sure it's hard for you to fathom, but in  
16 some areas of the state we are very badly treated by the  
17 judges on continuances and postponements and, quite  
18 frankly, in The Valley.  Sometimes it will take two or  
19 three months to get an eviction case to trial.

20                   HONORABLE TOM LAWRENCE:  There have been  
21 changes since May because the committee directed us to  
22 make the changes, so the changes are what he we voted on  
23 in May.

24                   PROFESSOR CARLSON:  But do you have any  
25 problem with that?

1 HONORABLE TOM LAWRENCE: I'm not sure.

2 Would you restate it?

3 MR. NIEMANN: After it says "or a longer  
4 period," comma, "not exceeding seven days."

5 MR. GILSTRAP: How about "for an additional  
6 seven days"?

7 MR. NIEMANN: No. That means you get seven  
8 days. You don't -- you want it discretionary to be less.

9 MR. GILSTRAP: "Not to exceed seven days."

10 MR. NIEMANN: Both the JP -- the JP  
11 association through Judge Prindle yesterday wanted that  
12 self-imposed limit, and so do we.

13 CHAIRMAN BABCOCK: Yeah. It should say,  
14 "Upon a showing of exceptional circumstances supported by  
15 affidavit of either party or on the court's own initiative  
16 the trial may be postponed for a longer period not  
17 exceeding seven days."

18 MR. NIEMANN: Right.

19 MS. CORTELL: I'm confused, because this  
20 could be aside and apart from the first seven days, right?

21 MR. NIEMANN: It is. It is two seven-day  
22 periods.

23 MS. CORTELL: That's not clear to me.

24 MR. NIEMANN: "For additional." I thought  
25 it said "for additional."

1                   MR. GILSTRAP: How about "for an additional  
2 period, not to exceed seven days"?

3                   MR. NIEMANN: Change "longer" to "additional  
4 period, not to exceed seven days." That resolves your  
5 concern; is that right?

6                   HONORABLE TOM LAWRENCE: The reason that  
7 that second sentence is in there, the first sentence --  
8 there are three different sentences in here with three  
9 different means of postponing a case. The first one is  
10 that either party may submit an affidavit and get it  
11 postponed for seven days.

12                   The second sentence is a showing of  
13 exceptional circumstances supported by affidavit of either  
14 party or the court's own initiative, the trial may be  
15 postponed for a longer period; and that's to cover those  
16 situations where there's an illness, something else, some  
17 extraordinary circumstance, the judge is going to be out  
18 of town or whatever it is, to give the ability to postpone  
19 it for a longer period of time if needed; and that's why  
20 we said "exceptional," was to give some flexibility.

21                   The third sentence is postponed for  
22 additional period only if the parties agree. There's  
23 basically a Rule 11 agreement.

24                   CHAIRMAN BABCOCK: Larry's point is you  
25 can't leave sentence No. 2 open-ended.

1 MR. NIEMANN: We don't mind the seven plus  
2 seven. What we do mind is seven plus unlimited.

3 HONORABLE TOM LAWRENCE: Well, the  
4 subcommittee was trying to provide for those situations  
5 where there's some emergency and illness or something like  
6 that, and if you don't have it open-ended to a degree then  
7 you're not going to be able to provide for that, and the  
8 judge is probably going to have to continue it anyway, but  
9 it just won't be provided for in the rules. That was the  
10 only reason it was designed to be something extraordinary.

11 MR. NIEMANN: Well, what's going to happen  
12 is with exceptional circumstances you're going to say,  
13 "Well, the tenant has cancer, dying in the hospital," and  
14 that could be three months. Do we get a three-month  
15 postponement because of this? Does the landlord subsidize  
16 the tenant during this period of time with free rent?  
17 That's a pretty strong policy decision for a judge and  
18 this committee to be making.

19 MR. FUCHS: What if the exceptional  
20 circumstance is that the tenant is hospitalized and would  
21 be released on the eighth day, but the judge says, "Well,  
22 my hands are tied. I've got to try this in seven days,  
23 and, yes, you're claiming you paid the rent, but I don't  
24 have any choice. You're going to have to show up."

25 MR. NIEMANN: Well, it's a societal question



1 of who takes it on the chin, the people that promise to  
2 pay the rent or the people that in good faith assumed that  
3 the rent would be paid.

4 PROFESSOR DORSANEO: That wasn't your best  
5 hypothetical.

6 MR. GILSTRAP: But it does pose the  
7 question. It does pose the question. I mean, that's what  
8 we're talking about. But, you know, in your hypothetical,  
9 I mean, suppose it's eight days and the guy says, "Well,  
10 it's the ninth day." You're going to have to draw the  
11 line somewhere. Open-ended probably isn't going to get  
12 it.

13 MR. FUCHS: I'm willing to trust the  
14 justices of the peace, and I just don't believe -- with  
15 all fairness to Larry, I just don't believe that problem  
16 is as severe as he's emphasizing to the committee, if it  
17 exists at all.

18 MR. NIEMANN: Let me ask the question, you  
19 haven't practiced in The Valley?

20 CHAIRMAN BABCOCK: Hang on. Hang on. Mary  
21 had her hand up. Go ahead.

22 MR. NIEMANN: And not everybody has your  
23 integrity.

24 CHAIRMAN BABCOCK: Or not.

25 MR. NIEMANN: And much less the judges in

1 The Valley, just to be candid about it.

2 CHAIRMAN BABCOCK: Mary.

3 MR. NIEMANN: The "mi amigo" syndrome down  
4 there is killing us.

5 MR. EDWARDS: I tell you what, when we read  
6 the residential property code in 92 and wherever else it  
7 happens to be and you read the TAA lease, man, the tenant  
8 needs to have a little something.

9 MR. NIEMANN: Every single statute passed  
10 since 19-aught-aught has been with the impiper of Fred  
11 Fuchs' support and my support. We've compromised and gone  
12 to the Legislature arm-in-arm, Bill. Even on your bill,  
13 the swimming pool bill, the security device bill.

14 MR. FUCHS: It's reflected reality in the  
15 Legislature.

16 CHAIRMAN BABCOCK: Mary.

17 MS. SPECTOR: All I wanted to say is that  
18 the hypothetical is not so hypothetical. The tenant in  
19 the hospital, there's been a commitment hearing, there's  
20 mental illness involved. We've gotten several here at our  
21 clinic where the hearing has occurred while the tenant was  
22 hospitalized, and I think the court should get -- court  
23 having some flexibility to extend the period so the tenant  
24 is released and doesn't come home to an empty room would  
25 provide a lot of relief.

1                   CHAIRMAN BABCOCK:  Ralph.

2                   MR. DUGGINS:  If that's really the problem,  
3 the tenants are hospitalized or committed to facilities,  
4 then we ought to specify that that's the only reason why  
5 it could be postponed for a longer period of time, because  
6 I do think if somebody wants to say this is exceptional  
7 they can make it fit, and it shouldn't fit.  So to put  
8 compromise in between it ought to be limited, if we're  
9 going to do it at all, to where the respondent is actually  
10 hospitalized and specify that it is hospitalization and  
11 not some bogus clinic.

12                   MR. NIEMANN:  Well, what if it's a six-month  
13 hospitalization or hospice situation?

14                   MR. DUGGINS:  I'm not suggesting there  
15 shouldn't be some outside limit.  I'm just saying if we're  
16 going to do it, I'm agreeing with your position that there  
17 ought to be a defined set of circumstances that are  
18 exceptional rather than just say whatever somebody  
19 determines to be exceptional.

20                   MR. EDWARDS:  We've discussed before where  
21 we're talking about one judge one place and then we try to  
22 make a rule for the whole state to accommodate one judge  
23 for one place.  I don't think we can do that.

24                   MR. NIEMANN:  But I'm just telling you that  
25 unlimited is a truck-size loophole that the judges in The

1 Valley and some areas in East Texas will use to implement  
2 a long, long postponement.

3 MR. EDWARDS: What do you do if they  
4 postpone it anyway?

5 MR. NIEMANN: Right now we swallow hard.

6 MR. EDWARDS: Well, suppose there's a  
7 seven-day limit and they postpone it.

8 MR. NIEMANN: Then I think we have something  
9 to complain to the Judicial Standards Committee about.

10 HONORABLE TOM LAWRENCE: Well, and that was  
11 -- you know, that's what I'm saying is that if the judge  
12 has got a true emergency and there is something that  
13 forces him to postpone it for longer then you're opening  
14 him up to a complaint now. And maybe that's okay, but I'm  
15 just saying there could be circumstances, and that's all  
16 that we're trying to provide for.

17 CHAIRMAN BABCOCK: Nina.

18 MS. CORTELL: This may not be a way to fix  
19 it. I think it's hard to micromanage and say if the  
20 person is in the hospital or whatever. Is there any  
21 stronger language we could use in the first clause, and  
22 the answer may be "no," but maybe the word "extraordinary"  
23 or is there some other word that we could use that  
24 tightens it a little bit?

25 HONORABLE TOM LAWRENCE: Besides

1 "exceptional" you mean?

2 MS. CORTELL: Yeah. And there may not be.  
3 I just raise the question. To provide some --

4 MR. GILSTRAP: I think there's got to be,  
5 because -- because it seems to me the only way we're going  
6 to solve this is Ralph's approach, and that is, I mean, we  
7 can't -- I don't think the committee has the will just to  
8 have an absolute seven-day cutoff, but everybody  
9 understands what the abuse is, so that means we've got to  
10 craft some kind of narrow exception.

11 CHAIRMAN BABCOCK: Well, you know, Larry's  
12 -- the most extreme hypothetical that's come up is that  
13 somebody is in cancer -- you know, has got cancer and is  
14 hospitalized at MD Anderson for nine days or two weeks or  
15 whatever; and Larry's point is, you know, you can still  
16 try the case. It's not like a criminal case where the  
17 tenant has got to be there. They can send, you know, the  
18 sister or the wife or mother or something; and if they  
19 have paid the rent or if there was a misunderstanding then  
20 that can get adjudicated.

21 But where is the risk going to fall here,  
22 with, you know, somebody who may have very compelling  
23 circumstances, we feel sorry for him, but is the landlord  
24 going to have to subsidize that when they haven't paid  
25 their rent? And they may have good reason for not paying

1 the rent. So I'm not sure -- I'm not sure you can create  
2 a word by changing "exceptional" to "hospitalized" or to  
3 any other word. I think the whole issue is whether or not  
4 what the time period is. And whether it's -- and  
5 open-ended strikes me as too long because it's open-ended.  
6 Seven days may be too short. So you've got to get  
7 somewhere in the middle, it seems to me.

8                   Yeah, Carl.

9                   MR. HAMILTON: Well, in some situations  
10 where you don't have the defendant present, and that's  
11 another can of worms to open, but would the landlords be  
12 willing to something like the appointment of an attorney  
13 ad litem to represent the defendant upon real short notice  
14 so you could go forward with the proceeding in the event  
15 that let's say the tenant himself is hospitalized?

16                   MR. NIEMANN: I haven't thought it through.  
17 My initial gut reaction, that adds further complication  
18 and cost and sophistication that the average tenant would  
19 not have and should not be imposed upon us. I would  
20 respectfully submit if you do have the extraordinary  
21 cancer case or jail case or they're on vacation in Europe  
22 for six weeks case, which is rather extraordinary, an  
23 appeal in a trial de novo gives that tenant a second  
24 chance; and it seems to me that giving the judges the  
25 ability to shift the burden of loss to the landlord for

1 these extended periods is more of a legislative societal  
2 decision than --

3 MS. EADS: Could I submit that the societal  
4 decision has been made? We elect judges. I'm sure in The  
5 Valley there are judges who are not favorable to  
6 landlords, but there are judges who are very favorable to  
7 landlords in other parts of the state. That's the risk we  
8 pay for having an elected system. It seems to me -- and I  
9 know the case in which a woman, a single mother, had two  
10 small children, one of them was dying, and she was evicted  
11 because she couldn't get to the trial in time because she  
12 was not going to leave the presence of her dying child,  
13 and the other one was small, and she didn't have any other  
14 family, and the JP would not continue it.

15 That's also a horrible story. You know, in  
16 The Valley she may have gotten her continuance. In Dallas  
17 she didn't get her continuance. That is the price we pay,  
18 and the decision is whether or not -- I mean, I agree with  
19 Nina. Can we do something with the language, say  
20 extraordinary circumstances you can get -- the judge can  
21 continue it? I mean, that is just why we have people who  
22 are justices of the peace, to make these kinds of  
23 decisions.

24 CHAIRMAN BABCOCK: Okay. I think, it seems  
25 to me, and I am not against changing it to "extraordinary"

1 or whatever word anybody wants to come up with, but it's  
2 the time period, it seems to me, that's the sticking  
3 point; and so let's get a sense of the committee as to  
4 whether or not they like the open-ended time period or  
5 not; and then if they don't like the open-ended time  
6 period, let's see what time period we do like.

7 MR. DUGGINS: May I ask a question first?

8 CHAIRMAN BABCOCK: Yeah.

9 MR. DUGGINS: Am I right, we have the first  
10 seven days plus an additional seven that will have already  
11 expired at the point at which the court would be  
12 considering this motion?

13 CHAIRMAN BABCOCK: Not necessarily. There  
14 are two different things. Good cause is for seven days,  
15 but exceptional circumstances or extraordinary  
16 circumstances, whatever we want to call it, under the rule  
17 as proposed, a judge has discretion to do a longer period,  
18 which is not --

19 MR. DUGGINS: No. I'm asking at the point  
20 where you're deciding this third stage motion or second  
21 motion, whatever you want to call it, the exceptional or  
22 extraordinary --

23 CHAIRMAN BABCOCK: It's not necessarily a  
24 second stage motion.

25 MR. ORSINGER: It might be the first motion.



1 MR. EDWARDS: Anywhere from one to seven  
2 days.

3 MR. DUGGINS: Well, what I'm trying to  
4 understand is how much time would typically have expired.  
5 You file your lawsuit. You have seven days to the first  
6 trial.

7 PROFESSOR CARLSON: Six days.

8 MR. DUGGINS: All right. So seven days  
9 would have gone by and then the party could come in and  
10 for good cause shown get an additional seven days.

11 HONORABLE TOM LAWRENCE: Yeah, but good  
12 cause was something that would happen in 10 days, and they  
13 would have to go to the second sentence for anything over  
14 seven days.

15 CHAIRMAN BABCOCK: He's just trying to see  
16 how far down the road we are.

17 MR. DUGGINS: It could be I agree with you  
18 on the timing. I'm just trying to see how much time would  
19 typically have expired.

20 MR. EDWARDS: Not necessarily typically.  
21 The maximum under the first two would be 14.

22 HONORABLE TOM LAWRENCE: All right. One  
23 comment and then a suggestion. The comment is that, one,  
24 it's not necessarily just the tenant that's going to have  
25 the problem. It may be the landlord. It may be the judge

1 that has the problem.

2 MS. EADS: Right.

3 HONORABLE TOM LAWRENCE: Two, either the  
4 tenant or the landlord under 747(a) can have a  
5 representative. I mean, if they are in the hospital, they  
6 can have somebody come and represent either landlord or  
7 tenant; and then, three, I mean, I see your point about it  
8 being open-ended and that may not be the best way to do  
9 it. And I would just throw out 10 days.

10 CHAIRMAN BABCOCK: Let's vote on it as the  
11 subcommittee has proposed it. Okay. So we're going to  
12 take a vote on whether or not the language which is in the  
13 current proposed 745, showing of exceptional circumstances  
14 can be postponed by the trial judge for a longer period,  
15 which is open-ended. So how many people are in favor of  
16 that? Raise your hand.

17 All right. Those opposed? It passes by  
18 seven to four, so that's the way it will be. What else do  
19 we have to discuss?

20 PROFESSOR CARLSON: Move to take it by  
21 cesarean.

22 CHAIRMAN BABCOCK: We'll take it by  
23 cesarean. There's some language that is being redrafted,  
24 and we'll go from there.

25 Thanks, everybody, for coming; and, Larry,

1 thank you and Mary and --

2 MR. HAMILTON: When is our next meeting?

3 MR. GRIESEL: September 20th in Austin.

4 CHAIRMAN BABCOCK: September 20 and 21.

5 We're back in Austin.

6 PROFESSOR DORSANEO: One of the things I  
7 didn't say yesterday when you said "pleased to be here" is  
8 that I don't know how many of you know this, but the  
9 original Texas Rules of Civil Procedure were probably  
10 manually typed and largely organized and crafted in this  
11 building by Professor Roy McDonald, Elaine's co-author  
12 some years ago.

13 PROFESSOR CARLSON: I have a co-author who  
14 is deceased and I have a co-author who is alive and well.

15 PROFESSOR DORSANEO: Barely deceased.

16 CHAIRMAN BABCOCK: By the way, before we  
17 close the record, Fred, thank you, too, for being here.

18 MR. FUCHS: Thank you for inviting me.

19 CHAIRMAN BABCOCK: Thank you for helping us.  
20 Appreciate it. Anybody else got anything else?

21 Then we're in recess until September 20th.

22 (Meeting adjourned at 12:17 p.m.)

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CERTIFICATION OF THE MEETING OF  
THE SUPREME COURT ADVISORY COMMITTEE

\* \* \* \* \*

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 15th day of June, 2002, Morning Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 1,357.00.

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

Given under my hand and seal of office on this the 1st day of July, 2002.

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