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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

October 1, 2011

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 1st day of October, 2011, between the hours of 8:57 a.m. and 11:59 a.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

11-04 Ancillary Proceedings Task Force draft (January 2011)

11-04c ONLY pages for 9-30-11 meeting from 11-04

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CHAIRMAN BABCOCK: We are back on the record and dealing with the ancillary rules. I think we got through attachment Rule 1 and 2 yesterday, so now we're on No. 3, so, Pat, why don't you go through the rule and then we'll go back and comment on it section by section.

MR. DYER: Okay. We'll add a version of the form of the writ. Current Rule 594 contains that form, and somehow that got deleted in the editing process, but I'll put that back so that will be the new No. 3. On No. 3, contents of the writ, part (a), "Writ of attachment must be dated and signed." The rest of that, it's derived from 593, 594, 596, but we've modernized the language and taken out the "tested as other writs" language as in the current rule.

Subpart (b) comes out of 593, 592, and 597, just combining those sections. (c) deals with the return of the writ. The biggest change is that we've taken out the language requiring the return at or before 10:00 o'clock a.m. Monday next after the expiration of 15 days and have added the 30-, 60-, 90-day return to conform attachment practice to that of the other writs.

Subpart (d), the only change from the current rule on the notice that goes to the respondent is the part that says, "Your funds or other property may be exempt

under Federal or state law." In the larger committee and the subcommittee on these four sets of rules there was a great deal of talk about the notice not providing very understandable language to a respondent. This was the compromise solution to proposals that were several paragraphs long advising the respondent of different rights and exemptions that they have. This was a compromise just to alert them that there may be claims that the property attached is exempt.

Subpart (e), okay, I had earlier indicated we dropped form of the writ. I'm sorry. We've included that as subpart (e), and that comes straight out of 594 with modifications to make it clear and to incorporate the 30, 60, 90 return days.

CHAIRMAN BABCOCK: Okay. Let's talk about subpart (a), general requirements. Anybody have any comments about that?

HONORABLE TOM GRAY: Chip, I'll just ask if it is clear to everyone that by stating that it must be signed by the district or county clerk or the justice of the peace, if that means that a deputy clerk is included, or is that overly specific?

MR. DYER: I would say it's included.

HONORABLE TOM GRAY: I would agree, but I just raise the issue. Sometimes we get, shall we say,

technical arguments that it was a deputy clerk, not the clerk, on appeal.

MR. DYER: Well, my -- go ahead.

MS. WINK: It was our understanding from working with the clerks that this is an understood issue, just like the term "officer" throughout the rules has a particular defined meeting meaning of refinement. They're very comfortable with it.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, the things I see signed by the district clerk have the district clerk's name and then a signature by a deputy, and if people want to argue about that I don't think we should concede to that stupidity.

CHAIRMAN BABCOCK: You say you replaced the phrase "tested as other writs."

MR. DYER: Yeah. Nobody knew exactly what that meant.

CHAIRMAN BABCOCK: That was going to be my question, "tested as other writs."

MR. DYER: So what we believed it to mean was that it had to bear -- had to be dated and had to be signed in an official capacity and bear the seal of the court.

CHAIRMAN BABCOCK: Okay. Was there any case law on "tested as other writs"?

MR. DYER: No, not to my knowledge.

CHAIRMAN BABCOCK: Okay. Any other comments on (a)?

Okay, let's talk about (b). Comments on subpart (b)?

MR. DYER: Okay. You will notice I've not included private process servers, and that's because these rules deal with the seizure of property.

CHAIRMAN BABCOCK: Okay. Any comments on (b)? Hearing none, let's go to (c).

MR. DYER: Got one over here.

CHAIRMAN BABCOCK: Yeah. Carl.

MR. HAMILTON: Same question about the writ being returnable. In view of the new legislative mandate, do we need to change that and just say that it's the service of the writ that's returnable?

MS. WINK: If I could -- I think I can give a better answer to that than I did yesterday. In certain ancillary sets of rules a main proceeding will be in one court, perhaps district, and an ancillary proceeding will be in another court, such as JP court. So where the writ is returnable in this language is just telling the person it goes back to whichever court issued it in general. There is a separate rule, and again, given yesterday's discussions we'll have to update the rules on the returns

of the various writs to make sure they comply with the new -- the new bill. But that's -- you'll see that in Rule 4.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: The note says that subsection (c) is derived from Rule 606, and Rule 606 has a provision that requires that the return identify the property, et cetera, but that has been deleted, and unless I have missed something, it's not carried over into other subsections of the rule.

MS. WINK: Rule 4.

MR. MUNZINGER: It's in a different rule now.

MS. WINK: Yes, sir.

MR. DYER: Yes.

MS. WINK: I think once you get through attachments you'll find that the sets of rules as we've harmonized them tried to put them in particular orders, so there's always a separate rule about delivery of the writ and return of -- and the return.

MR. MUNZINGER: Well, you have two rules then that address return of the writ, 3(c) and then those provisions of 4 that concern return of the writ.

MS. WINK: Well, 3(c) is what the command of the writ must say. 3(c) is telling us what the contents of the writ must say; and the writ must say, as it always has,

which court it's returnable to and where it's returnable; and we'll have further instructions for the return by the officer who actually served it.

MR. DYER: Yeah. Rule 3 is directed toward the contents of the writ as a whole, so it must contain the 30-, 60-, 90-day language.

MR. MUNZINGER: I'm just wondering if practitioners or others might be confused if you have two places where you talk about return of the writ, and I wonder if that subsection (c) in Rule 3 might be better if it were just part of (b) of Rule 3.

MR. DYER: Well, it could be, but the section is entitled "Contents of the writ," so this just deals with what language must be contained within the writ, so the writ must contain the returnable language; and if we go to Rule 4, that deals with delivery, levy, and then what the return of the writ must actually say.

MR. FRITSCHE: Perhaps we could address it by changing the titles of the sections. In other words, in 3(c) "The return" and in 4(d) "The officer's return." Would that make it --

MR. MUNZINGER: I can live with either one. I'm just pointing out the difference, and as a person who read this probably for the first time in his life today, it just -- it raised the questions that I've raised.

PROFESSOR HOFFMAN: I guess I would second what Richard says. I agree. I think it's a little hard to tell, though, frankly, whether the problem comes in the way you've done the statutory setup or in your green boxes. Your green box tells us to go look to 606 because you derived it from there, but when we go to 606 we see all sorts of stuff that isn't here. So it makes us go, "What the heck are you doing and where did it go?" Then you say "Well, that's in another rule," so maybe that's just a function of the way you presented this as opposed to the way you wrote the --

CHAIRMAN BABCOCK: The green box should have said "derived in part from 606."

PROFESSOR HOFFMAN: Anyway, it's a little hard to follow.

CHAIRMAN BABCOCK: Well, changing the title of 3(c) might not be a bad idea.

MR. FRITSCHE: Okay.

CHAIRMAN BABCOCK: But you couldn't change -- you would still have to leave 4 as "Return of the writ."

MS. WINK: We could say, "Officer's return."

CHAIRMAN BABCOCK: Well, you've got it in the title.

MS. WINK: Uh-huh.

CHAIRMAN BABCOCK: You say "Delivery, levy,

and return of writ."

MR. DYER: We can work on the title.

MR. MUNZINGER: Is the purpose of subsection (c) to set out the time for the return?

MR. DYER: Yes. It's to state that it must contain language that it's returnable 30, 60, or 90 days.

MR. MUNZINGER: Maybe that's the title, "Time for return of writ." In any event, the point has been raised.

CHAIRMAN BABCOCK: The point has been made. All right. Any more comments on (c)?

PROFESSOR HOFFMAN: Can you talk for a minute about the substantive point about 30, 60, or 90? Why does anybody choose -- why are you giving them a choice, and why doesn't everybody choose the shortest one?

MR. DYER: In writ of execution practice it depends on the circumstances. If you have reason to believe that property is going out very -- going out of the state, you're going to want the quickest return date you can. Secondly, if you've got a writ of execution and you need a little bit more time to assemble information, you're typically going to choose the 90-day language. The other thing is frequently because of the number of writs that are out there the officer may not have sufficient time to return the writ within 30 and then it expires and you have

to go get another writ. So I would say in my experience the most frequent option is 90, but you've got a 30-, 60-, and 90-day option in execution. We think that you ought to have that same option depending on the applicant request for all of these writs.

PROFESSOR HOFFMAN: And where does the 30-, 60-, or 90-day formulation come from? It's not in 606 or in Civil Practice & Remedies Code 61.023.

MS. WINK: It is new. It is new.

MR. DYER: Well, it comes from writ of executions, and I believe it's -- you'll see that in sequestration it doesn't let -- it doesn't say the 30-, 60-, 90-day rule, but it says you can use the rules that come out of execution. So I figured if they use it the same way on sequestration then there's no reason in my mind to change it, make it different on attachment. No one on the committee knew why we had a return date 10:00 o'clock Monday following 15 days.

PROFESSOR HOFFMAN: Okay.

CHAIRMAN BABCOCK: Okay.

PROFESSOR HOFFMAN: I'm sorry.

CHAIRMAN BABCOCK: Go ahead.

PROFESSOR HOFFMAN: That was actually a sigh of not resignation but of continued uncertainty.

CHAIRMAN BABCOCK: Okay.

MR. DYER: Do you see a difference on --

PROFESSOR HOFFMAN: No. No. I don't even understand. So, so your green box tells me that this rule was derived from either Rule 606 or Civil Practice & Remedies Code 61.023, but in neither section is there anything about 30, 60, or 90. So then you said, "No, that came from another rule entirely."

MR. DYER: Yes.

PROFESSOR HOFFMAN: What other rule entirely?

CHAIRMAN BABCOCK: The "at or before 10:00 o'clock on Monday" may have no purpose -- maybe nobody knows, but it's quaint.

MS. WINK: As Pat is looking for the precise place for that, keep in mind that the task force as a whole had people who were specialists in each of these particular issues, and they as well as members of our constable staff and our sheriff's organizations were there on part of the task force as well. They were able to tell us some of the challenges that they've run into and how they don't have a problem with the 30, 60, 90 because it gives them the flexibility in the other sets of writ rules whereas they didn't have it here and they couldn't see any reason that we shouldn't. So you will see throughout all of these that we've made an effort when it makes sense, we hope when it makes sense, to harmonize the rules so the same flexibility

is provided throughout these extraordinary writs.

PROFESSOR HOFFMAN: Okay. So I understand, one is just a tell me where to look for the new language that you don't tell me where it comes from. Then once we do that then my next question, of course, is going to be what has been the experience with that other language? So you're telling me there have been no problems, but we haven't had any discussion about that, and one question that I would have as a reader of this for the first time would be how do I choose and is the choice entirely mine as to pick it and are there any guidelines for the court to consider in protecting the property owner in deciding whether it should be 30, 60, or 90 days?

So, I mean, these are all the questions that are raised by addition of new language. I'm not quibbling with your substantive point that the experts in the field think that it's worked well in this context, why not have it work well in this context, but I'd like to hear more about it before we just stamp, okay, this works here as well.

MS. WINK: Understood.

MR. DYER: Can I find that language at our break?

HONORABLE NATHAN HECHT: 629.

MR. DYER: 629 is an execution rule. The

rule that I'm looking for is in one of the other ancillary rules that incorporates the writ of execution returnable days at 30, 60, 90. I just can't find it.

PROFESSOR HOFFMAN: Okay. Then how about let's do this. Since we can't find the language --

CHAIRMAN BABCOCK: How about 621?

PROFESSOR HOFFMAN: If we can't find the language, talk about then those other questions I just asked, which are is the choice -- it sounds like, Pat, you were saying the choice is entirely up to the applicant. It's their discretion to pick door one, two, or three.

MR. DYER: Yes. 621 on execution makes it 30, 60, or 90 days as requested by the plaintiff, his agent, or attorney.

PROFESSOR HOFFMAN: Okay. And is there any role here that we should be considering of discretion for the trial judge in protecting the interests of the property owner as between the 30-, 60-, or 90-day option? Does it matter?

MR. DYER: No, because the property hasn't yet been seized. This is at the option of the applicant to decide how quickly he wants it returned, but whether it's -- regardless of the time that it's returned, it doesn't affect any of the rights of the respondent.

HONORABLE STEPHEN YELENOSKY: It's just how

long they can try to find the property, and it doesn't affect the respondent until it's actually executed.

PROFESSOR HOFFMAN: So why not write the rule that says "up to 90 days"?

MR. DYER: Well, you also have to have some kind of deadline by which that writ expires. You have to know whether it's still good.

PROFESSOR HOFFMAN: So why not just have them all expire no later than 90 days?

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, then you say because you want to convey to the officer that it needs to be done more quickly in some instances.

MR. DYER: Uh-huh. If you just say "up to 90 days" then all of the discretion goes to who's serving it.

PROFESSOR HOFFMAN: And it slows the process down.

MR. DYER: Yes, and there's no prioritization.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Not if you give them the flexibility to do it up to 90 days and then you specify in the writ the number of those -- in other words, the flexibility is in the rule to have a writ that lasts for no longer than 90 days, but when you draw the writ -- I mean,

my confusion here came from, well, used to you could command it to be done within 15 days. You could do it less than 30 days. Now you get at least -- I mean, it's at least 30 days, so the officer on day 29, it may not be there anymore where it was there on day 14 or 15, and if you were allowed to specify in the writ that it was returnable in 15 days then you would have gotten your property. It would -- but as I read the rule as drafted, it has to say it's returnable in 30, returnable in 60, or returnable in 90.

CHAIRMAN BABCOCK: Dulcie.

MS. WINK: What the officers told us is, is a little bit like the world of the lawyer. When we know we have 30 days, we have a window. They're very familiar with the 30, 60, 90 as a result of executions. The practitioner, when he or she applies for the writ and gets the writ, and maybe they choose a 30-day window. That does not stop them from talking to the officer directly, explaining the need, explaining whatever information they have, and trying to shepherd that through, which will help if they have the ability to get it in 15 days, but like anything else, especially in some counties there are very few officers with everyone's request. In other counties there are very populous situations where we have never enough officers to get to the requests.

So things are going to be prioritized, and it really is up to the applicant to get a window that helps with the prioritization and also to follow through with the officer to do that, and Professor Hoffman also asked a good question. We've already been asked as a task force to be prepared once the forms of the new rules are ready to write those bar articles that explain here's what is new, here's how this changed, here's how the flexibility, and to give the practitioners more information.

MR. DYER: Rule 598 says, "A writ of attachment shall be levied in the same manner as is or may be the writ of execution upon similar property." And the actual practice is that these writs are made returnable 30, 60, 90 because that's the way execution is done, and that's the way you can prioritize. I think if you allow someone to say "returnable in 15 days," everybody is going to try to preempt it because that would put you at the top of the list. Now, to some extent that's going to still exist with the 30-, 60-, 90-day option, but my experience is most people do go with the 90 unless there are exigent circumstances and then they want to try to go with the 30, but what we've done is made it consistent with execution and actual practice.

CHAIRMAN BABCOCK: Nina.

MR. DYER: I think that that's what Rule 598

means.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I guess my question is with regard to the property that you know is going to be gone in a week, and if it's returnable in 30 then the officer may say, "I get to do this day 29." So my question is are you saying that the officers are saying this would put an undue burden on them to allow us to put an earlier return date on it? In other words, is that the problem you're trying to balance?

MR. DYER: Yes.

MS. WINK: Yes.

MR. DYER: Now, let's say that you do have information that it's going to be gone in 15 days and you've got a writ that's returnable in 30, 60, 90. Maybe you choose 30, maybe you choose 90, but you call up the constable, and a lot of times they will drop whatever else they are doing or look on their priority list and say, "Okay, we can get somebody out there today." It doesn't always happen, but if you set it up to where they must do it then I think that creates a problem.

HONORABLE LEVI BENTON: Chip?

CHAIRMAN BABCOCK: Yeah, Levi.

HONORABLE LEVI BENTON: Pat and Dulcie, my problem with that is we shouldn't leave it up to the

discretion of the officer. We ought to be able to have language in the writ that commands the officer to act in a shorter period of time if the circumstances require. Even if the writ itself won't expire, the officer ought to be commanded to go out and act. Circumstances may be that he or she can't act, and you don't want to cause the applicant to have to go back to the courthouse to get another writ, fine, but there should be no discretion left to the officer. The officer is just executing a ministerial duty.

MS. WINK: They just don't want every lawyer asking for 10 or 15 --

HONORABLE LEVI BENTON: Of course they don't.

MS. WINK: -- because then they would have an unmanageable load. They wouldn't be able to satisfy any of those writs.

HONORABLE LEVI BENTON: Of course they don't, and trial judges don't want lawyers to take -- excuse me, lawyers don't want trial judges to take matters under advisement. You know, I want my ruling right now, you know. That's -- it's human nature, but --

MR. DYER: But shouldn't the discretion be with the judge and not the officer? If you think that that property is going to disappear in 15 days, get a TRO. You know, you go to the judge and you get the TRO. I don't think you put in the writ to command a sheriff or constable

that depending on, you know, what circumstances and who presents those circumstances to the constable and how does he have the judicial discretion to say, "Okay, yeah, I will go out and do that now." I don't see how you do that in a writ practice.

HONORABLE LEVI BENTON: The TRO is an order on the party, and the party may or may not respect the court. The writ is directed to the officer, who is him or herself a public servant, and presumably will give greater deference or more deference to the role of the court. I just don't think we ought to give the discretion to the officer to -- or what if -- what if we're in a small -- what if we're in El Paso, and everybody knows that Richard Munzinger is the king of El Paso County, and we've got a writ to attach his property and, you know, and the applicant is represented by a lowly Harris County lawyer. Do we want to give the El Paso County constable the opportunity to slow boat executing on Mr. Munzinger's property? I mean, I just don't think so. I think they ought to be directed to act.

MR. DYER: Well, if I'm not mistaken, there are rules that govern the duties of the sheriff or constable serving process, and if there's undue delay, there are circumstances under which they can be held personally liable, but your scenario, in fact, happens.

HONORABLE LEVI BENTON: I know.

MR. DYER: There is no doubt that it happens. You get a writ, and the constable says "not going to be served." So, yeah, you have a problem. Can you address that by adding additional language to the writ? I don't see how. If a constable is going to ignore the writ in the first place or the TRO in the first place, why wouldn't he ignore language in the writ? But I think current rules regarding the duties of sheriff and constables cover that scenario. But how do you deal with a hundred writs come in the same day, and the officer is commanded to execute on all of them that day?

HONORABLE LEVI BENTON: Here's what you do. You go see Commissioner Munzinger or over at commissioner's court and say, "We need more resources." The taxpayers have a policy choice.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I don't know, it sounds like we're going after a problem that nobody has identified. I mean, the experts are telling us it's working now. I also raised my hand just to point out, is it Rule 621, enforcement of judgment? That says execution is returnable in 30, 60, or 90 days.

MR. DYER: Right, as requested by the plaintiff.

HONORABLE STEPHEN YELENOSKY: Right. Is that what you're sourcing?

MR. DYER: That's the execution, but in the attachment rules themselves, Rule 598, it says, "Writ of attachment shall be levied in the same manner as is or may be the writ of execution."

HONORABLE STEPHEN YELENOSKY: So it's those two together.

MR. DYER: Yes. That's why we brought the language of 30, 60, 90 from execution into attachment because 598 says that that's the same way levy should be made on attachment.

MR. FRITSCHE: Chip?

CHAIRMAN BABCOCK: Yeah, David.

MR. FRITSCHE: Let me just point out Rule 4(b) as well, because we have two issues here. We have the levy and when the return must be filed. In Rule 4(b), 4(b)(2), the constable and sheriff are directed to proceed as soon as practicable to execute the levy, to levy upon the property. So remember when we're talking about when the writ is returnable it really doesn't have any practical effect on time of levy. It's when the officer must file the return back with the originating court or the court to which it's returnable. So I think we tried to address the issue of immediate levy or as soon as practicable in

4(b)(2). If we want to give more direction to the officer on timing of the levy, perhaps we could address it in 4(b).

CHAIRMAN BABCOCK: Uh-huh. Gene.

MR. STORIE: Yeah, I was having a similar thought, because it seemed to me if you had some urgency in trying to get the property it's in the levy, and not in the return of a writ, so you could theoretically have a levy the week after a writ's received, and they don't tell you about it for a couple of months if you had the 90-day framework.

CHAIRMAN BABCOCK: Maybe I'm reading this wrong, but aren't you affecting a pretty big change by this 30, 60, 90 because --

MS. WINK: No.

CHAIRMAN BABCOCK: Well, I'm sure I'm reading this wrong, but 606 has been around since -- according to the source, since 1942, and that says the "10:00 o'clock on the Monday after 15 days in all cases," and so you're shaving off, you know, 12 to 15 days when you move it to 30, and maybe there's no reason to have it at 10:00 o'clock after the expiration of 15 days, but it's been in the rule a long time, and --

MR. DYER: No one we spoke to had ever complied with that. They did it on the 30, 60, 90, and no one could figure out why it was there in the first place

because it looks like you're filing an answer.

CHAIRMAN BABCOCK: Yeah. I mean, it's very similar to the answer language.

MR. DYER: Yes. But it's the officer who is required under the old language to return it within that period.

CHAIRMAN BABCOCK: Okay. Yeah, Levi.

HONORABLE LEVI BENTON: The exchange I was having with Pat -- and if I was too early or too late I apologize, but I was really focused on the levy and not the return, and so the rule we're talking about, Rule 3, deals with the return, not the levy.

MR. DYER: Correct.

CHAIRMAN BABCOCK: Right.

HONORABLE LEVI BENTON: We're going to get to the levy in just a second.

MR. DYER: Yes.

HONORABLE LEVI BENTON: In which case we'll just insert everything I said so I don't have to say it again.

MR. DYER: Copy and paste.

CHAIRMAN BABCOCK: All right. Let's move on to 3(d). Any comments on 3(d)?

MR. DYER: I will say that the subcommittee on attachment as well as sequestration and garnishment,

there was an element that insisted that there be additional warnings in plain language to alert the respondent to a number of different possible exemptions. The subcommittee as a whole said that was going too far and would that mean that we would have to amend the rule every single time a new exemption came up and how much are we putting ourselves in a position of advising the respondent as to legal rights. So this was a compromise solution just to alert the respondent that there might be an exemption.

CHAIRMAN BABCOCK: Okay. Any comments on that?

MR. FRITSCHE: And that change is throughout all of the harmonized rules, every one.

CHAIRMAN BABCOCK: Okay. Well, then let's then get to 3(e).

MR. HAMILTON: I have a question on (d).

CHAIRMAN BABCOCK: On (d)? Okay.

MR. HAMILTON: On (d), yeah. Super technical, that 12-point type, is that something that is determinable on these computers now or --

MR. DYER: Well, I can't read 10-point type anymore. The 12-point doesn't necessarily fix it because you can change the font that you're using, and 12-point in one font may not be readable as 12-point in Times New Roman, but we thought that at least we ought to increase

the point from 10 to 12.

HONORABLE NATHAN HECHT: This is 12.

MR. HAMILTON: I know, but does it make any sense to talk about 12-point anymore when that was on typewriters, wasn't it?

HONORABLE STEPHEN YELENOSKY: No, computers do the same.

MR. HAMILTON: Computers, do that, too?

MR. DYER: And the appellate courts require 14-point.

HONORABLE NATHAN HECHT: 13.

MR. DYER: 13-point. So we just said let's just increase it from 10 to 12. I'm okay with 13 or 14.

MR. MUNZINGER: Is the correct word "type" or "font"?

MR. DYER: This is just the point. We didn't specify the font.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: You know, being from over in East Texas, somebody hands me this writ, and it says property owned by me has been attached. I'm not going to know what that means, and if we're trying to communicate information to the person who might have just had their prize game fighting roosters seized we might want to define. I mean, is there a better word than "attached"? I

mean, "taken," "seized," something. I mean, I know there's other rules that talk about that.

MR. DYER: Well, when we get to how an attachment levy is made that's where you'll see the problem. If you attach real property you don't actually seize it and take it away from somebody. You file the writ in the county records, and you post a notice. If you attach something that's immovable, say like, you know, a hundred pounds of gold, you attach a notice to it. You don't physically pick it up and move it. So if we were to say "seized," is that really accurate in all of those circumstances? We thought "attached," even though people may not understand what it is, contains all of the --

HONORABLE TOM GRAY: Okay.

MR. DYER: -- different ways property can be seized.

HONORABLE TOM GRAY: Well, I'm just glad y'all thought about me when you were trying to define what word to use.

CHAIRMAN BABCOCK: Well, and it goes on to say, "You may regain possession," so that sort of tells the person they've lost something.

HONORABLE TOM GRAY: Except, you know, I seize up when I see that my property has been attached, and I don't know what that is, so --

MS. WINK: Wait until you hear the cattle on the range explanations. There are many, many details that we're leaving out.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: What sort of exemptions are there?

MR. DYER: Well, for example, exempt property.

MS. SECCO: Like homestead?

MR. FRITSCHE: The concerns in the committee were the new Federal rules on subsidies and funds that are deposited into individuals' accounts, either possibly Social Security or Medicare. There's -- there are new rules on banks having to remain segregated or be careful in garnishment situation of -- and, I mean, this was Raul's concern.

MR. DYER: Uh-huh. Uh-huh.

MR. FRITSCHE: And I'm trying to think of what the specific Federal monies -- is it Social Security?

MS. WINK: Social Security.

MS. SECCO: There's the anti-alienation provisions in the Social Security Act.

MR. FRITSCHE: Right.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: One that I

thought of that might be useful for an unrepresented person is tools of the trade, right? Isn't that an exemption?

MR. DYER: Right.

HONORABLE STEPHEN YELENOSKY: A guy with the prize rooster who is a plumber might want to know that.

MR. DYER: Yeah. I mean, you've got your 30 and 60,000-dollar personal property exemption. You've got homestead exemption. There are a host of exemptions in existing Texas law and also under Federal law, so we didn't want to list all of those because as the law changes you'd have to go back and change the rule.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Did I understand you to say that if he levied on a hundred pounds of gold he would just leave it there? He would take possession of it, wouldn't he?

MR. DYER: Well, if they had the immediate resources to do so, yes, but if they've got to go back and get a truck to pick it up, they're going to attach a piece of paper there, and then probably the constable would probably stay there until they went and got a truck.

MR. HAMILTON: But they are going to actually take possession?

MR. DYER: If they can. But if it is a, quote, "immovable object" and they can't pick it up then

they attach a piece of paper saying that it's been attached and the law says it's now attached.

MS. WINK: And sometimes, Carl, the sheriffs and deputies in some counties have yards for the protection of property. In some smaller counties they may or may not. Sometimes the facilities that they have available to them won't store, you know, thousands of yards of pipe that's being taken from a pipe yard, for instance. So what they take and what they move is going to depend on what's available and what the cost is in some situations.

MR. DYER: You know, that -- if you come in on 71 they've got all of that pipe out on the land? You're not going to want to incur the time and expense to try to actually seize possession of that and move it someplace else. You would just attach a notice that says it's been attached.

CHAIRMAN BABCOCK: Yeah, Levi.

HONORABLE LEVI BENTON: Is there a deadline on getting the rewrite of these done?

MR. DYER: On getting --

HONORABLE LEVI BENTON: Getting this project finished? Is there a Court-imposed --

MR. DYER: No, not --

CHAIRMAN BABCOCK: Our lifetime.

HONORABLE LEVI BENTON: The reason I ask --

MR. DYER: We started this process three years ago.

HONORABLE JAN PATTERSON: 30, 60, or 90 years.

HONORABLE LEVI BENTON: I just wonder whether it would be worthwhile to ask -- I think it was Justice Christopher who led the subcommittee on plain English on jury instructions, to ask that subcommittee to maybe look at the language of writs before this becomes final because, I mean, everyone around this table -- excuse me, we understand most of the language, but even those around this table struggle with some of the language, and if we're going to redo these rules, you know, we ought to avail ourselves with the opportunity to have the plain English folks take a look at writs particularly before we make them final.

CHAIRMAN BABCOCK: Yeah, David.

MR. FRITSCHE: Part of the concern was in some of the statutory direction, like in sequestration, the Legislature tells us what has to be in the writ.

HONORABLE LEVI BENTON: Okay.

MR. FRITSCHE: In other words, 62.023 directs that this language must be there, so this language is basically the sequestration language harmonized among the attachment, garnishment, and the like.

HONORABLE LEVI BENTON: Okay. Out of the statute, got it. Okay.

MR. FRITSCHE: But I will tell you it's not in the attachment statute, so we took it from sequestration, since that was the legislative directive.

CHAIRMAN BABCOCK: Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Are you saying that whatever statute you're deriving this from would preclude us from doing plain language?

MS. WINK: In sequestration, yes. In sequestration, yes. And to the extent we tried to make these rules as harmonized across so the practitioner doesn't say, well, there must be a reason that they're using different language here than there, we've tried to comply with existing law as well as how do we make it understandable.

HONORABLE STEPHEN YELENOSKY: But the requirement that arcane, unintelligible law be in it or the words be in it wouldn't preclude you from adding plain language, would it, and it wouldn't preclude you from then conforming other things not governed by a statute to that plain language?

MS. WINK: Agreed.

HONORABLE STEPHEN YELENOSKY: I mean, ancillary proceedings, the language is a mess, and starting

with the word "writ" and going on from there.

MR. DYER: We actually considered trying to get rid of the writ practice, but the consensus was that just was not ever going to happen, that that was not going to be approved. But your point about adding language to what's in the statute, that's -- I don't have a problem with that. Keep in mind, the attachment statute doesn't require this. The sequestration statute does.

HONORABLE STEPHEN YELENOSKY: I understand.

MR. DYER: The sequestration statute also requires it to be in 10-point.

HONORABLE STEPHEN YELENOSKY: Well, I'm just saying you obviously have to comply with the statute, and if you want to be consistent between them it may be that you would then add plain language where it's -- where the arcane language is statutorily required and use only the plain language in the others, but you know better than I. I was just expressing frustration.

MS. WINK: We feel it. We do.

HONORABLE STEPHEN YELENOSKY: You feel my pain.

CHAIRMAN BABCOCK: They feel your pain.

MS. WINK: We've been feeling it for years.

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

MR. MUNZINGER: Only to point out that if you attempt to do this in plain language, what's a layperson -- 12-year-old person's definition of attachment? "Your property has been temporarily taken by a government officer to be" -- it goes on and on and on and on and on. I don't know that you really do anybody any good by doing all of that. A, you extend the length of the writ. If they can't understand that they've lost their property and that there's some government guy that took it from them, that's what the word "attached" means. Leave it there and in the next sentence you tell them, or two sentences away, you can get it back. I think you can carry this -- and I don't mean it in any critical way. I just think there's a limit to how far we can dumb down the law and dumb down life.

CHAIRMAN BABCOCK: There you have it.

HONORABLE STEPHEN YELENOSKY: Well, it's not -- it's not dumbing it down because language changes, and perfectly correct language that is not dumb language could better explain what happens.

MR. MUNZINGER: I used bad words. Dumb down was a shorthand of trying to explain it. I didn't mean it in a critical way, but there is a limit to what you can do with the complexities of these things and be exact. What is attachment? It's a process. There's a piece of paper that takes your property away from you and puts it in

custodia legis, in the custody of the law, pending whatever.

CHAIRMAN BABCOCK: What was that thing you just said?

HONORABLE STEPHEN YELENOSKY: Custodia legis. I agree with you. I agree with you, and I fight against condensing the language so much that it's meaningless. There is a point, but there are different words, and we moved way from Latin words, for example, and "writ" is an English word, but it's not one that anybody uses outside of this room.

HONORABLE JAN PATTERSON: Except East Texas maybe.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: The statute says, "The officer attaching the personal property shall retain possession," and I'm wondering is there any case law that says if he just puts a sign on there saying it's been attached, does the case law say that is the same thing as it's now in the legal custody of the sheriff?

MS. WINK: Yes. To make a long story short, there is not only case law, if I remember correctly, from the officers who serve in the task force and who teach the officers across the state of Texas how it works, so they're very knowledgeable gentlemen, but they explained to us

that, yes, this is why we do it, and they've had -- and that case law has grown up over all the years that Texas has existed. There are just certain things you can't move to a more secure location. They do amazing things. Sometimes they have to take custody of crops, and if the crop has to be harvested, they have to do the harvest. They have to hire people to get out there and do the harvest.

MR. HAMILTON: Okay, but if that's in the case law why don't we get it in the rule so people will understand that when they put a sign on their personal property that means that it's in the legal custody of the sheriff now and also put that on the -- on the writ?

MR. DYER: So they understand what legal custody is, even if it doesn't appear to be in physical possession of the sheriff?

MR. HAMILTON: Well, I don't know.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: Well, there's a lot to say for words that put one on notice to make further inquiry, and I think that may be what one -- that is one of those words, and as Chip pointed out, it is in the context of the next sentence, but it does make one make further inquiry, and I think that's part of the purpose of a notice. It can't be so exhaustive that it has to explain

every word or dumb it down so that we can understand it all.

MR. DYER: Well, one of the suggestions was the first sentence ought to be "Go get a lawyer."

HONORABLE JAN PATTERSON: Well, and this probably accomplishes that, the word "attached," I think.

HONORABLE STEPHEN YELENOSKY: Well, increasingly people can't go get lawyers, can't afford them.

MR. DYER: That's true.

HONORABLE JAN PATTERSON: That's a different issue.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I would be in favor of a little more clarification to a nonlawyer, and I agree the next sentence does it in a reverse sort of way, but why can't you use that concept that your rights to this property have been taken away or something like that? You can talk in terms of rights instead of -- since it won't always have been physically taken.

MR. DYER: I don't have a problem with the concept.

HONORABLE LEVI BENTON: Well, since Justice Christopher is not here we ought to just put it all on her to take --

CHAIRMAN BABCOCK: Please note in the record that Judge Christopher has been given homework. Okay. Any more comments about (d)? Let's move on to (e). Any comments about (e)? Yeah, Gene.

MR. STORIE: Just maybe to sort of reiterate what I said before, I don't see why you wouldn't just return the writ if it's been levied as soon as practicable after it's been levied and then your outside date would be the 30, 60, or 90, because you wouldn't want -- and I'm sure this doesn't happen, but you wouldn't want the constable to send the writ, you know, after two or three weeks because he's just too busy, although the literal language says maybe you can do that since --

MR. DYER: That does sometimes happen. It just depends on the county and how many writs are out there, but we deal with the return of the writ in Rule 4, so --

MR. STORIE: Right.

MR. DYER: The command is they're supposed to do it as soon as practicable, but the 30, 60, 90 is when that writ expires. So if it's practicable for them to do it that first day then they can do it and then they return the writ immediately.

MR. STORIE: I just didn't read the rule to actually say that. I mean, I think that's what happens,

and I'm ignorant of what happens.

MR. DYER: We've got that in Rule 4(b)(2).

CHAIRMAN BABCOCK: Well, speaking of Rule 4, why don't you take us through that?

MR. DYER: What we've done with regard to delivery, levy, and return of writ is incorporate the execution rules and some of the case law interpreting those rules to provide a method of delivery, levy, and return in each of the four sets of rules so that a practitioner could go to just the attachment section and say, "Okay, how is this levied on?" So if we look at Rule 4, this says who the writ, once it's issued, goes to -- it can go immediately to the sheriff or constable or at the request of the applicant deliver it to the applicant who then delivers to the constable. The reason being -- and this is current practice -- frequently the clerk's office may be overwhelmed with business, and it may take them a very long time to deliver it to the sheriff, so when you file your writ your transmittal letter says, "Please prepare it and I will pick it up, and I will deliver it to the sheriff," so you can cut your time lag down considerably.

Part -- subpart (b), time and extent of levy. We may have to adjust this language to conform with the changes to 17.030, but this is just the writ we're talking about right now. "Endorse the writ with the date of

receipt, and as soon as practicable proceed to levy on the property." The language in existing Rule 596 and 597, in 597 the word was "immediately proceed to execute the same." We did not believe that that was reality. There is no way the writ can immediately be levied, so we changed that to "as soon as practicable" because that is what, in fact, happens. They do it as quickly as they can, but they cannot do all writs immediately.

And then (b)(3) is out of the current rules. This is where the sheriff or constable has to make a determination of value of the property. Yesterday we spoke about how they did not want to be involved in that valuation when it came to determining the amount of the bond, and our proposed rules get rid of that valuation aspect, but they still have this valuation aspect where they have to go out and actually determine how much property to levy on to satisfy the demand.

(c) is all new in the rules of attachment, but these are the methods of levy that come out of execution rules and the interpretation of those rules. So with regard to real property, the way that you levy on real property, you describe property on the return and you file it for record with the county clerk, so now there is a document in the county clerk's office that's a -- certainly a cloud on title, but shows that a claim has been made on

the real property.

Personal property, it depends on the size and extent of it. The easiest way is if it's something you can pick up and store in a location, that's the way that it's done. Seizing the property in place deals with bulky and immovable items, and it may also involve cattle, and there is some very bizarre case law out there about how you levy on cattle on the open range and what an open range means and whether it's unfenced. We decided we weren't going to get that specific in the rules, and we'll continue to let the sheriff and constables who deal with that issue continue to deal with it the way that they've done in the past.

Part (c), seizing the property and holding it in a bonded warehouse or other secure location, and then we've got a provision in there that if the property is released -- now, keep in mind, in attachment when property is attached it goes into the sheriff or constable's possession or custody. The applicant doesn't get it, but the applicant -- the respondent has a right to file a replevy bond and then get the property taken into the procession of the respondent, but before possession is moved, if you've got a piece of property that's been attached and is very, very valuable, one of the options is to seize it and put it into a bonded warehouse, and I think

that that's the current practice with most sheriffs and constables, is to put it in a bonded warehouse.

You will see later on, we encountered a problem with a whole lot of applicants saying, well, the problem with the bonded warehouse is it only takes two months before the storage charges exceed the value of the property that's been attached, and we need to address that situation. We will get to it later, but what we wanted to do for attachment and the other rules was make clear how this writ is levied, so that right now if you go to the attachment rules you don't really know how it's levied. You have to go to the execution rules to determine it. We thought why not put it all in the same section to make it easier for the practitioner.

(d), the return of the writ, comes out of a combination of 596, 606, and 61.021. We may have to adapt -- change this language to meet with the changes of 17.030 because here we have that the return must be in writing, must be signed by the sheriff or constable, and then it's returnable to the clerk or JP from which it issued. Subpart (2), that the action must be endorsed on or attached to the writ. Since the change in 17.030 talks about process, that would include writ, so we'll have to make appropriate changes to that. The rest of the description on the return, you have to state the action

that the sheriff or constable took, describe the property attached with sufficient certainty to identify and distinguish it from property of like kind, state when it was ceased and where it's being held. If the property has been replevied then the sheriff or constable must deliver the replevy bond to be filed with the papers of the suit.

CHAIRMAN BABCOCK: Okay. Let's go back to (a). Any comments on (a)? Carl.

MR. HAMILTON: I have a comment on (c)(1), real property.

CHAIRMAN BABCOCK: Okay. Hold that thought. Hang on for a second. Anything on (a)? Anything on (b)? Yeah, Hayes.

MR. FULLER: It may be stating the obvious but under (b)(2), I would just say "as soon as practicable before the writ expires."

MR. JACKSON: That should be (b)(2) and not (b)(3). I have a (b)(3) on mine, a (b)(1) and a (b)(3).

MR. DYER: You don't have a (b)(2)?

MR. JACKSON: No. Well, mine is missing (b)(2).

MR. FULLER: Mine says (b)(2).

HONORABLE LEVI BENTON: The one that was, I guess, sent --

MR. DYER: We're just messing with you.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: (b)(3).

CHAIRMAN BABCOCK: Yes.

MR. MUNZINGER: "Levy on property in an amount that the sheriff or constable determines to be sufficient to satisfy the writ." The source of that is Rule 597, which currently reads "and found within his county as may be sufficient to satisfy the command of the writ." The old rule limited the amount on its face. The new rules seems to give discretion to the officer. I know that as a practicable matter the officer has some discretion. He obviously must exercise it, but does this work a substantive change? Is the officer liable for error? Is the officer I -- I mean, if he takes too much. My debt is a thousand dollars and he takes my brand new Mercedes, which he knows is a hundred times more than a thousand-dollar debt. Does he have any liability for that?

MR. DYER: No.

MR. MUNZINGER: I think that the change works a substantive change in the law.

MR. DYER: No. I disagree. But let's say I do have a thousand-dollar claim and the only property I can attach is your hundred thousand-dollar Mercedes. I can attach it. It's up to you to come in and say, "Hey, Judge, this is way excessive. I'll put a bond up for a thousand

dollars and give me my car back."

MR. FRITSCHE: Or replace it.

MR. DYER: Yeah. Or you can move to substitute property. You can say, "Okay, I've been hiding this thousand-dollar tractor I've got over here. Let me put that up for attachment and give me my Mercedes."

CHAIRMAN BABCOCK: Or you can have the hubcaps.

MR. DYER: Yes. You've got the spinners, right?

MR. MUNZINGER: Apart from my example you do not believe that this works any substantive change in the rule?

MR. DYER: No.

MR. MUNZINGER: Apart from a practical standpoint.

MR. DYER: No, I don't think it works any. The sheriff and constable have always had discretion to determine how much property they seize to satisfy the debt. That discretion doesn't always please the applicant. You know, the applicant may say, "I think you've way overvalued that. I want this piece of property out there," and it's up to the constable --

MR. MUNZINGER: I was only concerned that we not inadvertently change the substance.

CHAIRMAN BABCOCK: Jeff, are you scratching your head, or do you have your hand up?

MR. BOYD: Scratching my head.

CHAIRMAN BABCOCK: Scratching his head. There we go. It's in the record now. It's tricking the Chair, though.

MR. DYER: We deal with that in Rule 5.

CHAIRMAN BABCOCK: Anything else about 4(b)?

MR. WATSON: Chip?

CHAIRMAN BABCOCK: Yeah, Skip.

MR. WATSON: Just a question. I understand that in (b)(2) that "immediately" was changed to -- excuse me, "as soon as practicable" because immediately is -- is not possible, but it's never been possible; and I was trying to think, okay, why did they ever say immediately" if it was obviously could not be complied with; and it looks to me like we're working kind of a subtle change in where discretion is vested. The court has the right once it says "immediately" to say, "You're not doing what I told you to do," you know, "get out there and do it," but when it is changed to "as soon as practicable," discretion just shifted to the officer.

Now, I understand the difference between appearance and reality, but I'm talking about the ability to enforce, the ability to say, "Hey, you know, I'm

overwhelmed," the judge says, "That's fine, that's fine," versus the ability to say, "That one goes on the back burner, I'm going to have another donut." You know, we don't -- do we really want to shift this to a -- to be saying that the judge no longer has the power to say, "I said immediately and I meant immediately"? I mean, I think it's obvious to everyone "immediately" was never possible, so why did they use that word?

MR. DYER: That's an excellent question.

CHAIRMAN BABCOCK: Well, and I'm not sure that immediately is impossible. I give you the writ, I say, "Immediately go out and do it." So you drop what you're doing and you go out and --

MR. WATSON: Well, I mean, they were making a very valid point about being overwhelmed by the volume of the work.

CHAIRMAN BABCOCK: Yeah.

MR. WATSON: You know, and I'm sure populations have increased greater than the number of constables proportionately. I mean, I get it, you know, but and I understand that the constables' input on the task force was invaluable and important. I'm just not sure that's a wise move. I like the idea of discretion remaining in the hands of the black robe as opposed to the person charged with it, and I don't see a hardship from

that. I just don't see it.

CHAIRMAN BABCOCK: David.

MR. FRITSCHE: And the word "proceed" I think is important because you can immediately proceed versus immediately levy. If you immediately proceed to levy, that means forthwith.

MR. DYER: Ah, that's clear.

MR. WATSON: I don't mean to put too fine a point on it, but I just think there was a reason that word was used initially, and I don't think it should be willy-nilly discarded.

CHAIRMAN BABCOCK: Judge Yelenosky, and then Levi.

HONORABLE STEPHEN YELENOSKY: Skip, I think very often we're faced with the option of saying what we really mean when in the past we haven't, and the unintended consequence is that people take that as a change when it's not a change, except a change in the language to conform to the reality. The way we've often dealt with that is by a comment that says exactly that. In general, I guess, and I don't feel that strongly on this particular point, but in general I think where we find language where we don't mean what we say, I think we should change the language to say what we mean for future generations so that they're not saddled with it and throw in a comment.

As far as the judge's control, the judge is going to be signing these things that are going to be going out. If the person seeking them is concerned about what the constable is doing, I have no doubt that the judge is going to have authority to tell the constable what to do, whatever the word is.

CHAIRMAN BABCOCK: Levi.

HONORABLE LEVI BENTON: Yeah, I don't -- I don't agree with that, and I think the language should provide that the constable's obliged to proceed to levy in a time frame consistent with the language in the court order or the writ so that you leave the discretion in the judge. The judge can say if he wants as soon as practicable or the judge can say "instanter," do it right now. I just -- I don't want to leave the fall back decision to, you know, the applicant can plan and go back to the court and, you know, maybe -- with all due respect, maybe it's an election year, the judge wants the endorsement of the Travis County Sheriff's deputies. The judge doesn't want to pick up the phone and say to the constable, "Go do it right now," even though the order says as soon as practicable. And so leave the discretion for the -- judge can exercise his or her discretion in the language of the writ.

HONORABLE STEPHEN YELENOSKY: Well, then the

judge isn't going to put "immediately."

HONORABLE LEVI BENTON: He might. She might.

HONORABLE STEPHEN YELENOSKY: Well, if they're concerned -- if they're truly not following their oath and are doing something different because of an election then they're going to do it in their order.

MR. DYER: Let me throw this out there. The old rule says "immediately" --

HONORABLE LEVI BENTON: Right.

MR. DYER: -- "proceed." The old form of the writ says "attach forthwith." The proposal we have is we command that you "promptly attach." That's the language of the writ and then in the timing and extent we've used "as soon as practicable." If we want to keep "immediately," shouldn't we address what that actually means?

HONORABLE LEVI BENTON: Just a second. Where is "immediately" in the language of the writ?

MR. DYER: It's not in the language of the writ. It's in Rule 590 -- 597, "Sheriff or constable receiving the writ shall immediately proceed to execute." Okay. That's in the duty of the officer. 594, the form of the writ which is directed to the sheriff, "We command you that you attach forthwith."

HONORABLE LEVI BENTON: The provision that has "immediately" I'm suggesting shouldn't be there. It

should express that the constable should act in a manner consistent with what is -- with what's set out in the writ or the order, and the judge should have flexibility on language to put into the order because you can't have one form for every circumstance.

CHAIRMAN BABCOCK: Carl.

HONORABLE LEVI BENTON: It might be -- it might be you want to attach --

CHAIRMAN BABCOCK: In a minute.

HONORABLE LEVI BENTON: -- Carnival's boat going out of Galveston Bay, and you can't wait.

MR. HAMILTON: Well, that's the point, that the application for the writ is made because the defendant is about to remove or hide the property, so we need immediate action on the part of the sheriff, and giving the sheriff discretion, as Richard says, could cause too much delay.

MR. DYER: Well, but practically how do you handle a hundred applications a day that all say they must be immediately executed? How do you handle five of them in one day in a county that only has one sheriff?

MR. HAMILTON: Hire more people.

MR. FRITSCHE: One of the practical concerns is that the officer may not have access to the order because the clerk issues the writ and then the constable or

sheriff acts pursuant to the writ without reliance upon what the order says, and that's -- that has been current practice, and that's just a practical concern.

CHAIRMAN BABCOCK: Levi.

HONORABLE LEVI BENTON: Well, I started to ask this 10 minutes ago. Maybe this is a question for another day, but if we permit private process servers to serve citations why don't our -- you're shaking your heads.

MS. WINK: No. Well, we do allow them -- in Rule 103 we allow them to serve writs so long as that writ does not require the taking of a person or property. The reason being law enforcement may be needed to deal with the heated situation if we're taking persons and property, and that's already been done in Rule 103, so we stayed consistent with that. This is attachment.

HONORABLE LEVI BENTON: Is that the only reason that --

MS. WINK: Yes. Well, there are some others.

MR. DYER: That was the subject of another advisory committee, wasn't it, on the --

CHAIRMAN BABCOCK: It was. It was. Okay. I think the Court's got the policy debate in mind. Good point that you raise, Skip. Let's go to (c). Yeah, Justice Gray.

HONORABLE TOM GRAY: Mine is primarily in

(c)(2)(c), so if you want to take them in order and somebody has something before that.

CHAIRMAN BABCOCK: No, we're not going to be that precise. Go ahead and talk about (c)(2)(c).

HONORABLE TOM GRAY: Okay. The way the rule, as I understand it, is trying to be structured is kind of in the sequence of events, and my concern about the way (2)(c) -- or (c)(2)(c) is currently structured is where it gets into the cost aspects of it. One of the only cases that I can think of that this issue came into our court, the issue that kept it coming back to our court on various proceedings and appeals was the cost, and there were two factors in the cost that came into play, and one was the transfer cost, and the other was the cost of holding, and I think the only costs that are addressed here appear to be the holding costs or at least it's arguable that the transfer costs are not involved, are not directly involved, and this happened to be a bunch of personal property at a rental business that they took from one location and took it to the auctioneer, and multiple auctions were delayed, and so they held it for a very, very long time, but the wrecker driver and the company that transferred all of this equipment were very interested in getting paid as well. But I'm -- in looking at that issue, it occurs to me that the cost of this doesn't seem to really be involved in the

levy, in the method of the levy, and maybe the cost needs to be in a separate rule or a separate part of the rule, not under the method of levy of personal property.

In particular, in the last sentence of subsection (c) is if it's released. That ought to be, it seems like to me, in a replevy part. If the property is released from a bonded warehouse or has been transferred then the respondent has to worry about the transfer and storage costs.

MR. FRITSCHE: It's in the -- it's in 9(b) where we try to address that issue, and we may need to expand what's in 9(b). "All judgments and any judgment, all expenses associated with storage of the property may be taxed as costs against the nonprevailing party."

MR. DYER: But maybe we could add "with transfer and storage."

MS. WINK: In practical application the transfer costs are being kept as part of the costs of storage, that that is just part of what's going on, and it varies significantly from county to county based on what resources are available to them and also what kinds of transportation facility they have.

HONORABLE TOM GRAY: Then my comment would be that this is just not the place to address costs at all.

MR. DYER: The reason why we do have it there

and we have it in several other sections is that we wanted the practitioner to look at this and say, "Okay, yeah, I can get possession of the property, but if I do that I've got to pay the expenses," because under the existing rules to us it appeared that there were not enough provisions dealing with costs and when those costs had to be paid as opposed to we'll just tax all of those costs at the back end, which we thought was completely insufficient. You know, if the respondent replevies and gets the property right at the outset then they ought to pay those storage charges then. They may seek to retax them later on, but in terms of getting it paid right then you've stopped those expenses, and that's the reason we've included it here, and you'll see when we also deal with the respondent's replevy bond and an applicant's replevy, which attachment has never had before, we've added these provisions about costs just to ensure that at every step of the way they're addressed. I agree that it appears a little bit out of place, but we just wanted to emphasize it.

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

MR. HAMILTON: Well, the (c)(1) on filing it with the county clerk, I'm not sure the county clerk has particular records of where these things get filed.

MS. WINK: Oh, yes.

MR. HAMILTON: Should they be filed in the deed records?

MR. DYER: Yes. Or if that's not what they're called maybe they're called real property records, you know, whatever it's called where you file a mortgage and a deed of trust. That's where it would be filed.

MR. HAMILTON: Well, should we say that so the county clerk will know where to find it?

MS. WINK: They know. Anything that has to do with real property --

MR. HAMILTON: Pardon?

MS. WINK: Anything that has to do with real property, liens, attachments, they're accustomed to having those filed in the county deed records. They're so accustomed to this that's not even an issue.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: In (2)(c) the -- you say "seizing the property and holding it in a bonded warehouse or other secure location, in which case the applicant may be held responsible for the costs." In the next sentence if the respondent replevies you say he "must pay all expenses." Why is it discretionary in the one and mandatory in the other? That's my first question, and then I have a question, you use "costs" in the first sentence, "expenses associated with the storage" in the second

sentence, and "fees" in the third sentence, and I'm wondering if those are all the same things, and if so, shouldn't they all be called the same thing? My suggestion would be "expenses associated with the storage of the property," but I really also would like an answer to the first question, why is it discretionary in the first and mandatory in the second?

MR. DYER: The second point I completely agree with. It should be -- they should all be consistent. With regard to the first point, this is at the stage where the respondent is replevying, filing a bond to retake possession of the property. Our thought was the only way it makes any sense and to stop any continued fees, you have to pay those expenses right then and there. If the respondent pays those and ultimately the respondent wins in the lawsuit then the respondent can ask that those storage fees be taxed against the applicant as the nonprevailing party.

MR. MUNZINGER: Would it help if you said "must pay the then incurred expenses associated with the accrued or incurred expenses associated with the storage of the property"? It may be a problem only in my mind and not in others, but --

MR. DYER: Well, yeah, we can definitely clarify the language, but what we wanted at this stage --

what frequently happens is respondent files a replevy bond, takes it to the constable and says, "Okay, give me the property." Constable says, "I'm not releasing this property until somebody pays these storage fees." Well, there's no court order out there that says I have to pay it. What happens? It continues in storage, and these storage fees are astounding.

MR. MUNZINGER: Yeah.

MR. DYER: So we thought this was the best way to clear that issue up right then and there, not only for the parties, but also for the sheriff or constable. The reason why it says the applicant may be held responsible for the costs is what ultimately happens in the lawsuit. If the applicant wins, the applicant is probably not going to be responsible for costs. The court does have discretion, just like in any other award of costs, to split it. So at this stage of the game we can't say the applicant will or will not be. We're just saying it's possible that at the end of the lawsuit the applicant may be.

MR. MUNZINGER: Thank you.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: The argument that's then going to be made to me at the appellate level is that the respondent replevied the property and paid the expenses,

and, therefore, you cannot award the bonded warehouse cost and transfer to me, they've already been paid, that issue is moot, but you've just said if the respondent wins the suit and it should have never been taken in the first place that he should recover his costs.

MR. DYER: Well, but if I take an original deposition and I pay the court reporter for that and I win the lawsuit, I still get to ask the trial court to award the cost of the original deposition even though I paid it. Is there any difference here?

HONORABLE TOM GRAY: Well, as I understood what you just explained there was, because this addresses the expenses when they're paid. In other words, I mean, the person that gets the replevy bond and gets the property back, which I would suggest that needs to be the operative word used instead of "released to the respondent" in the event the property is replevied because then it's very clear the precise circumstance in which it is going to be applied. As I understood what you said a minute ago, and I may have misunderstood it, is that the respondent at that time pays the costs, and it's a dead issue at that point. Because the --

MR. DYER: Why?

HONORABLE TOM GRAY: Well, because the bondsman has been paid, the bailor. The bonded warehouse

has been paid.

MR. DYER: Right, but I'm seeking to recover the cost.

MS. WINK: In 9(b), "At the time of judgment. In any judgment all expenses associated with the storage of the property may be taxed as costs against the nonprevailing party," whoever that may be.

HONORABLE TOM GRAY: And I understand, and I'll get off of this after this comment. I mean, I understand why you're putting it here, but I think this is such a reduced statement about costs and fees and expenses and what you're trying to do that it makes it more confusing than simply having the section that comes later that's dedicated to it, and I'll get off of it with that comment.

CHAIRMAN BABCOCK: Any other comments about (c)?

PROFESSOR HOFFMAN: Yeah, I have one.

CHAIRMAN BABCOCK: Yeah, Lonny.

PROFESSOR HOFFMAN: I just had always assumed that with real property we actually stuck a sign in the ground that gave notice. We don't do that?

MR. DYER: You can.

MR. FRITSCHE: The key here is the levy, which creates an attachment lien, and the world is on

notice once it's filed of record.

PROFESSOR HOFFMAN: Okay. I just was noting the difference with personal property. You actually have to -- where was that?

MS. SECCO: Affix a notice of seizure?

PROFESSOR HOFFMAN: Yeah, where am I --

MR. DYER: That's in 2(b)?

PROFESSOR HOFFMAN: Am I in the wrong place?

MR. DYER: In seizure of personal property that is movable you don't have to place a notice anywhere, but the respondent is notified.

PROFESSOR HOFFMAN: Yeah, I guess I'm asking why is it that you affix a notice of seizure with the 2(b) property, but you don't affix some kind of a notice with real property?

MS. BARON: I think that's because that's the only way you can do it. You don't have deed records that cover immovable personal property, but it's very common to file something in the deed records if you want to put a cloud on title and that puts the burden on the property owner to have the cloud removed.

PROFESSOR HOFFMAN: Check the deed. Yeah.

CHAIRMAN BABCOCK: All right. Yeah, Marisa.

MS. SECCO: I just had a quick -- to sort of reiterate what Judge Gray said, when I first read (c)(2)(c)

and read "in the event the property is released to the respondent" it was unclear to me if that was just replevy or if that could be final judgment, so because the property could be released at final judgment and not just at replevy, so it kind of reads like the respondent would have to pay those costs no matter what.

MR. DYER: Okay. Yeah. That's a good point.

CHAIRMAN BABCOCK: Okay. How about (d)? Any comments on (d)? Yeah, Richard.

MR. MUNZINGER: The last sentence of (d)(2) is different than the subject matter of the title and different -- it's a break in the narrative of what's gone on here, and I'm just curious whether you want it there or if you want to have it in a separate section or have it in a different title or something else. You see my point? The rule is talking about the return of the writ, but the last sentence is talking about what the sheriff does if the property has been replevied.

MR. DYER: We could move that to each of the replevy sections.

CHAIRMAN BABCOCK: Okay. Any other comments? Yeah, Gene.

MR. STORIE: Well, I guess I'm still confused about the timing of things, and it's the same thing I mentioned before, because if you return it in time you have

a -- to me at least, a disconnect between the time for levy and the time for return of the writ, and I don't know why you wouldn't want the writ returned as soon as it's executed or not until it expires, the 30, 60, or 90 days, which --

MS. WINK: This is just long term -- long term practice, the reality of it. Often -- I think some of your concern may be that the officers are attaching the property and you don't know about it until the return is filed. Now, the reason we like to deliver these things to the officers is the officers have our cards and they call us and let us know, so there's often communication beyond just the return.

MR. STORIE: Okay.

MS. WINK: And more than anything else they just make sure they've got the time to get it done, filled out properly, and filed with the court.

MR. DYER: So you're addressing the last part of (1) within the time stated in the writ.

MR. STORIE: Yeah. And that's why I brought the comment up originally on (3)(e), because that was the form, which talks about "On or before 30, 60, 90 days from the date of issuance."

MR. DYER: So if it's a 30-day and they levy, they have to return it within the 30 days. If they levy

within that 30 days, it doesn't matter that it's returned -- well, it has to be returned to the court within the 30, but that 31st day doesn't somehow void the levy. If the levy is done and the writ is returned within the 30 days, your attachment is good. Now, if the officer returns it beyond the 30 days, you've got problems.

MR. STORIE: Right, and I think, you know, Dulcie may have answered my question about it. So if you had a 90-day time frame and you had levy within two weeks, why would you not want the return, you know, by two weeks or three weeks? But she says the communication is ongoing so it's not actually a problem.

MR. DYER: Right. It really isn't.

MR. STORIE: And they won't return it early either because --

MS. WINK: Sometimes they do. Sometimes they do.

MR. DYER: My experience in Harris County is it's within a week or two weeks after levy. It's a pretty quick turnaround. There's no real need for them to keep it, and it just clutters things up.

MR. STORIE: Right. Okay. Now, let's say -- and again, I'm just kind of speculating, but let's say you have a 90-day framework and they go out after three weeks and they don't find anything on the property. Are they

then discharged and they don't have to try again in a month?

MS. WINK: Well, what -- again, what generally happens is they'll let us know, "I went there, it wasn't there" so that the attorney can do some checking and investigation, say "Try this, try that." So it gives them ongoing time frame. They don't just make one try and say, "I'm done."

MR. STORIE: Well, that's what I thought, but there's nothing in the rule that really sets that out, because you don't have an expiration date for the writ. You just have a return date, so that's why it's confusing to me.

MR. DYER: But the return date is the expiration date, but I will disagree. You do see it happen where a sheriff says, you know, "I tried," and they return it, you know, without calling you, and you've got to go get another writ. The issue of successive levy of an individual writ, yes, it is required. Does it happen? There are a couple of cases out of Dallas involving a bar, and they attached the daily proceeds.

MR. STORIE: Right.

MR. DYER: And the constable I think tried to return it after only trying one or two nights, and they sued under then existing rules dealing with or the statute

dealing with the duties of the officer and they won, and the argument was "You should have gone there every single night under this attachment and just taken all the daily revenues." Well, they won, but they changed the statute dealing with the constables, and frankly, I can't recall exactly what it is now, but it didn't affect the issue of successive levies under the same writ. That's ideally what you want the sheriff or constable to do, but the only way you're really going to get that done is if you casually and repeatedly remind them that "I don't have to go get a second writ. You can continue to levy this one until it expires."

CHAIRMAN BABCOCK: Hayes.

MR. FULLER: Is there a problem in a situation where you've got a 90-day writ, someone levies on the property within 15 days, puts it in the bonded warehouse so that there are costs accruing, but nobody is told about that until the 90th day? So you've got two months worth of costs that perhaps could have been avoided had someone simply known the property was there.

MS. WINK: I can't say it doesn't happen, and all I can say is I think the articles that will be written to go with these rules that are much more friendly to the practitioner should be planned to warn of these practicalities, and those rules mean make sure you get to

know your sheriff or constable, make sure you're kind to them. "Please" and "thank you" definitely helps, acting like a bullish lawyer doesn't. So it's an imperfect world, but it does help to keep following up.

MR. DYER: It could happen. I suspect it has happened. Our rules don't really address it. The only thing I would suggest is that the applicant file or the respondent for that matter file a motion with the court to address the issue. That does get the attention of people who are charging pretty excessive storage fees.

MR. FULLER: Well, and my question goes to is the applicant's notice that the property has actually been seized that return?

MS. WINK: No, not always. Sometimes they will call us if we give them our cards and we ask, and, frankly, we call them, pick up the phone on a weekly basis or every few days and ask the status because the squeaky wheel does have a tendency to get attention.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Did you say that if the levy is to be returned within 30 days and property is levied on in 15 days, but the return is not made until 35 days, that's a problem?

MR. DYER: I think that it is. I know under the execution rules it is. If you -- if the return comes

in after it has expired, so I'm pretty sure it's --

MR. HAMILTON: But the levy has already been made, and the levy has been sent over to the deed records in the county clerk's office, but for some reason they just didn't get returned to the district clerk.

MR. DYER: There's a case where writ of execution is levied on property, property is sold after the writ expired.

MR. HAMILTON: Yeah, but that's after the writ expired.

MR. DYER: It's the same expiration date. It's a 30, 60, 90 return date, but that's also the expiration date. The levy was completed while it was still a good writ. The fact that it was sold after the expiration, court said, "No, that's an invalid sale." So the logic to me would be the same. If I've attached property, but then it's -- then don't get that return in before the expiration date, I've got a problem. I can't tell you that there's case law out there.

MR. HAMILTON: But in the execution case they sold it after the writ expired.

MR. DYER: Right.

MR. HAMILTON: Here the attachment is complete before the writ expires, and they just return it later, so I don't know.

MR. DYER: Well, you may be right. It may not be a problem in attachment.

CHAIRMAN BABCOCK: Justice Gaultney, and then Justice Gray.

HONORABLE DAVID GAULTNEY: Well, this is an area that I'm, again, not speaking about something I know, but it seems to me that with the 30-, 60-, and 90-day return period what you're trying to do is give flexibility for the levy, right? Not for the return, but for the levy, right?

MR. DYER: Uh-huh.

HONORABLE DAVID GAULTNEY: Why wouldn't there be a requirement for an immediate return after levy, and looking at (d)(1) on return, it says "within the period of time," so if you've given them 90 days to levy, presumably they would have 90 days to return. Let's say if they levied early, they would have a period of time to return, right?

MR. DYER: Uh-huh.

HONORABLE DAVID GAULTNEY: Okay. Yet if you look at (c)(1), it says the return must be filed immediately after levy on real property, right? Is there -- first of all, is there an inconsistency there, and secondly, is there something that can be done with the rules that would allow the discretion in terms of time to

levy to try to get the return filed faster?

MS. WINK: Let me address the two things. I think there is a different concern as to why the rule says immediately with real property, because the outside world is not on notice of that levy until proof of the levy is filed in the deed records, so that's what really protects the real property situation; whereas with personal property it's either being taken, seized by the sheriffs and constables and safeguarded, or it's being seized in place and there is some kind of notice that lets people know this property has been seized. So there are just a little bit different issues there, and I think that's why they probably say immediately with real property. Can I cite you a case to that? No, but that seems to be the logical answer.

With respect to the other issue, you know, I think we may be focusing too much on how quickly the return gets back. I know there's a concern that you want to make sure that people know about it, but I think the practitioner who is making the request at the time of the application is going to have to balance all of those things, how quickly do I think I can get something, how often do I think I might have to look for property if it's being moved around, and communicate back and forth with law enforcement, and what's our realistic expectation of law

enforcement? If I'm trying to be kind to my officer and trying to get my officer to help me, one of the things I don't want to do unnecessarily is make his or her life so impossible that I become their least favorite friend, so to speak.

HONORABLE DAVID GAULTNEY: Can I just follow up on that?

MS. WINK: Uh-huh.

HONORABLE DAVID GAULTNEY: As I understand it then the real property is really kind of a -- return, that it be returned immediately is really kind of an exception to (d)(1), or am I wrong about that? I mean, because of the need to get -- that's the only method of giving notice to people with liens on the property.

MR. DYER: I agree with -- yeah, the way we have it phrased, you're right.

MS. WINK: You're right, yeah.

CHAIRMAN BABCOCK: Yeah, Justice Gray.

HONORABLE TOM GRAY: In the case that you were talking about, the time line was levy, expiration of the writ or the return, however it's phrased, and then sale of the property. When was the return actually made, or was it ever actually made? Was it before or after the sale?

MR. DYER: The return was made before the sale.

HONORABLE TOM GRAY: Okay. Obviously a number of us are concerned about the timing of the return. With this anecdotal evidence of a specific case of a problem with a late return, timely let -- I think you said that one was in a different situation, but timely levy, untimely return, some event occurs, and probably -- is there a way that we could add to this a simple solution of a return within 10 days, 15 days after the expiration makes the process that was done, attachment, whatever, valid? You understand what I'm saying?

MR. DYER: I'm definitely hearing that we need more specific language with regard to when the return should be filed.

HONORABLE TOM GRAY: And, see, I don't care when it should be filed. I'm worried about the legal effect of it.

MR. DYER: Right. And I need to address the specific issue about whether the return of a writ of attachment or sequestration beyond the date stated in the writ, whether that definitively has an effect on the validity of the writ, so I will address that, but what I'm also hearing is we need better language with regard to when that writ needs to be returned.

HONORABLE TOM GRAY: And there's no question, I agree with you that if you take the action or if the

officer takes the action after the date, then it's just bad. I mean, if it's after the 30-, 60-, 90-day deadline, that's not any good.

MR. DYER: Right.

HONORABLE TOM GRAY: But what I'm worried about is that officer that does get it done on the 29th or 30th day, but maybe that's a Saturday or Sunday, you know, and maybe the rule saves him then, but maybe not. I don't know. I would like that clarified.

CHAIRMAN BABCOCK: Okay. Good point. Yeah, Hayes.

MR. FULLER: In other words, you may want to tie (d)(1) into (b)(2) so that you're talking about doing something as soon as practicable before the writ expires or as soon as practicable within the time stated in the writ. Make those two consistent.

CHAIRMAN BABCOCK: Okay. Any other comments on that?

Okay. It's time for our morning break. We'll be in recess for a little bit, come back in about 10 or 15 minutes.

(Recess from 10:30 a.m. to 10:47 a.m.)

CHAIRMAN BABCOCK: Okay, Pat, Rule 5, attachment Rule 5 looks elegant in its simplicity. There are very few words.

MR. DYER: We worked hardest on this rule.

CHAIRMAN BABCOCK: And so I'm sure there are going to be no comments to attachment Rule 5, but in the off chance that Carl's got something to say.

MR. HAMILTON: Just looking at Rule 5(d) -- it doesn't have a number on it.

CHAIRMAN BABCOCK: Rule 5 is a --

MR. HAMILTON: Well, 5 is the delivery of the service on the respondent after levy, right?

CHAIRMAN BABCOCK: Yeah, service of writ on respondent after levy.

MR. HAMILTON: Okay. Now, I'm assuming that if there's no levy, nothing gets served on the respondent.

MR. DYER: Correct.

MR. HAMILTON: So why don't we over on Rule 3 where it's the notice to the respondent, instead of saying that you're notified that property which you own has been attached, why don't we say "has been levied upon and seized" -- "or seized by the sheriff or constable"?

CHAIRMAN BABCOCK: Because that wouldn't be plain English.

MR. HAMILTON: Huh? Well, I mean, that tells them that the sheriff or constable has taken some of their property, whereas I don't know that "attached" tells them anything.

MS. WINK: Well, the writ is attached to the notice. The writ is attached, so the language --

CHAIRMAN BABCOCK: I thought the property was attached.

MS. WINK: Only for you, Chip.

MR. HAMILTON: I know the writ is attached, but the language in the writ now says you're notified that something you own has been attached. I'm just saying that why don't we say "has been levied upon and seized by the sheriff or constable"? That way they know something has happened to their property.

MR. DYER: Well, I think this was the earlier discussion about whether we should modernize the language --

MR. HAMILTON: Yeah, I understand. Yeah.

MR. DYER: -- which I think we've agreed we'll take a look at that.

MR. HAMILTON: Okay.

CHAIRMAN BABCOCK: But on Rule 5, Carl, is there a problem with the way it's drafted?

MR. HAMILTON: No.

MR. DYER: I did want to add just briefly, there is a slight change from the rule it was taken from. The current rule doesn't state who is supposed to serve the respondent. We wanted just to clarify it's the applicant

rather than the constable.

CHAIRMAN BABCOCK: Okay. Anything else on 5? All right. Then --

HONORABLE TOM GRAY: How is the applicant going to get a copy to serve?

MR. DYER: I believe we do have the constable giving the --

MS. WINK: The constable has to provide things back, not only to the court but also to the applicant, if I remember correctly.

HONORABLE TOM GRAY: I thought they only returned it to -- and I don't think that comes out on the transcription, but I had that in quotes, "returned it to" the --

MR. DYER: The constable returns it to the court. It's just up to the applicant to get a copy of that and serve it on the respondent.

HONORABLE TOM GRAY: They return it to the clerk or the JP.

MR. DYER: Correct.

HONORABLE TOM GRAY: And so then the mechanics of that I'm concerned about, but they'll figure it out. Never mind. I'll let it go.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I know that the language,

"Service may be in any manner prescribed for service of citation or as provided in Rule 21a" has its origins in that Rule 598a, and I believe also that it contemplates the situation where the attachment is part of a suit which is filed at the moment as distinct from an attachment arising in an already pending suit. It appears to me that the sentence allows a delay in service on a defendant in a case in a pending suit because I can instead of giving the service in a pending suit as required by Rule 21a, in a pending suit I could delay serving my adversary by using one of the service of citation rules. I could have him served by the sheriff, who could lollygag around for two weeks before he serves, or I could send it by certified mail I guess, which would be the same as Rule 21a. Do y'all see any problem at all in that?

MR. DYER: I don't.

CHAIRMAN BABCOCK: Okay. Anything more about 5? Marisa.

MS. SECCO: I just had a question. In all of the ancillary rules is the service of the writ, does it come after the writ has already been returned by the sheriff or constable?

MR. DYER: It doesn't have to be, but most of the time it's going to be after the constable has returned it to the court.

MS. SECCO: Okay.

CHAIRMAN BABCOCK: Okay. Anything more on 5? Okay. Let's go to 6.

MR. DYER: Okay. Respondent's replevy rights, by and large this is all based on the existing rules. Part (a) is where the replevy bond is filed. It's with the court or sheriff or constable and serving the applicant with a copy of the bond. You may ask why should there be a replevy bond filed with a sheriff or constable as opposed to the court. Well, let's say Saturday your crops have been attached or your John Deere tractor has been attached, and there's no way you can get to a judge, but you can get to a sheriff or constable. You can deliver a replevy bond to the sheriff or constable so that you can get your property back and maybe harvest your crop that weekend. So that's why there's a provision for providing the bond to the sheriff or constable.

Keep in mind, by this time the amount of the replevy bond has also been set in the court's order, so the constable doesn't have to determine what that amount is. The last sentence, "all motions regarding the attached property must be filed with the court having jurisdiction of the suit," that seems self-evident, but there are situations where a justice of the peace court issues a writ of attachment, but the piece of property attached is beyond

the jurisdiction of the JP court. In that instance the motion is filed with the court having jurisdiction over the amount in controversy rather than in the JP court.

In part (b), the amount and form of the replevy bond, it's -- first off it's set by the court's order, and here again we've added "with sufficient surety or sureties." The statute currently requires two sureties, so we'll just make that change there. Our preference was to have the Legislature change that because two sureties are not required anymore for any of the other statutes.

The part that's been added is who gets to approve those surety or sureties. It's either the court or by the sheriff or constable who has possession of the property. So, once again, in the Friday afternoon scenario where someone seized the John Deere tractor, you can go to the sheriff or constable, the bond amount is already in the court order. It's a sheriff or constable who approves the sufficiency of the sureties, and that's existing practice as well. And the change that we did have, the current rules provide that the officer determines the amount of the replevy bond based on his valuation of the property. Like we discussed yesterday, we disposed of that and just put the amount of the replevy bond in the court's order.

Part (c) is a new rule, bringing us into line with Rule 14c and alternative security. Part (d), the

review of the respondent's replevy bond, this is current rules. The only language we've added is "After hearing the court must issue a written order on the motion." The last part of (d) was a subject of discussion yesterday with regard to uncontroverted affidavits and the parties must submit evidence. We will continue to work on that language to make it better.

Part (e) is new, but we felt that the current rules did not make it clear what happened when a respondent filed a proper replevy bond, and it was not challenged. So this is what we've garnered from not only practitioners but from what the intent of the current rules appears to be, and that is if a sheriff or constable has possession of it, they must release it to the respondent within a reasonable time after the sheriff or constable gets a copy of the bond, and now we've added again -- and we may need to move this elsewhere. The last sentence of (e) is "Before the property is released the respondent must pay all expenses associated." So we've already said we'll address that again.

Part (f) deals with substitution of property. This derives from the current rule, which states, "No property on which liens have become affixed since the date of levy on the original property may be substituted." We thought that was a little bit hard to understand, but I

believe that the intent of it was you can't come in and move to substitute to get property released by putting other property in there that's already got a lien on it. Okay. So the substitution aspect of this rule allows the respondent to say, "Okay, you've got my John Deere tractor in there for 50 grand. It's worth 50 grand. You've only got a $5 claim. I'm going to substitute this piece of property that's worth 5 or 10 grand so I can get my tractor back." That's what this allows.

The last section is new. It says "Unless the court orders otherwise, no property on which a lien exists may be substituted." We thought this was much more clear than "no property on which liens have become affixed," and I think they used "affixed" there because they didn't want to say "attached" because we're dealing with attachment, and, well, you get the picture.

Part (1), "Court must make findings." This is in the current rule. Before a court can allow substitution of property, the court has to determine the value of the proposed substituted property. So in other words, the respondent can't just come in and say, "This is worth X dollars, so give me back my tractor." It's got to be proven to the satisfaction of the court, and the court has to make fact findings.

Part (2) is, again, addresses the issue of

substitution and the method and how you do it both with personal property and real property. We wanted to make sure as best as we could how to preserve an existing attachment lien. By statute when a writ of attachment is levied an attachment lien comes into place. So if someone wants to substitute property for what you attached, say two weeks ago, you want to make sure your lien is still good from the date of your original attachment. So the intent of this rule is I'm taking new property on which there is no lien currently, and I am moving to substitute the property that was attached two weeks ago on which there is a lien. By this language that new property now has the lien that the old one did as of that -- the date of levy. And then only at that stage is the old property released.

So we tried to make it as clear as possible as to the timing of all of this and the perfection of liens because let's say you've got your attachment two weeks, you've got an attachment lien and there are intervening creditors who file liens, so we wanted to protect the priority of the attachment lien if there is a substitution of property. Another way to do it would be to say, nope, there are no substitution rights, but we feel that would damage valuable rights to the respondent to substitute property.

The last thing that we also allowed is

discretion in the court to allow there to be some existing lien on the property, but not one that takes all the equity in the property, so that you could theoretically substitute property on which there is a minor lien, but there is sufficient equity in the property to protect the applicant. That was not addressed at all in the existing rules, but we thought that that was a valuable right. And that's -- also covers subsection (3).

CHAIRMAN BABCOCK: Okay. Let's go to 6(a). Any comments on 6(a)? Carl.

MR. HAMILTON: How do we file -- how does one file a bond with the sheriff or constable?

MR. DYER: You go down to the bonding agency, you get your bond, and then --

MR. HAMILTON: Just hand it to them?

MR. DYER: Yeah, hand-deliver it to them. If you want possession of the property, yeah, you hand-deliver it to them.

MR. HAMILTON: That's filing, just handing it to the sheriff?

MR. DYER: Yes, for purposes of getting possession and filing the bond. Now, the bond ultimately does have to go to the court, but in the situation we discussed where the court isn't open and you can get access to the sheriff or constable, giving it to the sheriff or

constable is sufficient. At that point the sheriff or constable has to determine the sufficiency of the sureties.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: Can you go through just very briefly how it comes about that the property has been previously claimed or sold?

MR. DYER: Okay.

MR. WATSON: I mean, how does it just disappear and suddenly you're looking at proceeds that may be a fraction of what it's worth?

MR. DYER: Well, you've attached property, and it's a truckload of tomatoes on the market. They're already ripe. Under existing rules you can have an immediate sale of the perishable goods, so now they're gone, but you have proceeds.

MR. WATSON: It's only perishables then.

MR. DYER: Well, no, I'm just saying that's one example.

MR. WATSON: Well, let's say it's an 18-wheeler full of -- to use an example used earlier, of Frank Zappa posters that for some people are extraordinarily collectible and valuable, and I'm a collector of Frank Zappa posters and I hear as a third party that they've been attached, and I've been looking at that for a long time. Can I go in and buy them and for an

amount that's greater than the amount of the attachment but a very good deal for me?

MR. DYER: Well, if you're a Frank Zappa fan you know the answer to that is the crux of the biscuit is the apostrophe. I'm sorry, that's out there in the lyrics, but the short answer --

CHAIRMAN BABCOCK: That's plain language, man.

MR. DYER: Well, it was back in those days.

CHAIRMAN BABCOCK: You can't get any plainer than that.

MR. DYER: The short answer to your question is no.

MR. WATSON: Okay. Good. That's all I need to know.

CHAIRMAN BABCOCK: Unless Munzinger has them in his hundred thousand-dollar Mercedes.

MR. MUNZINGER: Is Frank Zappa the premier of Greece or something like that?

MR. DYER: He was a rock star, that -- well, let's say he had been to the well quite often.

CHAIRMAN BABCOCK: Succeeded by his son Dweezil.

MR. DYER: And Moon Unit. See, you-all do know.

CHAIRMAN BABCOCK: You're not going to put any of this Zappa stuff over on us, I'll tell you that. Okay. Any other comments about (a)? Yes, Marisa. Do you know who Frank Zappa is?

MS. SECCO: I've heard the name. My dad was a fan. I'm just kidding.

CHAIRMAN BABCOCK: From your grandfather, no doubt.

MS. SECCO: Just the title of (a), "Where filed," it seems like it's really addressing the right to replevy and how you go about replevying, not just where it's filed. I mean, the last sentence talks about where it's filed, but kind of I think maybe that first sentence that's in yellow and then ending with "by filing a replevy bond" might be (a) and then all of these might be subsections to (a) rather than having that. Because to me that's just not the gist of (a). I don't know if anyone agrees.

MR. DYER: Something like title (a), "General," and then (a)(1), "The replevy bond must be filed with the court or the sheriff or constable." (a)(2), "All motions regarding must be" --

MS. SECCO: Something like that, yeah.

CHAIRMAN BABCOCK: Yeah, that's a good point. Okay. Anything else on (a)? All right. Let's go to (b).

Any comments on (b)? Going once.

MR. HAMILTON: Wait a minute.

CHAIRMAN BABCOCK: Carl. Saved by Carl.

MR. HAMILTON: The replevy bond has to be in an amount set -- oh, that's in the original court's order then. It's not something that we go to get right now. That's back in the original court's order.

MS. WINK: Yes.

MR. HAMILTON: Okay.

CHAIRMAN BABCOCK: Is that right?

MR. DYER: I'm sorry?

CHAIRMAN BABCOCK: Carl has a question.

MR. HAMILTON: She answered it.

CHAIRMAN BABCOCK: Oh, she did? Okay.

MS. WINK: I answered.

CHAIRMAN BABCOCK: All right. Anything else about (b)? Richard.

MR. MUNZINGER: I just wonder about the phrasing on the respondent satisfying, I wonder if that's the way you want to express it. "Satisfaction by the respondent to the extent of the penal bond of the judgment." It seemed to me unusual, but that may be because I don't know Frank Zappa.

MR. DYER: If you knew Frank Zappa you would understand all things. I think this is existing language.

MR. MUNZINGER: I looked at Rule 599. I didn't think it was, but --

MR. DYER: Let's see. 599 on the defendant replevy, "condition that the defendant shall satisfy to the extent of the penal amount of the bond any judgment which may be rendered."

MR. MUNZINGER: You have "satisfying to the extent of," and it's the "satisfying" that kind of threw me.

CHAIRMAN BABCOCK: Okay. Any more on (b)? All right. How about (c)? Moving on to (d), any comments on (d)? All right. On (e). I had a comment on (e). You say "must release the property to the respondent within a reasonable time." In other instances where you're getting the bond it's got to be as soon as practicable or immediately. "Within a reasonable time" seems to be a more leisurely pace than some of the other words that we've used.

MR. DYER: So we should add "within a leisurely time"?

CHAIRMAN BABCOCK: At a leisurely pace. Well, I was thinking about speeding it up a little bit.

MR. FRITSCHE: "As soon as practicable."

CHAIRMAN BABCOCK: Yeah. That's what I was thinking. Any other comments on (e)? Yeah, Skip.

MR. WATSON: Just the phrase "and the replevy bond is not successfully challenged by the applicant," just to go back to something you explained earlier that as I recall the replevy bond can be taken, on the weekend example, directly to the constable. Are there situations where the constable must referee the challenge to the replevy bond?

MR. DYER: No. No, that has to go through the court. So on the Friday example, if the bond is in the proper amount, the only discretion the constable has is to determine the sufficiency of the two sureties. They've got to be two sureties. If that's sufficient, the property has to be released. The applicant's response would have to be file a motion that following Monday to increase the amount of bond.

MR. WATSON: I would just -- you might consider "successfully challenged in the court" or something to make it clear to the uninitiated like me of what's going on there.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I'm still a little behind the curve, but if you file a bond with the sheriff or constable, how does it get to the clerk?

MR. DYER: Sheriff or constable has to deliver it to the clerk.

MR. HAMILTON: It doesn't say that in the rules anywhere.

MR. DYER: I thought we did have it.

MR. MUNZINGER: It's in an earlier rule.

HONORABLE TOM GRAY: It's under (d)(2), last sentence, but we talked about moving it where it says "When property have been replevied the sheriff or constable must deliver the replevy bond to the clerk or justice of the peace to be filed with the papers of the suit."

MR. HAMILTON: Where is that?

HONORABLE TOM GRAY: Under Rule 4.

CHAIRMAN BABCOCK: 4(d)(2).

MR. DYER: So we could probably move 4(d)(2) into a separate subsection in Rule 6?

MR. HAMILTON: Yeah, I think that would be better if you put it over there.

MR. FRITSCHE: I think it has to be in (e). It has to be in (e).

CHAIRMAN BABCOCK: Okay. Anything more on (e)? Yeah, Richard.

MR. MUNZINGER: The current phraseology is "If a replevy bond is not successfully challenged." What is the situation if a motion has been filed attacking the replevy bond but the court has not heard the motion, so there is, in fact, a motion pending but the bond -- the

court has not ruled on it and can't because it's a Friday or whatever. The way this rule is written the person who has the replevy bond can replevy the property, notwithstanding that there is a motion pending. Is that --

MR. DYER: Correct.

MR. MUNZINGER: -- what is intended?

MR. DYER: Yes.

MR. MUNZINGER: Why?

MR. DYER: Because we want to err on the side of the defendant who needs to get his property back so that we don't increase the damages. If we allow the defendant or the respondent to be damaged just by the filing of a motion --

MR. MUNZINGER: I agree. Thank you.

CHAIRMAN BABCOCK: Okay. Any more on (e)?

MR. BOYD: Chip, I do.

CHAIRMAN BABCOCK: Yeah, Jeff.

MR. BOYD: Is there any concern about needing to clarify what are the expenses associated with the storage of the property?

MR. DYER: Yes. I think earlier we addressed that. We're going to try to make that clear probably in a separate section.

CHAIRMAN BABCOCK: Okay. Anything else on (e)? All right. Let's go to (f). Substitution of

property. Comments on (f)? Justice Gray.

HONORABLE TOM GRAY: I'm not sure I entirely understood your explanation of what could be substituted, but I think I read the current rule differently than what you are reading it. Where it said "no property on which liens have become affixed since the date of the levy on the original property may be substituted," as presented here that was an absolute prohibition, and it would seem that if Carl's hundred thousand-dollar Mercedes that only had a thousand dollar lien on it because he paid cash for the other $99,000 was levied on and then he said, "Well, I'm going to fix this. I'm going to go get an additional lien on it," that then the Mercedes under the old rule could not be used at all, but under the new rule because -- unless the court orders otherwise, that implies that the court could substitute it, but then the timing of the lien priorities becomes a challenge under the next rule. So we've substituted an absolute prohibition for some discretion that may create a timing problem, it seems to me.

MR. DYER: Yes, and we've tried to address that timing problem in the language.

HONORABLE TOM GRAY: Okay. I just wanted to be sure I understood what we had done by the various rules. Okay.

CHAIRMAN BABCOCK: Okay. Anything more on this one? We're all good on (f)? Okay. Then we'll move on to 7.

MR. DYER: Okay. 7, I'd like to address a little differently. This is a brand new section and there are differing views. I will give you the subcommittee view, and David will give you the anti-subcommittee minority report because it does involve some significant differences.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I apologize. I was researching something in the current rules, and I wanted to ask a question about subsection (f), and I didn't want to ask the question and waste time until I had looked at the rules.

CHAIRMAN BABCOCK: Okay.

MR. MUNZINGER: "Substitution of property on a reasonable notice, which may be less than three days," the current Rules of Procedure require three days' notice on a motion unless the court allows it to the contrary. We don't have that exception here. Why?

MR. DYER: This is out of the existing rule. The existing rule always allowed reasonable notice to the opposing party, which may be less than three days.

MR. MUNZINGER: Thank you.

CHAIRMAN BABCOCK: Now onto the subcommittee and the anti-subcommittee.

MR. DYER: Attachment does not have an applicant's replevy bond right. Sequestration, there is an applicant's replevy bond right. Main difference between sequestration and attachment, in sequestration the applicant has an existing lien on the property. In attachment you don't have any lien at all until you find some property to attach, so you do not have a preexisting lien. Because storage costs have escalated so rapidly now, if you attach property and it gets put into a bonded warehouse, it takes, generally speaking, just a couple of months if the property is $10,000 or less for your storage charges to exceed the value of the property, and it only gets worse from there.

Harris County -- well, typically you're required to put it in a bonded warehouse. Bonded warehouses are much more expensive than public storage. Unless you get the property out of that bonded warehouse, they keep those daily charges hitting you and hitting you and hitting you, and it basically means if you've got any suit less than about 30 grand and you've got some attached property, it's worthless. It basically invalidates the procedure because the costs of storage are so high.

The subcommittee said, therefore, we should

allow an applicant to file a replevy bond if the defendant hasn't already replevied so that the applicant can take possession of the property and store it at a smaller storage charge. Keep in mind, the applicant still has to file a bond. So the subcommittee believed that even though there are distinct legal rights, sequestration versus attachment, that the defendant -- that a respondent was adequately protected by the bond. Therefore, we wanted to give the applicant a replevy bond.

MR. FRITSCHE: I think Pat pretty much described the dilemma, and that is in sequestration there is a security interest that is owned by the applicant. There is a property right that preexists the lawsuit. The concern here is if an applicant who has not reduced its claim to judgment attaches personal or real property of the respondent and replevies the personal property, takes possession of it, then you have somehow damaged the respondent perhaps irrevocably because that applicant has had the use of that personal property, and essentially the minority side is since there was never a property interest granted to the applicant in an attachment situation other than the lien that arises as a matter of law, there shouldn't be a replevy right vested in an applicant under attachment, so as we're going through, think about that potential dilemma as we go through Rule 7.

MR. DYER: So that having been said, it only -- the applicant's replevy right only kicks in if the respondent has not replevied property within 10 days after service, so there's a 10-day delay there. It is also discretionary with the court. The other replevy bonds are not. I mean, if the replevy bond is in the right amount and the sureties are approved, the respondent gets possession, period. It's not discretionary with the court. The applicant's replevy bond is, so that the court can address potential problems that we just discussed.

Part (c), the language itself comes out of the respondent's replevy bond. Most of this language tracks the applicant's replevy bond language in the sequestration rules. The conditions of the applicant's replevy bond, these are the same conditions that come out of the sequestration rules dealing with what you are -- what you're required to do. Basically you can't take the property out of the county; you can't injure, destroy it; you've got a duty to maintain it in the same condition as it was replevied together with the -- and the phrase is value of fruits, hire, or revenue, and you may wonder doesn't that language sound archaic. It does. It's out of the existing rule, but fruits, offspring of cattle, that's a fruit. Hire, rental revenues. Revenue, if you've got an asset-producing property, that's the revenue. So we

decided to keep that language. We could change it to bring it up to more modern terms, and then you are required to return it if you end up losing the suit. To the extent you don't return the property, this is in 5(a), you've got to pay the value of the property along with the fruits, hire or revenue, and to the extent that the property is returned but it's not in the same condition as it was when it was replevied, you have to pay the difference between the value of the property as of the date it was replevied and the date of the judgment, regardless of the cost of the difference in value, and we will also have to address that.

(e) is the Rule 14c paragraph that we've used before. (f) deals with service on the respondent. (g) deals with the right to possession upon compliance of filing of a replevy bond that's been approved by the court. The "regardless of the cause of the difference in value," in sequestration on the return of property that is not as valuable as it once was, you have to pay the difference between the value from the day it was replevied and the date of the judgment regardless of the difference in value. There is old case law that says that you do not have to account for normal depreciation because the theory goes the property would have normally depreciated whether it was in the possession of the constable or the applicant; therefore, you can't get that. I think the better rule is

to make it clear you have to pay the difference in value regardless of the difference in value between the date of replevy and the date of judgment. I think otherwise it's unclear, and there is not much case law. I think there are only two cases dealing with normal depreciation, and I think that the sequestration rules that include the "regardless of the cause in difference of value," I think that may have come after those cases because those cases were pretty old. And that's all I've got to say about that.

CHAIRMAN BABCOCK: If I -- are cattle personal property?

MR. DYER: Yes.

CHAIRMAN BABCOCK: Okay. So as I understand it, if I'm the respondent and I get a replevy bond and I give it to the sheriff and I get -- and the sheriff says "Yeah, this is fine," then I can get my cattle back?

MR. DYER: Yes.

CHAIRMAN BABCOCK: Okay. But if I'm the applicant and I get a replevy bond, it gets approved, then I can take the cattle?

MR. DYER: Yes. You go back to that same sheriff and say --

CHAIRMAN BABCOCK: "Here, I've got a replevy bond, too."

MR. DYER: No, if the respondent does it first you don't have --

CHAIRMAN BABCOCK: You don't have any rights.

MR. DYER: Yeah. If respondent does it --

CHAIRMAN BABCOCK: After 10 days if he hadn't done it then I can go --

MR. DYER: Yes.

CHAIRMAN BABCOCK: -- and say, "Here's a replevy bond, I want the cattle."

MR. DYER: Correct.

CHAIRMAN BABCOCK: And Munzinger is going to have a question about that.

MR. MUNZINGER: Well, I need to leave to catch my plane. That's why I raised my hand.

CHAIRMAN BABCOCK: But your parting shot is.

MR. MUNZINGER: My question is attachment is a creature of the Legislature. Chapter 61 of the Civil Practice & Remedies Code outlines and creates the remedy. How does the Supreme Court get the right to give this new weapon to the attaching creditor unless it is specifically authorized by the Legislature in Chapters 61 of the Civil Practice & Remedies Code? I don't know if you've briefed that, but that is a problem to me because, as Chip points out, you're taking somebody's property from them. Even though the person didn't answer within 10 days, et cetera,

and we understand the problem that the expenses are accruing on the warehouse or whatever it is so that the value is being taken, but once again, where do we get -- does the Supreme Court get the power to create a remedy if it's not contemplated by Chapter 61? I'm leaving. I'm going to go study on Frank Zappa.

CHAIRMAN BABCOCK: Do you have an iPad?

MR. MUNZINGER: I do.

CHAIRMAN BABCOCK: Okay. Well, just type in "Frank Zappa."

MR. MUNZINGER: I will.

CHAIRMAN BABCOCK: Or if you want to type in "mothers of invention" that will get you to the same place.

MR. DYER: That's a very good point. I don't know the extent of the rule-making authority with regard to Chapter 61.

CHAIRMAN BABCOCK: Well, it's a pretty good point because this sort of sounds substantive, and the Court's rule-making power is procedural, so Skip.

MR. WATSON: Well, right in that area, I mean, it's obvious we're trying to address a very real practical problem, which is -- as I understand it, is that the extraordinary writ of attachment can be rendered essentially moot or really a negative remedy by the charges that are coming down on the attached property. Now, my

question is this, and I don't know anything about your area, so forgive my ignorance here, but is there a different way to approach the problem? Is there another option that would be within the power of the Court and wouldn't be stretching the envelope here, such as does the court have the power to order, for example, the sheriff or the constable to hold the property not in a bonded warehouse at a thousand dollars a day where one or the other is going to have to pay for it; and as I understand it, the constable is having to pay, the county is having to pay that thousand dollars a day whether anybody picks it up or not? Those charges are accruing on counties that don't have the money in the coffers to even pay for the constables. Okay. Did I get that right?

MR. DYER: My -- okay.

MR. WATSON: All right. Now, if that's the case, can -- does the court have the discretion to order that the property be held in the sheriff's property room with the -- with the stolen bicycles, the evidence from all of the cases that are going on in the county courthouse or in public storage? Is that an option?

MR. DYER: I don't have a direct answer, but here's what I believe to be the case. I believe that under the statutes the constables in a county that has a bonded warehouse must place the property in the bonded warehouse,

and that's to protect the property against fire, casualty, loss. Otherwise if it goes into private storage, for example, someone has got to pick up insurance for it, so that I think in counties that have a bonded warehouse it has to go there. I'm not positive of that, but I think so. In counties that don't have it the judge does have more discretion, but you're still having going to have to pick up the issue who is going to pay for the insurance to cover the property.

MR. WATSON: What if it were in a county building, and is it possible -- I don't know if you've ever tried to track down missing exhibits from a record in a county property room, but it's an interesting experience, and once you get in there you see that there are all manner of things stored there, and there's a lot of room in some of them. I mean, some maybe not, but why couldn't the court simply order for it to be -- you know, when the sheriff seizes it or attaches it or whatever the word is, to take it, take custody of it, and the court has the power to tell the sheriff, "Put it here, put it in the property room. It's under your care, and it's under the care, custody, and control of the county."

MR. DYER: But is that going to be covered under the county's insurance policy if for some reason it's damaged?

MR. WATSON: Well, I don't know.

MR. DYER: I would think that's one of the issues. I think that --

MR. WATSON: I guess if trial exhibits are, so would this. I mean, I don't know. I'm just wondering if there is another approach. I'm not trying to take a position on either the majority or the minority report. I'm just asking if what appears to me to be an option is available.

CHAIRMAN BABCOCK: Aren't the cattle going to make a mess of the property room?

MR. WATSON: Big ones. Cattle, try emus. That's really --

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Practice & Remedies Code 61.042 says, "The officer shall retain possession of the property unless it is replevied." It doesn't say by who, so I think that's broad enough to include the applicant's replevy, but my question is, after the applicant replevies, can the respondent replevy it again?

MR. DYER: Under our scenario, no.

MR. HAMILTON: Well, the Rule 6 says that the respondent can replevy any time before judgment.

CHAIRMAN BABCOCK: You caught them.

MR. DYER: We couldn't pull any wool over the

eyes on that one.

CHAIRMAN BABCOCK: Makes it all worthwhile, doesn't it, Carl?

MS. WINK: Carl, which subsection of Rule 6 was that?

MR. HAMILTON: 6(a).

MR. DYER: No. I don't think so. "At any time before judgment if the attached property has not been previously claimed."

HONORABLE TOM GRAY: Well, if Richard was here, Richard would say, "What do you mean? I can't get my property back by paying a bond? You must be kidding. This is America."

CHAIRMAN BABCOCK: That's pretty good. I'm sorry the record can't get the inflection. SO that is an inconsistency, isn't it?

MR. DYER: I don't think so. I think "claim" means that it's already been replevied by someone else.

CHAIRMAN BABCOCK: Okay.

MR. DYER: Or that it's been sold. Clearly if it's been sold the respondent can't file a replevy bond to get it back.

MR. WATSON: What else could "claim" mean? I mean, that's got to be what it's referring to.

MR. DYER: Well, that's one of them. The

other claim can be a third party claim.

MR. WATSON: I got it.

MR. DYER: Which we have also tried to address in here.

CHAIRMAN BABCOCK: Okay.

MR. DYER: In a unique way.

CHAIRMAN BABCOCK: Is there any other for this subcommittee? Yeah, Hayes.

MR. FULLER: Just briefly along the lines of what Skip was suggesting there, when the court goes beyond defining or telling the officer what authority they do have under the law and starts telling them how to do their job and where they're starting to put stuff, don't we have a separation of powers issue in there of some sort between -- with that?

MR. DYER: I think that it is -- yeah, that that's a potential problem. The other thing is there are statutes governing the conduct of officers and sheriffs and constables and what they do, and I don't have those with me, but I think we would have to look at those before we could even attempt to make rules.

MR. FULLER: Okay.

MR. DYER: That's my concern. I mean, I would love for a judge to have discretion to say, no, it doesn't go into the expensive bonded warehouse, it goes

over here, but that's not the end of the story. Someone is going to have to pay insurance on that. I don't think you're going to get the sheriff or constable to have to pay insurance if appropriations haven't been made and, you know, so, yeah, it's -- it's a real problem.

MR. WATSON: I was just thinking it might be cheaper than the sheriff or constable having to pay the unappropriated storage fees.

MR. DYER: I completely agree. I just think that -- I don't think we can do rules here that change what the statute says the constables have to do.

MR. WATSON: That's all I'm asking, just asking if it was possible.

CHAIRMAN BABCOCK: Okay. Any other comments on Rule 7? Anybody else got anything? Carl? Okay. Well, Rule 8.

MR. DYER: Rule 8, okay. Dissolution or modification of the order or writ comes out of Rule 608, almost virtually identical out of (a). It's on a motion practice. (b) requires the prompt hearing, which may be less than three days. (c), and this is out of existing rule, "The filing of the motion stays any further proceedings." (d), the conduct in hearing, we have -- we've added a little bit of language here, "burden of applicant" comes out of the existing rule. You have to

prove the statutory grounds for your writ of attachment, so keep in mind under Chapter 61 that means you have to prove your general ground and then you also have to prove one or more specific grounds.

We added the last language in (d)(1) to make sure that the consequence was known, that if the applicant fails to carry its burden, and the applicant has to go first, the writ must be dissolved and the underlying order set aside. So that's the end of it. The respondent at that point doesn't have to do anything if the applicant doesn't establish its burden of proof. If the applicant does carry its burden of proof then the movant has to prove the grounds alleged to dissolve or modify. If the movant seeks to modify the order writ based on the value of property then the movant has the burden to prove the reasonable value of the property attached exceeds the value necessary to secure the claim. The language was to make clear that there existed more than one ground for a respondent to dissolve the writ. The existing rule makes it sound like the only reason is based on the value of the property. There may be other reasons, extent to dissolve the writ, so we wanted to clarify that, and finally, we added that if the issue is substitution of property, the movant has the burden to prove the facts to justify that substitution.

Part (3), we're going to have to revise based on the discussion yesterday about uncontroverted affidavits and additional evidence. That will be done. Part (e) deals with what the court can do on the dissolution or modification. The only addition we made is if the writ is dissolved the order must be set aside. That's the order granting the application. The attached property has to be released, and then all expenses associated with the storage of property may be taxed as costs to the appellant. Again, based on our discussion of costs earlier --

CHAIRMAN BABCOCK: You mean applicant?

MR. DYER: I mean applicant. We'll probably consider and do a separate section that addresses costs. A third party claimant, (f) is new, and this may be a substantive change, but the existing rules do allow for a third party claimant to make a claim to the property but then follow the trial of right to property procedure. The concern of the subcommittee was a piece of property is attached, and there is absolutely no basis for the allegation that either the plaintiff or the defendant owns the property. Should the person who does own the property be required to go through the procedure called trial of right to property that most people have never heard of, but you're going to have to go pay an attorney to do it?

We thought we should allow the possibility of

an expedited proceeding by motion challengeable by the applicant and the respondent, and if by motion the judge determines there is indeed no valid claim to this piece of property then it gets released to the third party claimant upon the filing of a bond, so there is a little bit of a hedge there, just in case something changes, but we thought that the third party should have an expedited route to get the property back instead of having to file a separate lawsuit against the applicant and respondent.

Part (g) also comes from sequestration. Under the writ of sequestration, before you can recover for wrongful sequestration the writ must first be dissolved, and the claim for wrongful sequestration is a compulsory counterclaim in the existing lawsuit. The subcommittee agreed that before a claim for wrongful attachment could be made that there should be a prerequisite that the writ be first dissolved, but we decided we did not want to make wrongful attachment a compulsory counterclaim in the existing suit. It's compulsory in sequestration because the statute says so. There is no similar provision in the attachment statute, and we came up with different scenarios where it made no sense to require it to be a compulsory counterclaim in the existing suit. And that's all of 8.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I forgot what it was now. Let

me find it.

CHAIRMAN BABCOCK: Yeah, sorry, you had your hand up mid-presentation.

MR. HAMILTON: Oh, if the applicant -- if the order is dissolved you say the expenses may be taxed against the applicant. Why shouldn't that be a must? Under what circumstances would you not charge the cost against the applicant if his application gets dissolved?

MR. DYER: Let me give that some thought. I suppose there are scenarios where the conduct of the defendant may have contributed to an increase in cost.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I think this is the section where this would come in, but if property is seized that has a lien on it but the lien is small, and if I'm remembering my own documents correctly, if property is seized that is an event of default in and of itself. So the first lienholder of my house or tractor or cap comes in and says, "Okay, an attachment has occurred, property has been seized. That's an event of default. I am asserting the priority of my first lien." Is this section where the first lienholder comes in and says, "Deliver the property to me," and if it is why does that first lienholder then have to put up a bond?

MR. DYER: The first lienholder could, but

under existing law, it's *In Re: Grocery Supply* which involved a writ of execution. Writ of execution is served, property is picked up. The prior secured creditor says "You better not do anything with that property. I've got the prior lien." The execution creditor says, "Look, I know you've got a prior lien, but the rules specifically allow me to execute on property that has a lien or mortgage on it, and I take subject to that mortgage, so you are protected." Creditor did not agree with that, sued, and the court held, despite what the rules say, you cannot sell that property if there's a prior lien, and they take precedence, and you have to pay all of their attorney fees for having said that you could sell this property. So in your scenario, if I'm a prior secured creditor, I'm already protected. I'm not going to mess with filing trial of right of property or filing a claim in that lawsuit. I'm going to send a notice to the creditor who's taxed and say, "If do you anything with that property I'm holding you responsible and you're going to pay my attorney fees."

MR. WATSON: Thank you very much. That helps.

CHAIRMAN BABCOCK: Yeah, Justice Gray.

HONORABLE TOM GRAY: On subsection (f) that you've added to clarify or give an alternate remedy to a person who owns the property to avoid this trial of right

to property. You know, we don't see a lot of these, but if you're going to add something like that and the trial court doesn't buy it, I would like to see the question of whether or not a -- that's res judicata in the event that he has to go try his trial of right to property. In other words, trial court denies --

MR. DYER: That's a good point, yeah.

HONORABLE TOM GRAY: -- and all of the sudden he's got an adverse ruling --

MR. DYER: Uh-huh.

HONORABLE TOM GRAY: -- from a previous proceeding.

MS. WINK: That's huge.

MR. DYER: Yeah, that's a good point that we did not consider, but will be considered.

CHAIRMAN BABCOCK: Any other comments?

MR. HAMILTON: Is there a current rule on the third party claim?

MR. DYER: Yes. It's Rule 608, permits the filing of a motion by an intervening party who claims an interest in such property.

CHAIRMAN BABCOCK: Anything else on 8? Okay. Let's go to 9.

MR. DYER: Okay. 9 deals with judgments. Sequestration deals with judgments. It doesn't deal with

all judgments, and attachment, CPRC 61.063 deals with judgment on replevy property involving a judgment against a defendant. We thought we should address the different scenarios and different judgments which could come from a writ of attachment and the underlying lawsuit. So 9(a) is (d) -- it's basically adopted from sequestration, but it is new. Deals with a case that's decided against a respondent who replevied the property. So in this situation property has been attached, defendant has replevied, defendant has possession, defendant loses the underlying lawsuit.

So in this case final judgment should be rendered against all the obligors on the respondent's replevy bond, jointly and severally according to the terms of the replevy bond, either for the amount of the judgment plus interest and costs or an amount equal to the value of the property replevied as of the date of replevy, plus interest. All right. So you have two possible amounts there, and it's going to be related to the value of the property. If the value of the property is lower than the amount of the claim then you have to look to the terms of the replevy bond to see if the replevy bond states that upon defendant losing you pay the higher of total amount of claim and value of property. If in No. (2) -- No. (2) we only deal with if we adopt the provision that an applicant will have a replevy bond. It doesn't seem to me that

that's going to happen, but this is just a parallel provision with regard to the respondent's replevy bond. And then part (b) deals with awarding expenses. We're going to rework that and probably do a separate section entirely on costs and how they should be assessed.

CHAIRMAN BABCOCK: Any comments on 9?

PROFESSOR HOFFMAN: So I have a comment that may not be specific to 9, and so I'm a little scared to go back to 3, so I'm going to say it relates to 9, but it's about the bond. This made me think of it now. I don't know why I didn't think of it before, but it turns out there's this really pretty interesting issue for kind of procedural nerds about what happens after a judgment and it's on appeal, or for that matter it could be that the trial court does something with it, and we're trying to figure out who won and who lost and whether the bond gets released depending on that. So the story that I've recently heard is a story involving a gigantic case. It was a multi-hundred million-dollar judgment, and it goes up on appeal, and it was only a battle about damages. So they had all agreed on liability. It was a breach of contract case. It was just a question of how much we owed you. So they get this huge verdict, and so the lose -- that party appeals, and the appellate court reverses because it says the evidence on damages was no good.

So now the issue becomes has the bond been satisfied because the losing party won, and so bond -- the appeal bond goes away. So it makes me think about that same question could apply here. How do we know when you won or not, and does the term of the bond sort of answer when it is dissolved on its own? So it turns out in this incredibly expensive context when you would think with such high stakes litigation it would all be spelled out, the bond is utterly confusing and vague. So I'm guessing we have a problem with the bonds here as well if we've got it with that.

MR. DYER: Well, are you talking about assessing costs to the prevailing party, or are you talking about the terms of the bond and what happens to the bond after it is appealed?

PROFESSOR HOFFMAN: Yeah, the second one.

MR. DYER: But has the judgment been superseded? If the judgment has been superseded then nothing happens and the property should not be released. If the judgment has not been superseded then the natural consequences of a bond and a judgment involving that bond go forward, which means the bond may be released if the respondent wins. If the respondent loses, you've got to pay up the bond. All right. So let's say on appeal it gets reversed. Well, then you've got to go file suit to

recover that property, as you would in any other case. So --

PROFESSOR HOFFMAN: Okay. Well, that answer makes sense. I guess maybe my comment is more general, which is in some other contexts it looks like we're relying on the terms of the bond to be clear about when it gets released or not and when you're under the hook to pay under the bond as opposed to paying under the property, which I assume for the creditor is a wonderful place to be because the likelihood of payment goes way up --

MR. DYER: Yes.

PROFESSOR HOFFMAN: -- as a result of the bond. Do the rules need to be more specific is my question to either consider now or later as to what the terms of when a bond is satisfied or not and thus when it gets dissolved?

MR. DYER: We don't actually have a form of bond in the rules. I think we looked at that and decided that the forms that are currently used contain all the information that's needed and that we didn't need to have a rule that told them your rules -- or your forms need to be different.

PROFESSOR HOFFMAN: Okay. Thank you.

CHAIRMAN BABCOCK: Okay. Anything more on 9? Yeah. Gene.

MR. STORIE: When you have either-or is it the judgment or the bond that decides which of those applies?

MR. DYER: It -- where are you? Are you on --

MR. STORIE: Yeah 9(a)(1), "either for the amount of the judgment plus interests and costs or for an amount equal to the value of the property." Are those the terms of the bond, or is that what the judgment is providing?

MR. DYER: It should be -- okay. You do raise a point, which is it's not as clear as it should be. But the terms of the replevy bond determine the liability of the obligors.

MR. STORIE: Okay.

MR. DYER: The existing language in sequestration is even less clear and says that -- actually it may be with the statute, that the obligors are jointly and severally liable for the entire judgment and then it says "according the terms of the bond." Well, you know, "I only signed on as a surety here for five grand and yet the respondent just lost $500,000. I'm responsible for all of that?" So we attempted to clarify this, but I agree it's not as clear as it should be. But it's the terms of the bond that determine the obligor's liability, not the

underlying judgment against the respondent.

MR. HAMILTON: Can't we just put a period or end the sentence, "terms of the replevy bond plus interest" without putting that other phrase in there?

MR. DYER: I think we may be able to. I can't say it absolutely yet without going back and looking at the other provisions, but I think that that may -- that may -- it solves the problem with regard to the obligors. I just want to make sure that it doesn't mess up the judgment against the respondent, so I just need to clarify that.

CHAIRMAN BABCOCK: Okay, yeah, Justice Gray.

HONORABLE TOM GRAY: And I don't know if this fits here or maybe after the next section or something, but in reading this on judgments it occurred to me that if the scenario that you've described happens and in the case that you and I were talking about at the break where the property has been attached during the suit. Now, it comes time -- the respondent either directly in the trial court or on appeal has prevailed. All of this cost has been accruing, and it's in storage. It was never replevied. How does the respondent go get his property because the fees have still not been paid? And he's entitled to it.

MR. DYER: That's an interesting question because ideally they would have been taxes cost to the

prevailing party. Now that on appeal he's prevailed he goes back to the trial court and says "You have to reassess these against the plaintiff," but wouldn't the trial court then say, "Okay, I can do that, but only at the end of the litigation. I can't do it now"?

HONORABLE TOM GRAY: Well, see, and taxing doesn't help you at all.

MR. DYER: Doesn't get it paid.

HONORABLE TOM GRAY: That's not money, and so, I mean, somehow or another it seems like the trial court or the -- we need to be able to put the respondent back in possession of the property without regard to payment of the cost and expenses.

MR. DYER: Well, to the extent that the satisfactory appeal gives the respondent a claim for wrongful attachment, that would be the remedy. Again, that doesn't get you paid. It just gets you a claim. If on appeal it does not give you a wrongful attachment, I don't see any other vehicle to recover those other than on the new trial. Assuming that it's been remanded. Was it reversed and rendered or reversed and remanded?

HONORABLE TOM GRAY: Remanded, as I recall.

MR. DYER: If it's remanded, I don't see how you can get those costs paid -- well, I don't see how you can even get them taxed unless you bring that up in the new

trial. I don't.

HONORABLE TOM GRAY: Well, separate and aside from the one that we had talked about at the break, but I'm just talking about in a straightforward case, case has been tried to judgment, and the -- either the respondent wins at that level or it maybe goes on up to the next level and gets reversed and rendered or whatever, but the respondent wins. His property has been in custody for the entire time of the trial. Absolute final judgment, no liability, he's entitled to his property. Trial court assesses costs against the losing party. Plaintiff's been required to pay the costs. The respondent has been awarded his judgment for costs. He still doesn't have his property.

MR. DYER: Yeah. And that's sad, but there's nothing that's out there that's going to get him payment by somebody else. If he wants the property back, he's going to have to pay.

HONORABLE TOM GRAY: He's going to have to go pay the storage fees and the --

MR. DYER: Yep.

MS. WINK: And that's why that right of replevy was so important in the first place.

HONORABLE TOM GRAY: Yeah, but he couldn't afford that. You had all his property.

MS. WINK: I know. That's why we want

evidentiary standards when people are pleading for these things.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Well, the applicant does have a bond that ultimately you can recover on, I suppose, but --

MR. DYER: But the bond value is typically determined by the value of the property and the amount of the claim.

MR. HAMILTON: Maybe we ought to increase that then to like in other instances, two times the value or something, to take care of the storage costs and all.

MR. DYER: That's possible. I don't know if it would address that particular scenario.

MR. HAMILTON: Well, it won't get the money right now to release the property, but he would get it eventually.

MR. DYER: Well, what I have seen, though, I mean, keep in mind you can modify the amount of the bond more than once. I mean, even supersedeas bonds are routinely modified during the pendency of an appeal. So if your litigation is dragging out then you should go back to the court and say, "Your Honor, I'm getting popped an extra two grand a month for this to be in storage. Increase the amount of the bond." Now, the only problem is whose bond.

If the applicant doesn't have a replevy bond, we're only talking about the respondent's replevy bond, right, so the applicant may say, "You've got to increase the bond because these storage costs are accruing, and if I win, that bond should be there to pay the storage costs," but you don't have the similar protection for the respondent, because the applicant doesn't file a replevy bond. Not under -- you know, not unless y'all go with what we've thrown out.

MR. HAMILTON: No, but the applicant filed a bond originally to bring the attachment proceeding.

MR. DYER: Yeah, but that bond is to protect against not pursuing the suit to effect. So that's a relatively minor bond that basically covers the costs if the applicant DWOPs the suit. Can it be used to cover increased storage costs? I don't think that's what it's designed for, but I'll take a look at that. Maybe it can.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I just want to make sure I understand. "Obligors" means the principal and the sureties?

MR. DYER: Yes.

MS. CORTELL: And so even though the sureties heretofore hadn't been really a party to the suit. I mean, I don't have a problem if that's how the supersedeas works, but --

MR. DYER: Right. Somebody asked me if a bond obligor in one of these proceedings had a right to come in and challenge the value of the property. I don't believe they do. They're not considered a party to the suit. Now, if there is a subsequent suit on the bond, well, then they would have the defenses there, but the determination of the value I think is something that's already been determined.

MS. CORTELL: But we're saying here that the court can enter judgment against them.

MR. DYER: Yes.

MS. CORTELL: Okay. I just wanted to be sure I understood that.

MR. DYER: And that comes out of a couple of parallel rules in sequestration.

MS. CORTELL: Okay. And then the other question is -- and I think you've already got this, but we're going to make clear that's not the entirety of the judgment, because when we use the word "must" I'm a little worried. In other words, it may be this, but it may be more, right?

MR. DYER: Right. Right. I'm going to take a look at what the effect of the deletion would have on the judgment against respondent.

CHAIRMAN BABCOCK: Okay. Well, I think we're

going to stop here with Rule 9, and we'll take up attachment Rule 10 at some point in our October meeting, which is October 21 and 22, I believe. We're going to have to start that meeting, as I said before, with the parental rights termination rules, because their -- our comments are due the following Monday, so we'll start with that, and that may take a little bit of time, but we'll get back to this and hopefully finish everything off. But everybody gets a gold star for being here today. Thank you, and Pat and David and Dulcie, thank you.

HONORABLE JAN PATTERSON: Thank you, you guys, for all of your work on this.

CHAIRMAN BABCOCK: So we'll be in recess until next month. Thanks, everybody.

MS. SENNEFF: Until this month.

CHAIRMAN BABCOCK: Until this month, right. Three weeks from now.

(Adjourned at 11:59 a.m.)

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MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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

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