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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

November 19, 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 19th day of November, 2011, between the hours of 9:01 a.m. and 11:55 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

11-33 Garnishment commentary (Ancillary Proceedings Task Force)

11-34 Distress Warrants (Ancillary Proceedings Task Force)

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CHAIRMAN BABCOCK: All right. Welcome, everybody. Back on the record on Saturday morning, still working on our ancillary rules, and we will pick up where we left off yesterday on garnishment, and, Pat, you and Elaine take us -- take us forward.

MR. DYER: Okay. I'm not exactly sure where we stopped yesterday.

CHAIRMAN BABCOCK: Well --

HONORABLE SARAH DUNCAN: I think it was page one.

MR. DYER: Yeah, it might have been page one.

MS. SECCO: Yeah, I think it was, because we were talking about --

HONORABLE SARAH DUNCAN: I think Jane's concern about -- which I went to sleep thinking about last night.

MR. DYER: You need to get a life.

CHAIRMAN BABCOCK: Jane had a concern about whether or not the Rule 1, which talked about garnishment before judgment and order, should be put at the back of the rule rather than the front of the rule, and we talked about that off the record and any other thoughts about that?

HONORABLE JANE BLAND: Not maybe at the back of the rule, but some statement about the grounds.

MR. DYER: Would a comment be appropriate?

HONORABLE JANE BLAND: Let me think about it and if I think of anything, I will e-mail you.

CHAIRMAN BABCOCK: Yeah, good. Good.

HONORABLE SARAH DUNCAN: But I was thinking -- and I admit this is nerdy -- when I was trying to fall asleep last night is if garnishment is the only available prejudgment capture vehicle --

HONORABLE JANE BLAND: Attachment.

HONORABLE SARAH DUNCAN: And attachment.

MR. DYER: And sequestration.

PROFESSOR CARLSON: Distress warrants.

HONORABLE SARAH DUNCAN: All three are available prejudgment?

PROFESSOR CARLSON: Right.

MR. DYER: Yes.

HONORABLE SARAH DUNCAN: What I was thinking is we should divide them -- this should be divided not into the type of writ, but into prejudgment and post-judgment in aid of enforcement and that there should be an introductory part of the prejudgment rule that says something along the lines of "The grounds for and requirements of prejudgment seizure are narrow and strict," because they are, and since that's less available than post-judgment in aid of enforcement, put the post-judgment in aid of enforcement

parts of the rule first and then have a separate section on prejudgment.

CHAIRMAN BABCOCK: Anybody have any comments on that thought? Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I think if you put the CPRC grounds in the rule itself rather than just referring to them that will make it more apparent that there are a bunch of hoops that you have to go through for prejudgment garnishment.

PROFESSOR CARLSON: Are you talking about for all of the prejudgment or just garnishment?

HONORABLE TRACY CHRISTOPHER: In garnishment to --

PROFESSOR CARLSON: Yeah, we could do that.

MR. DYER: I think the reason why we didn't incorporate the language straight out of the statute was to provide for later amendments to the statute.

PROFESSOR CARLSON: Uh-huh.

CHAIRMAN BABCOCK: Okay. Any other comments on that thought? Okay. Did you finish taking us through Rule 1 before we started talking about the -- where it should be in the rule, in the overall rule? I don't remember.

MR. DYER: I think -- yeah, I think we did.

HONORABLE JANE BLAND: We were well past

that.

CHAIRMAN BABCOCK: So any other comments on Rule 1? Yeah, Justice Gaultney.

HONORABLE DAVID GAULTNEY: I don't remember if we talked about this or not, but (d), on effect of pleading, it seems like that perhaps might better be under application than just a standalone provision.

MR. DYER: At the last session we agreed that it should be a standalone provision.

HONORABLE DAVID GAULTNEY: Okay. I'll withdraw the comment.

CHAIRMAN BABCOCK: Okay. Any other comments about Rule 1?

HONORABLE SARAH DUNCAN: I just have one question about (b)(3), 1(b)(3), "State the maximum dollar amount sought to be satisfied by garnishment." How do I -- how do I know that? Do I just state the maximum dollar amount I seek in a judgment and use that for garnishment? Without discovery how do I know -- how do I even have any idea what's available to be garnished?

CHAIRMAN BABCOCK: Well, this is the judge. It's the order stating it.

MR. DYER: Well, no, the application.

HONORABLE SARAH DUNCAN: He's put it in the application.

MR. DYER: The current rule requires the judge to set the maximum amount --

HONORABLE SARAH DUNCAN: In the order.

MR. DYER: -- in the order, so we thought to give the judge some basis for that, make the applicant state the maximum.

HONORABLE SARAH DUNCAN: And I can understand that, except I don't know how I as the applicant know how to fill that in without discovery.

PROFESSOR CARLSON: In a prejudgment proceeding --

THE REPORTER: Speak up a little bit. I'm sorry.

PROFESSOR CARLSON: Oh, I'm sorry. You know, like in a breach of contract case, suit for breach of contract, on a promissory note, let's say the only funds that the debtor has is in a bank account. You know what the amount of debt is. That's the amount you seek to have garnished.

MR. DYER: It has to be for a liquidated claim.

CHAIRMAN BABCOCK: Just for the record, we're talking about (b), as in boy, (3), not (e), as in elephant, (3).

MR. DYER: Yes.

CHAIRMAN BABCOCK: Okay.

MR. DYER: So under the statute you have to -- you can get it either if you have the original attachment that's already been issued, or plaintiff sues for a debt and makes an affidavit stating debt is just due and unpaid, so it has to be for a liquidated claim.

HONORABLE SARAH DUNCAN: And that tells me the amount of my claim. My question is do I just -- without knowing what's available to be garnished, do I just put the amount of my claim in that line?

MR. DYER: Yes. Yes. Sometimes you'll garnish and there's nothing there.

HONORABLE SARAH DUNCAN: Right. Right.

CHAIRMAN BABCOCK: Okay. Yeah, Carl.

MR. HAMILTON: Under (f), multiple writs, you may have answered this last time, but I've forgotten. Why do everybody -- why does everybody have to be notified if there are multiple writs issued, and what are the consequences if you don't notify everybody?

MR. DYER: We haven't provided any consequences if you don't. The intent is to reduce the chance of excessive levy.

MR. HAMILTON: Chance of --

MR. DYER: Of excessive levy, so that you don't go out and garnish way more -- all right. Let's say

you have three writs and they're directed to different institutions. You want to alert the officer who's serving the writs that there are other outstanding writs out there and keep in touch with the officer so that if one hits and gets the maximum amount that you sought to garnish, the other two aren't going to hit also.

MR. HAMILTON: But are they going to communicate, or does the applicant have to keep the --

MR. DYER: It's to impose a duty on the applicant.

MR. MUNZINGER: Could you restate the answer you just gave?

MR. DYER: Let's say I apply for and get three writs of a garnishment and I hit on one that satisfies the maximum amount. I should tell the officer on the other two writs not to levy.

MR. MUNZINGER: The rule (f) does not require -- it says that "The applicant must inform the officers or persons to whom the writs are delivered that multiple writs are outstanding," but does not specifically require that there be any kind of identifying information of the other writs or the officer -- or the identity of such officers to whom such writs were issued. Was that by intention?

MR. DYER: Actually, no, I don't think we

really took it out that far.

MR. MUNZINGER: Is it necessary, do you think, to tell the sheriff of Travis County that there's one in McClennan County also and if so -- I mean, they all go to the sheriff, don't they?

MR. DYER: No, not on garnishment, because garnishment doesn't necessarily involve the seizure of property.

MR. MUNZINGER: The only point I'm making is do you think it's advisable to require in (f) that the identity of the parties to whom multiple writs have been issued be stated in the applications so that each person serving the writ would know to whom he may or could or should communicate in the event that it becomes necessary or advisable?

MR. DYER: Yeah, we could. That would foster better communication.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I mean, the way the garnishment most often works is you say, okay, the person owes me a hundred thousand dollars, and you hit five banks because you know he has bank accounts in these five banks because he's moving his money around and you're trying to find it. Conceivably, one bank could have a

hundred thousand dollars, and if you froze money in the other banks at the same time that you've already frozen this hundred thousand dollars, you, the person trying to get the garnishment, can be in trouble because now you've frozen more than the amount of the debt, and you've got to immediately get those things released in the other accounts. So I think the whole mechanism of the ability to say this was wrongful garnishment will protect the potential debtor with the multiple writ situation.

CHAIRMAN BABCOCK: Okay. What else? Anything else on 1? Richard.

MR. ORSINGER: I was going to comment when we get to the post-judgment garnishment, but why don't we put some kind of responsibility on the party seeking the garnishment to be sure that they don't trap excessive money rather than putting it on the officers who are serving the process?

MR. DYER: Well, the only problem is you don't know how much money is in the financial institution until the writ hits.

PROFESSOR CARLSON: And they answer.

MR. DYER: Right. And typically what happens is you'll get a call from the attorney for the bank that says, "We don't have any" or "This is how much we have," but you don't know going in.

MR. ORSINGER: And you think the officers are going to have better knowledge than the applicant?

MR. DYER: No.

MR. ORSINGER: So why don't we put the burden on the applicant if you want to put it on somebody to keep in touch with how much is being frozen? Because I don't think these officers are calling each other. I don't do -- I did one garnishment recently, but I don't do them very often, and it would be amazing to me if these constables in different precincts, much less in different counties, were calling each other on the phone.

MR. DYER: I agree. Again, I don't think that we carried this to its conclusion with regard to details about communications. The existing rules don't impose any duty to advise the officers that there are multiple writs out.

MR. ORSINGER: Since the exposure is the exposure to the applicant for wrongful garnishment, the applicant is the one who is motivated to maintain or keep in touch, is also the one who's likely to get the call from the banker. So maybe it's useless to have officers communicating with each other, and it would be more helpful to write a rule somewhere saying that the applicant should keep track of it or should withdraw the excess writs or something.

CHAIRMAN BABCOCK: Well, what Tracy just said is there's a mechanism, there's a self-interest to keep track of it, because if you freeze more than what the debt is --

MR. ORSINGER: You could get sued.

CHAIRMAN BABCOCK: -- then you're going to be in trouble.

MR. ORSINGER: Right. So that's the applicant's motive.

CHAIRMAN BABCOCK: And your point raises the issue whether this sentence in (f) is even necessary, because what's the purpose?

MR. HAMILTON: Yeah. What's the purpose of the officers being notified?

CHAIRMAN BABCOCK: So, you know, so there are multiple writs. They shrug their shoulders and say, "So what?" Yeah, Elaine.

PROFESSOR CARLSON: There were two members of the task force that were -- one was a sheriff and one was a constable, right? Carlos Lopez.

MR. DYER: Yeah.

PROFESSOR CARLSON: And we relied heavily on their experiences as well from their perspective on what would work or is working.

CHAIRMAN BABCOCK: And they wanted to know if

there are multiple writs?

PROFESSOR CARLSON: I think that's what Carlos said.

MR. DYER: Yeah, I think so.

CHAIRMAN BABCOCK: Did he articulate why he wanted to know?

PROFESSOR CARLSON: I think he is a very conscientious constable who probably does coordinate. Also, isn't there some prospective liability on the constables and the sheriffs for excessive levy?

MR. ORSINGER: This is a garnishment proceeding. In a garnishment proceeding an answer is filed in court by the bank and then you go to court to take the money. So I can't imagine a constable could ever be responsible for garnishment. All they did was to serve process. From that point on it's a lawsuit.

PROFESSOR CARLSON: That's true, because the property stays in place. You're right.

MR. ORSINGER: Yeah. If it was an attachment then that would make sense.

PROFESSOR CARLSON: That's right.

CHAIRMAN BABCOCK: Any other comments on Rule 1? Let's go to Rule 2, Pat.

MR. DYER: Okay. Rule 2 is the bond requirement for a prejudgment writ. In (a) the only change

we made was to put the term "wrongful garnishment" rather than "wrongfully suing out such writ of garnishment." Part (b) imports Rule 14c. Part (c) is parallel language that we've used in all of the other rules. In the bold print you'll see what the current rule provides, so there's no substantive change. That's all I have on Rule 2.

CHAIRMAN BABCOCK: Okay. Any comments on Rule 2? Okay. Let's go to Rule 3.

MR. DYER: Rule 3 is the post-judgment application. Subsection (a) is straight out of Rule 657. We removed the specific reference to the section of the Civil Practice and Remedies Code, but that section basically informs the practitioner that you don't have to wait 30 days after your judgment to get a writ of garnishment. You can get it as soon as the judgment is signed.

Part (b), we've incorporated in subsections (1) and (2) the language out of the statute that applies to a post-judgment writ.

MR. MUNZINGER: Can I stop you a minute and ask you to go back to subpart (a)?

MR. DYER: No.

CHAIRMAN BABCOCK: Now, now.

MR. MUNZINGER: At any time after final judgment, what happens if a party appeals the judgment?

MR. DYER: If it hasn't been superseded you can still pursue garnishment.

MR. MUNZINGER: But the use of the language "final judgment" in the face of an appeal, the judgment is not final if it's being appealed. It's final for the trial court purposes, but it's not final if it's on appeal. Does anybody see a need to explain that or --

MR. DYER: I think we discussed this one or two sessions ago, whether we needed to address the two different meanings of final and decided to leave it as-is.

MR. MUNZINGER: Thank you.

MR. DYER: That's my recollection. I could be wrong.

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

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: On (a) you have the appeal bond being approved only by the justice of the peace. Don't we need to have the court in there, and the -- or the justice of the peace?

MR. DYER: Well, we have "filed and approved in accordance with TRAP or an appeal bond is filed and approved by the JP."

MR. HAMILTON: "Or an appeal bond is filed and approved by the justice of the peace."

HONORABLE SARAH DUNCAN: That's the only

place you have an appeal bond remaining. You don't have an appeal bond other than in the JP court now, have for some years.

MR. HAMILTON: Okay.

CHAIRMAN BABCOCK: Okay. So (b) you've gone through.

MR. DYER: (c) is --

MR. ORSINGER: Wait a minute. Wait a minute. We haven't gotten to (b) yet.

CHAIRMAN BABCOCK: We haven't gotten to (b) either?

MR. ORSINGER: No. If we're on (b) now I've got something. Does the statute require that there be no property subject to execution before a garnishment can be issued, or is that a rule requirement?

MR. HAMILTON: It's a statute.

MR. ORSINGER: The statute requires that? Because that's --

MR. DYER: Yes. It's --

PROFESSOR CARLSON: 63.001.

MR. DYER: 63.001(2)(b), "Within the plaintiff's knowledge the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt."

MR. ORSINGER: Okay.

MR. DYER: That's for prejudgment.
MR. ORSINGER: Oh, wait a minute, but it's not for post-judgment?
MR. DYER: No.
MR. ORSINGER: Okay. I would like to argue --
HONORABLE SARAH DUNCAN: That was my question yesterday.
MR. DYER: Oh, I'm sorry. I'm sorry. It's for both. In subpart (3), the post-judgment one, "Valid subsisting judgment," "and makes an affidavit stating within plaintiff's knowledge defendant does not possess property in Texas subject to execution sufficient to satisfy that judgment," so it applies pre- and post-.
MR. ORSINGER: Okay. Thank you.
CHAIRMAN BABCOCK: Any more on (b)? Okay. Keep going.
MR. DYER: (c) is straight out of 658. We deleted the "verified" for the same reason, the new statute that allows a declaration to be used instead. (d), it's out of 658. (e), the two additions are subpart (4) and subpart (5). Subpart (4) says, "The property must be kept safe and preserved subject to further order of the court," which we have in all of the other rules. Subpart (5) clarifies that no bond is required in the post-judgment

context. Subpart (6) is a replevy bond, which is unchanged. Subpart (f) we have the multiple writs language.

MR. ORSINGER: Comment on (f).

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: The second sentence seems to contemplate multiple writs only going to different counties but multiple writs could go in the same county, and so it seems a little odd to me that -- that we mention multiple counties when it's probably more likely that they're all going to be in one county, and we don't mention that, and I'm not sure why we're mentioning it anyway. Why do we care that they -- whether they are or are not in different counties?

MR. DYER: Well, experientially we've had clerks who, number one, refuse to issue a second writ until the first writ has been returned --

MR. ORSINGER: Okay. That's --

MR. DYER: -- and if there's another writ outstanding in another county they've experienced the same problem.

MR. GILSTRAP: Question.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: All of these distinguish between the order and the writ. Are those in real terms

separate documents --

MR. DYER: Yes.

MR. GILSTRAP: -- in practice?

MR. DYER: Yes.

MR. GILSTRAP: So you'll get an order and then you'll go over and the clerk will issue a document called a writ?

MR. DYER: Yes.

MR. GILSTRAP: In all these cases.

MR. DYER: Yes.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Gray.

HONORABLE TOM GRAY: It may play primarily off Richard's comment about the second and third sentence and what are we contemplating more of, but it seems to me that maybe the last sentence if it were in the middle would make it where it was not implied that the multiple writs were to different counties so that if you read them in the reverse order that they are there now, you'll see what I'm talking about.

CHAIRMAN BABCOCK: Yeah. That's a good point. See what he's saying, Pat?

MR. DYER: Uh-huh. Move the third sentence to the second.

CHAIRMAN BABCOCK: Makes a little bit of sense. Okay. What else? All right. Rule 4, doesn't look

like there are any changes on Rule 4.

MR. DYER: No. It's -- it comes straight out of the first part of Rule 659. We took everything else out of 659 and put it into Rule 5.

CHAIRMAN BABCOCK: Any comments on Rule 4? Rule 5.

MR. DYER: Rule 5 is substantively the same as what appears in Rule 659 and 663. If you look at subsection (b)(2) where it says "answer under oath" and then we have (A), (B), (C), (D), (E). We broke this out to make it clear that the garnishee has to respond as to two specific dates, the date that the writ was served and the date that the answer is due.

CHAIRMAN BABCOCK: Yeah, Richard Orsinger.

MR. ORSINGER: Aren't those supposed to be the same? I mean, when you're served with a writ of garnishment you're supposed to freeze all activity, and so is there ever going to be a difference between (C) and (D)?

MR. DYER: Yes, if deposits are made after the date the --

MR. ORSINGER: Deposits?

MR. DYER: Yeah.

MR. ORSINGER: So deposits that are made between the date of service and the date of answer are captured by the writ?

MR. DYER: Yes.

MR. ORSINGER: Okay. And let me ask you a practical question. If you garnish a bank that has a safety deposit box, it's my experience that they won't open that without a court order, which requires them first to file an answer, so probably they're just going to ignore the requirement that they state under oath what effects they have in their possession, if -- if it's in a lock box.

MR. DYER: No, they have to state that they have a lock box.

MR. ORSINGER: But they don't have to state what effects are in the lock box until after the court authorizes the opening?

MR. DYER: Correct.

MR. ORSINGER: Okay. Because it doesn't really say that, but if that's the way it's being practiced then let's not worry about it, but it is a practical problem because a lot of times people do have lock boxes at these banks.

MR. DYER: Right, but that would be an effect.

MR. ORSINGER: The lock box would be an effect?

MR. DYER: Yes. The bank isn't going to know what's in it --

MR. ORSINGER: Right.

MR. DYER: -- but it is an effect that belongs to the debtor.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Going back to case docketed, and this is just picky, but it says, "When the foregoing requirement of these rules have been complied with, the clerk or the justice shall docket the case." So if someone submits a faulty application, does that mean it doesn't get docketed anywhere because the -- you know, the foregoing requirements of the rules have not been complied with?

MR. DYER: No, it still does get docketed.

HONORABLE TRACY CHRISTOPHER: Well, exactly, so this is poor wording.

MR. DYER: Yeah, that's existing language out of the rules.

HONORABLE TRACY CHRISTOPHER: Let's fix it.

MR. DYER: Okay.

HONORABLE TRACY CHRISTOPHER: While we're here let's fix it.

MR. DYER: We could change it to "When an application has been filed." I think that would work.

HONORABLE TOM GRAY: Why not just eliminate

everything prior to the comma and capitalize "the"?

HONORABLE TRACY CHRISTOPHER: Well, you don't issue the writ of garnishment unless the requirements have been met, but you do docket it regardless.

MR. DYER: Yes. As soon as the application is filed it's docketed.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE TOM GRAY: All right. Then move everything before the comma to after the word "and" so that it reads, "The clerk or justice of the peace shall docket the case in the name of the applicant as plaintiff and of the garnishee as defendant and when the foregoing requirements of these rules have been complied with shall immediately issue a writ of garnishment directed to the garnishee."

HONORABLE TRACY CHRISTOPHER: Perfect.

MR. DYER: Does that resolve the problem of a defective application?

HONORABLE TRACY CHRISTOPHER: Yeah, I think so.

HONORABLE TOM GRAY: Yeah. The garnishment is not issued, but the clerk is still commanded to docket it.

HONORABLE TRACY CHRISTOPHER: Right. That will fix it.

MR. DYER: Well, but does that impose a duty on the clerk to determine if the application is proper before it issues the writ?

HONORABLE TOM GRAY: Only if this rule required the clerk to determine that it was proper before it is docketed as currently written.

MR. DYER: It didn't. The language has never been interpreted that way, but if we're trying to fix the language.

HONORABLE TRACY CHRISTOPHER: Well, you docket, you get an order, then you get the writ. So the clerk doesn't issue the writ until there's an order.

MR. DYER: Correct.

HONORABLE TRACY CHRISTOPHER: So that's the format, if you want to correct this.

MR. DYER: Okay. But I thought your concern was the language, "When the foregoing requirements of these rules have been complied with" --

HONORABLE TRACY CHRISTOPHER: Right.

MR. DYER: -- could be interpreted to mean it has to be a valid application as opposed to a defective application.

HONORABLE TRACY CHRISTOPHER: Right. So what I'm just saying is --

MR. DYER: But if that's a concern it doesn't

matter --

CHAIRMAN BABCOCK: Wait a minute. Hold on.

HONORABLE TRACY CHRISTOPHER: Right.

MR. DYER: If that's the concern, it doesn't matter where we put that language because the problem still exists.

HONORABLE TRACY CHRISTOPHER: No. I mean, it just needs to be rewritten to say, "An application is docketed by the clerk of the JP. Once an order issues the clerk or JP issues the writ of garnishment," and that just needs to be redone. Because, you're right, we don't want the clerk determining whether the application requirements have been complied with. That's the judge's job.

MR. DYER: Okay, so "When an application has been filed the clerk or justice of the peace shall docket the case in the name of the applicant as plaintiff and of the garnishee as defendant, and after the order has been issued shall immediately issue a writ of garnishment."

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: Yep. Okay. Any more on 4? Good catch. Yeah, Richard.

MR. ORSINGER: On (d).

CHAIRMAN BABCOCK: On what?

MR. ORSINGER: (d) as in dog.

CHAIRMAN BABCOCK: 4 doesn't have a (d).

MR. ORSINGER: 4 doesn't have a (d)?

CHAIRMAN BABCOCK: I don't think so.

MR. ORSINGER: I'm looking at it. No, I'm sorry, it's 5.

CHAIRMAN BABCOCK: 5(d). Any more on 4? Okay, now Richard, 5(d).

MR. ORSINGER: I didn't want to skip over (a), (b), and (c), if there was something important there.

CHAIRMAN BABCOCK: We can -- we don't have to go in order.

MR. ORSINGER: Okay. I'm a little confused about the process. I know that the writ is issued to the garnishee, which, you know, typically would be a bank, and so the process that they get served with is directed to what their responsibilities are. The owner of the property, the judgment debtor, is entitled to notice, but not -- is not -- or is he or is he not entitled to service of the writ?

MR. DYER: No, he also receives a copy of the writ, the order, and the application.

MR. ORSINGER: Okay. Now, in subdivision (b) it says that when we give the notice to the respondent we're going to warn them their property has been seized but it may be exempt, but we require that that be put in the writ, not in a separate notice, but then over on (e) in the

form of the writ itself we don't say anything about that caveat.

MR. DYER: Yes, in (e), the very first sentence, "The following form may be issued, but any form used must contain the notice to respondent."

MR. ORSINGER: Okay. Now then, is that required, or is that just a conventional practice? Because that seems confusing to me that you have a piece of process that's directed to the garnishee, who has an answer day and everything else just like a lawsuit, but in the middle of this is a paragraph that's directed to somebody else entirely that's not a party to the proceeding; and if nobody cares, I guess it doesn't matter because this is kind of on the fringe of litigation anyway; but it seems confusing to me to have process that's served on a bank, have a notice in there to someone who is a nonparty. Is that required by law, or is it just a habit we've developed?

MR. DYER: Well, it's in the existing rules. I don't -- there isn't a whole lot of statute dealing in garnishment.

MR. ORSINGER: Well, I don't know whether -- I mean, it may be that nobody cares; but, actually, if you're going to give meaningful notice to these third parties then we probably ought to have a separate thing

called a notice, and we ought to tell them a little more than that their stuff has been garnished and that there's potential exemptions that apply; and one thing, for example, is I believe that they have the opportunity to intervene if they wish; isn't that right, Kent?

MR. DYER: Well, I mean, they are a -- like in Harris County when you file an application for garnishment they usually take your cause number, which has a plaintiff and defendant, and they add an extension, a -A, and the -A has the garnishee as the -- well, as a responding party, but you have to serve a copy of the writ that contains the notice, a copy of the application, and a copy of the order on the defendant, and the defendant is a party to that proceeding.

MR. ORSINGER: Really, okay, because I just did one in Dallas, and the defendant is not considered a party there. They're given notice, but they have to intervene if they want to be part of the garnishment proceeding, but in Harris County the judgment debtor is automatically a party?

MR. DYER: Yes.

PROFESSOR CARLSON: Yeah.

MR. DYER: And can move to dissolve the writ or modify the writ. And the other thing is when the garnishee files an answer, both the plaintiff and the

defendant have the right to controvert that answer.

MR. ORSINGER: Well, does the judgment debtor -- is the judgment debtor instructed by the writ to file an answer by answer day?

MR. DYER: No. No. The only answer that's filed to the writ comes from the garnishee.

MR. ORSINGER: So they're a party who has no responsibility to ever make an appearance.

MR. DYER: Well, they've already -- if it's post-judgment, they've already been a party to the proceeding. If it's prejudgment, they're already a party to the proceeding.

MR. ORSINGER: And so are they entitled to all of the rules that talk about notice to parties and whatnot? Every step of the way they get a Rule 21a notice, and if you have to -- if the local rule requires you to schedule things at the convenience of somebody's lawyer, you have to call them on the phone?

MR. DYER: Well, unless you satisfy the requirements for an ex parte issuance of a writ.

MR. ORSINGER: My goodness. And you understand that the rules require that now?

MR. DYER: Yes.

MR. ORSINGER: That's your understanding?

MR. DYER: Yes.

MR. ORSINGER: I'm not sure that I understand it the same way, and I know that's not a statewide practice.

CHAIRMAN BABCOCK: Roger, and then Carl.

MR. HUGHES: Well, maybe we're jumping ahead, but the next rule, Rule 6, deals with the delivery and service of the writ on the judgment debtor.

MR. DYER: Right.

MR. HUGHES: And, I mean, I was asking the same questions, so I kind of skipped ahead and read, and the rule requires that -- is it Rule 6(d), as in dog, requires service of the writ on the garnishee? So that's how he gets the notice, and then it provides you have to have a certificate of service that you've served the writ on the judgment debtor, and it has to be on file 10 days before they can enter judgment on the garnishment. I mean, all the writ of garnishment does in post-judgment proceeding is to say, "You've got to hold that property," and then you have a subsequent proceeding that says, "Now give it to me," and so the judgment debtor can go -- you know, his attitude can be "I'm dead, there's nothing for me to contest. That is my property. They've got a judgment. What's there to fight about?" Or he may say, "No, it's" -- you know, "You're seizing too much property," or "It's exempt," or whatever, so he doesn't -- he's a party. He

can intervene. He just doesn't have to.

MR. DYER: Well, I think the question is whether he has to intervene, like file a plea in intervention. I mean, in Harris County that's not the practice, but you're saying in other counties they require the defendant --

MR. ORSINGER: No. No. The defendant's not -- in Dallas -- I just finished a garnishment. In Dallas they don't treat the judgment debtor as a party, but they're permitted to intervene if they wish, subject to being stricken.

MR. DYER: So they have to file a plea in intervention?

MR. ORSINGER: Yes, if they want to be heard or if they want to participate in the trial of the garnishment or if they want to fight the order to open the safety deposit box. In Dallas they're not given notice. They're not treated as a party. The garnishment goes forward between the garnisher and the garnishee without the active participation of the judgment debtor, unless the judgment debtor intervenes and makes themselves a party, and I, frankly, don't see in these rules that the judgment debtor is a party.

CHAIRMAN BABCOCK: Are you talking about pre- or post-?

MR. ORSINGER: Post-. Post-. Yeah.

MR. DYER: Well, if you look at the existing rules in the motion to modify or dissolve --

MR. ORSINGER: What rule would that be?

MR. DYER: Well, in here it's on page 15.

MR. ORSINGER: Okay.

MR. DYER: It says, "Any party or any person who claims an interest in the garnished property may move the court." It doesn't require an intervention. If you also look at the rights of parties to controvert the answer of the garnishee -- let me find that.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: You know, Richard, we have a case in our textbook on garnishment, and that particular court talked about exactly what you're alluding to, that the garnishment is a case within a case. So you'd have the plaintiff and the defendant, the debtor and the creditor are the original cause number. That's the original proceeding, and then out of that comes within that case the garnishment proceeding, of which you now have, as you point out, the garnisher and the garnishee, with notice to the defendant in the underlying proceeding.

MR. ORSINGER: Right, and I guess what's happening is we're saying that because this action is derivative of the other in some minds the judgment debtor

is treated as a party, but --

PROFESSOR CARLSON: It's all under one cause number.

MR. ORSINGER: Well, that doesn't make any difference, and a lot of these garnishments are going to occur after the trial court loses plenary power over the underlying judgment. It's not appealed. So there's no sense in which this is the same lawsuit in my opinion, and I don't think the rules -- I don't know that the rules contemplate that they're the same.

CHAIRMAN BABCOCK: How do you get an order then?

MR. ORSINGER: Because the garnishment lawsuit is a new lawsuit.

CHAIRMAN BABCOCK: With a new number?

MR. ORSINGER: With a new plaintiff and a new defendant and new indication of jurisdiction. If the underlying judgment goes final because it's not appealed and no motion for new trial is filed, at the end of 30 days the trial judge can't do anything in the old cause.

PROFESSOR CARLSON: The trial court has power to enforce its judgment --

HONORABLE JANE BLAND: Exactly.

PROFESSOR CARLSON: -- forever into time.

MR. ORSINGER: Well, in my opinion you have

to file a new proceeding if you're going to ask the trial court. You can get a writ of execution from the clerk, but if you're going to ask for turnover relief you have to initiate a new proceeding, which is a turnover proceeding, and the court loses plenary power over its original judgment, but what I want to get away from is --

CHAIRMAN BABCOCK: Hang on. Justice Bland wants to --

HONORABLE JANE BLAND: The trial court doesn't lose power to enforce its judgment even after its plenary power in the main case is gone, so all of these ancillary proceedings that occur post-judgment the trial court has jurisdiction the hear.

MR. ORSINGER: I think it has to be invoked by some filing.

MR. DYER: Well, but the current rules allow the defendant to move to dissolve the writ and also to controvert the answer of the garnishee.

MR. ORSINGER: Well, they also permit third parties to do that. Let's say that somebody's son comes in and says, "That's not really my father's money. That's really my money." So the son can come in and file a motion and try to have the garnishment released; isn't that right?

CHAIRMAN BABCOCK: Yeah, but that's off point, isn't it?

MR. ORSINGER: No, it isn't off the point. The point is, is that the fact that you can file a motion doesn't make you a party. We would all agree that the son of the judgment debtor is not a party, and yet he has just as much right to file a motion or intervene in the garnishment as the judgment debtor does. So that's not a test of party or not party, is whether you're empowered to file a motion. So and maybe this doesn't make any difference because local practice can vary and it's probably not harmful, but I'm just disturbed by the fact that we are treating the judgment debtor like they're a party when I think they're not or at least the rules don't make it clear that they are.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Existing Rule 663a requires service on the defendant.

MR. ORSINGER: Which is notice, right. But are they a party because --

HONORABLE NATHAN HECHT: It calls them the defendant.

HONORABLE SARAH DUNCAN: But that's --

MR. HAMILTON: I think that's the defendant in the main suit.

HONORABLE NATHAN HECHT: Yeah, right.

HONORABLE SARAH DUNCAN: It's the defendant

in the garnishment.

MR. DYER: No, it's the defendant in the underlying suit.

PROFESSOR CARLSON: It is.

MR. DYER: And that same term in Rule 673, "The defendant has the right to controvert the garnishee's answer," so I think the rules do contemplate that the defendant is a party, and the plea in intervention, I've never encountered that before.

MR. ORSINGER: Well, do they have an answer date? Do they have a deadline? Can you take a default judgment against the defendant?

MR. DYER: No. Because the defendant has either already appeared and answered -- if it's a prejudgment writ their answer date may not yet have come due, but they'll still have to file a traditional answer, suffer default judgment with regard to the underlying claim, but that's different from the answer of the garnishee.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Well, I agree with Richard that in our county they're treated as a separate suit, and like it says under 659, they're docketed in the name of the garnisher as plaintiff and garnishee as defendant, they get a new number, and we don't -- we don't serve the judgment

debtor with that. We give them notice, but we don't serve them, and I don't think they're a party.

MR. DYER: But it comes out of the same court, though, right?

MR. HAMILTON: Beg pardon?

MR. DYER: It comes out of the same court that issued the judgment.

MR. HAMILTON: Not necessarily, no.

CHAIRMAN BABCOCK: Is it Justice Gaultney that had his hand up?

HONORABLE DAVID GAULTNEY: Well, I mean, the defendant is going to have an argument that in excess -- he's going to have a dispute over his property being seized in satisfaction of the judgment, number one, but doesn't this writ also apply to prejudgment, I mean, garnishment? I mean, isn't this writ because of the way you've got it organized you've got it so it applies to --

MR. DYER: It's both.

HONORABLE DAVID GAULTNEY: -- the underlying proceeding, too, right?

MR. DYER: Yes.

HONORABLE DAVID GAULTNEY: So I guess there is a slight -- this is a little bit off topic if I can go here, but the way you have it organized is slightly different from the current rules in the sense that -- and

this probably is intentional, but I think it started Richard's questioning about why does the writ that's served on the garnishee include a notice to the defendant, right? And currently rules -- it's not set up that way, and currently, as I read it, the writ that's served on the garnishee doesn't include that notice. It's the copy that's served on the defendant or the respondent that includes the notice, and if you wanted to stay with that form, you could move the notice to the service rule. In other words, you've got it set out as it's got to be on the face of the writ that's served on the garnishee. If you wanted to you could move that notice into when you're serving the defendant. That's when you're serving a notice, but that's a minor deal. I don't know if you were looking for --

MR. DYER: I think that the practice is just keep it all in one writ. I mean, I understand that it doesn't necessarily make sense that a notice to respondent is in a writ served on the garnishee. But it's just one piece of paper, so if everything is in that one piece of paper you're only messing with one instead of two.

HONORABLE DAVID GAULTNEY: So the they're currently being -- the garnishee is currently being served with the notice as provided in 638?

MR. DYER: Yes. It's in the writ itself. We

could break out the notice to respondent, make it a separate document for garnishment, but --

HONORABLE DAVID GAULTNEY: 63a just requires that the copy of the writ that's being served on the defendant include that notice.

CHAIRMAN BABCOCK: Sarah, did you have a comment?

HONORABLE SARAH DUNCAN: It's been a long time since I've spent a whole lot of time with these rules, but at one point I did spend an enormous amount of time with these rules, and what I noticed to be a problem then I think is still a problem, and it's evident from our discussion around the table, and that's that we're using different terms to describe the same person without a whole lot of specificity. Are we talking about the defendant in the garnishment action, are we talking about the defendant in the underlying action, are we talking about -- I mean, this rule, for instance, starts off talking about the judgment creditor filing the application, but then without any explanation we transition and start calling the judgment creditor the applicant.

MR. DYER: Okay. If there's -- where is the judgment creditor language? That shouldn't be in there.

HONORABLE SARAH DUNCAN: At the bottom of page three.

MR. DYER: Okay. That shouldn't be there. That should be "applicant."

HONORABLE SARAH DUNCAN: But, see, applicant and defendant are not very descriptive in this context because at this point we have a defendant in the underlying action, we have a plaintiff in the underlying action. The defendant could be a plaintiff and have prevailed and be the applicant and be the judgment creditor, but when we use these generic terms in this context we're getting as confused -- or I'm getting as confused and I think people around the table are getting confused as the rules are right now because we're using the same word to define -- to describe different people.

MR. DYER: The subcommittee did at one point at the outset of these rules say to have a definitional section, that applicant means this, respondent means this, garnishee means this. I think they decided they didn't need it, but that was on the table at one point.

HONORABLE SARAH DUNCAN: Well, somebody decided at one point it wasn't needed for the current rules, and they're just a mess, I think we'll all agree, because they describe -- you can't tell necessarily -- when the current rules say defendant, you can't necessarily tell if you're talking about the defendant in the garnishment action or the defendant in the underlying action, and

they're used to describe both sometimes. So my plea is for a definitional section maybe for all these rules and that a lot of care be taken to use that definition -- to use that word every time to mean the same person --

MR. DYER: Okay.

HONORABLE SARAH DUNCAN: -- is my plea.

CHAIRMAN BABCOCK: Gene, did you have a comment? Somebody up there had their hand up. No? Okay. But over here, Carl.

MR. HAMILTON: Another thing that's confusing is the prejudgment and post-judgment process. In prejudgment garnishment we generally file an application for garnishment in the same suit, and it doesn't get docketed as a separate cause with the plaintiff and defendant, but yet it doesn't comply with Rule 659, because 659 says the clerk dockets it separately and gives it a separate name and so on. Post-judgment we generally file it as a separate lawsuit and then it does get docketed.

HONORABLE SARAH DUNCAN: If I can suggest part of the reason for that may be that post-judgment you may be seeking garnishment over a person or entity over whom the district judge in the underlying suit doesn't remotely have jurisdiction. You may have to go to South Texas and seek out your writ of garnishment over funds in the LNB, and you can't do that in Clarendon, Texas, because

Clarendon, Texas, as far as I know doesn't have an LNB and LNB doesn't do business in whatever county that is.

CHAIRMAN BABCOCK: Donley.

HONORABLE SARAH DUNCAN: So the reasons that it's different -- differently docketed in the prejudgment context where you're just trying to generally get something away from the defendant in the underlying suit and post-judgment when you're trying to -- you as judgment creditor are trying to collect your judgment from whatever sources you possibly can.

MR. HAMILTON: I agree, but that practice doesn't --

HONORABLE SARAH DUNCAN: It's not reflected --

MR. HAMILTON: -- fit with the rules.

HONORABLE SARAH DUNCAN: Huh-uh, it doesn't.

CHAIRMAN BABCOCK: Orsinger, then Munzinger.

MR. ORSINGER: Can we all agree that the garnishment can be filed in a court other than the court that granted the judgment?

MR. DYER: That's what I'm having trouble with.

MR. ORSINGER: Okay. Well, I think you can. I think a garnishment is a lawsuit, and you can file it in any court that has jurisdiction. That's my opinion, and I

think I'm not alone in that opinion. Now, if that's true --

MR. DYER: Well, why would you need to do that? I can get a writ of garnishment out of the case that I have and serve it anywhere inside Texas. Now, whether or not venue is appropriate, that depends on another section in --

MR. ORSINGER: See, I might prefer to have the garnishment proceeding done in my home county even though the judgment made -- venue on the judgment may have required that it be litigated in the defendant's home county. If I'm the plaintiff and I live across the state, I'd like the garnishment to be local.

Okay. So if you'll acknowledge or admit that a garnishment is a new lawsuit, a separate lawsuit, is not required to be brought in the court that granted the judgment then we're going to have to have a defendant and we're going to have to have notice, and what we've got right now is we have service on the garnishee, which is recognition of the fact that there's now a lawsuit against a defendant called a garnishee, but we have service on the respondent, which is not -- it's not by the court. It's not by an officer. It's by the applicant, and the applicant can serve either in the same way that you served a citation or any service permitted under Rule 21a, which

will be certified mail return receipt requested.

So what has happened, I'm afraid, is that the context of the pretrial garnishment where the judgment creditor and the judgment debtor are already locked in battle and they have lawyers and you have Rule 21a notice and all of this has now been transposed into a separate lawsuit that's a hybrid where the respondent of the judgment debtor is not really a party, or if he is a party, you can't say for sure. At least we can't all agree that he's a party, and he's not -- he's kind of served by the applicant by certified mail with a copy of the garnishment writ, which isn't even addressed to him. It's just got a paragraph stuck on it somewhere giving him notice that his funds have been seized.

This is not looking like a lawsuit to me. We need to beef it up, and either they are a party and we treat them like a party -- I'm talking about the judgment debtor -- or they're not a party, and we just give them notice, and they are not entitled to participate in the trial or anything else unless they make themselves a party by intervention, and I think the fact that the practice appears to differ around the state is indicative that these rules are general enough that you can kind of read whatever practice you want to into it.

In other words, in some counties it's

considered to be an extension of the original lawsuit, and some people don't even think you can file it in a different court. Others say, sure, you can file it anywhere you want, and you've got two parties and then you've got a third party that has notice and can intervene if they want. So there's a lot of confusion. Maybe it doesn't matter. It's kind of like TROs. I realize that the TRO practice extremely varied across the state, but doesn't really matter. But if it does matter we ought to write a set of rules that treats this either as ancillary to another lawsuit or as truly a new lawsuit that has all of the normal qualities of a new lawsuit.

CHAIRMAN BABCOCK: Munzinger.

MR. MUNZINGER: Is Section 63 of the Civil Practice and Remedies Code the exclusive source of authority for the writ of garnishment?

MR. DYER: Yes.

MR. MUNZINGER: Section 63.001 provides the grounds for garnishment. Subsection (3), this is post-judgment garnishment. "A plaintiff has a valid subsisting judgment and makes an affidavit stating that within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the judgment." The statute itself contemplates that the debtor is the defendant in the case. So whatever

Dallas has done, I don't want to say that Dallas is wrong about it, but the statute itself says that the judgment debtor is the defendant in every garnishment case, and the garnishee is the bank. That's the way -- I mean, the word "defendant" is the word "defendant." It doesn't say "judgment debtor." It doesn't say "respondent." It says "defendant." So I think that the statute is correct, and I think the rule is using the correct nomenclature.

CHAIRMAN BABCOCK: Carl spits in your face. Go ahead, Carl.

MR. HAMILTON: With all due respect, I don't think it says what you interpret it to mean, Richard. The plaintiff and the defendant that that paragraph is talking about are the plaintiff and the defendant in the lawsuit where the judgment was granted.

MR. MUNZINGER: No, but, look, there are two grounds -- there's prejudgment garnishment, and there's post-judgment garnishment. Agreed?

MR. HAMILTON: Yeah.

MR. MUNZINGER: Subsection (3) is the provision providing for post-judgment garnishment.

MR. HAMILTON: Right.

MR. MUNZINGER: "A plaintiff has a valid subsisting judgment and makes an affidavit stating that within the plaintiff's knowledge the defendant does not

possess property in Texas."

MR. HAMILTON: It's talking about the defendant in the main suit doesn't have any property so you've got to go somewhere else and sue somebody else for a garnishment.

MR. MUNZINGER: Well, but you mean to tell me if I have a judgment against you in El Paso and I want to now garnish against you in McAllen, I can sue the McAllen National Bank and not join you as a party?

MR. HAMILTON: Correct.

MR. ORSINGER: I agree with that.

HONORABLE TRACY CHRISTOPHER: You get notice, but --

MR. ORSINGER: Yeah, you get notice, but you're not a party.

MR. DYER: But under current rules you are allowed to move to modify and to controvert the answer. What more do you need?

PROFESSOR CARLSON: United States Supreme Court. I mean --

MR. ORSINGER: Well, I mean, even a third party that's unrelated to the lawsuit has the right to move to have the garnishment lifted if they own the property instead, so I think the point here is that our rules don't really make this clear whether this is just an ancillary

proceeding to the underlying litigation or whether this is really a lawsuit. I think it's really a lawsuit.

CHAIRMAN BABCOCK: Well, even if it's ancillary, that doesn't answer the question of whether or not the defendant in the underlying case has got to be a party.

MR. ORSINGER: Well, I guess you're right there, too.

CHAIRMAN BABCOCK: Just calling it ancillary doesn't mean anything.

MR. ORSINGER: I'm involved in another case right now where we're registering a judgment from another state, and we plan to get a writ of garnishment out after we register it. But when we register it the court, you know, under the Full Faith in Credit clause, is going to be the court where we register it is the court that's treated as if it's issued the judgment. So we cannot always assume that the garnishment is going to be filed in the same court that issued the underlying judgment, and if we accept that possibility then maybe we realize that this is kind of ill-defined. It's neither a fish nor foul, and do we want to do anything about that, or do we want to just perpetuate that into the future?

CHAIRMAN BABCOCK: Justice Bland spits in your face.

HONORABLE JANE BLAND: Well, I just -- no, I want to just move on, because I think that this issue is something that dovetails more with the statute than with our rules, because the statute, 63.005, has a statutory provision about the place for a trial on these things and in particular deals with the issue of a foreign corporation and what to do in that instance, so I think there's statutory language that can hash out for the practitioners the issue of other courts in other places and we ought to leave the rule the way it is with the idea that the rule contemplates notice, and I think in most cases the participation as a party of the judgment debtor.

CHAIRMAN BABCOCK: The party being the defendant in the --

HONORABLE JANE BLAND: Right.

CHAIRMAN BABCOCK: -- underlying suit.

HONORABLE JANE BLAND: The judgment debtor.

MR. DYER: I don't see how an independent suit can be an ancillary remedy. Garnishment is an ancillary remedy and has to be ancillary to a suit. So it sounds to me what you're saying is you have to file a brand new lawsuit and to which your garnishment in this other county is ancillary.

MR. ORSINGER: Oh, I don't think so. I think the garnishment itself is a new lawsuit. I think it can be

filed in any court with jurisdiction, and if in the event of an out of state judgment it has to be filed in the court that didn't issue the underlying judgment. So if it's going to be treated as a new lawsuit and we have this odd situation where the defendant is entitled to notice but he's not told to file an answer, and he doesn't have to file an answer to be a party under that conception, but he can file a motion as anyone can.

Any party who claims an interest in the garnished asset has the right to file a motion, whether they've been served or not or whether they're a party or not, so I don't know what to say, other than it's -- and I agree that the terms are inconsistently used as well, but it seems to me like what we ought to do, what's -- I've always envisioned garnishment as a lawsuit between the garnisher and the garnishee. You give notice to the third party. The only notice we're giving them now is notice that their property has been garnished. We're not telling them they're entitled to file an answer or required to file an answer or may be subject to a default judgment. We're telling them that their property may be exempt, but we haven't told them that they have the right to participate in the trial.

MR. DYER: They are told they have the right to move to modify or dissolve.

MR. ORSINGER: That's in their notice also?

MR. DYER: Yes.

HONORABLE TRACY CHRISTOPHER: Uh-huh.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Justice Bland, and then Roger.

HONORABLE JANE BLAND: I think that 63.005 contemplates that this would be a proceeding out of the court where the judgment is, and that -- and it has some provisions that deal with if it's going to be somewhere else, because it's a foreign bank or for other reasons; and so I think that there's some statutory authority, just looking at it quickly, that would kind of deal with what to do when the proceeding needs to be moved or held somewhere else, but that the default is that it's in the court that rendered the judgment. So I would look at 63.005, Richard, and see if you still think we need to do something in the rule.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I think we -- I don't think the world can be neatly divided into things that are -- it's either a new lawsuit or it's not. This is an ancillary proceeding, and somehow they're some sort of queer animals that are somehow loosely attached to the original lawsuit and part of it, and so I think the main

question is going to be how do we provide notice to the judgment debtor that this proceeding exists and the adequacy of the notice rather than is this a brand new lawsuit and try to solve issues of venue and jurisdiction altogether.

I think the real problem here is what's notice to the debtor, and what I'm a little concerned about is something I've noticed, that once the judgment is entered and there's no appeal or the appeal is over with, all of the sudden, you know, the judgment debtor disappears, he loses touch with his counsel, et cetera, et cetera, and it's entirely -- I'm a little concerned about a rule that simply says you could do a certificate of service saying return -- "Yeah, I sent this guy the notice by a return receipt mail." You never quite mention that it came back unserved.

The -- because -- or the -- you've served it on his former counsel, the guy who represented him a year ago in that lawsuit and hasn't seen hide nor hair of the client since, and so I can understand Rule 21a service if in a prejudgment garnishment. I'm a little concerned about using it post-judgment because the rule as -- the next rule as written, the notice on the judgment debtor will either be by formal service just like he was serving a petition or a writ or an order by using a third party or by Rule 1 --

21a. So we may want to think about that, because I think that's a real problem about this person has rights and he -- that person needs to know whether -- you know, the circumstances have arisen. Do you want to use them or not?

CHAIRMAN BABCOCK: Justice Gray, if you still want to make a comment, and then Justice Christopher.

HONORABLE TOM GRAY: Well, I was only going to make the comment that on the post-judgment garnishment we have to remember these people have been accorded full due process before that judgment was rendered, and they have the opportunity to contest it, appeal it, and so that's already been done, and now the person who has the benefit of that judgment is now trying to collect it, and so it's not exactly the same as taking someone's property without all of the trappings of due process like we think of on the front end of a lawsuit.

CHAIRMAN BABCOCK: Unless you take too much property.

HONORABLE TOM GRAY: Well, that's going to be a -- I mean, you've got the judgment, and you can't in effect leave with more than -- you may initially lay hands on more than, but not leave with more than what that judgment is for. So --

CHAIRMAN BABCOCK: Says who?

HONORABLE TOM GRAY: Well, I thought they had

to get an order to actually turn over the property, so --

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Right. You have to get an order to actually get the property, so you're protected there. I think 21a notice is sufficient. We certainly do that -- if it's prejudgment, the lawsuit is ongoing, and 21a notice is sufficient. If it's post-judgment and you send it to the lawyer who represented the defendant in the case and if that lawyer no longer wants to represent the client, he files a motion to withdraw and, you know, gets himself out of it with the last known address of the defendant, and, therefore, you then serve last known address of the defendant. You don't want to actually have to do full service on someone who's already gotten all of the process involved. I think 21a notice is plenty.

CHAIRMAN BABCOCK: Okay. Yeah, Sarah.

HONORABLE SARAH DUNCAN: If I could just say, I think there's a fundamental failure of the underpinnings of garnishment law. We couldn't be disagreeing on what we're disagreeing on. I'm looking, and I don't trust these -- oh, I would trust David Beck. This is a 2000 case out of the Houston First. "Section 63.005(a) is jurisdictional; i.e., once a garnishee's answer has been controverted the only action a trial court can take is to

transfer the proceeding to the county of the garnishee's residence." Well, if it's not a separate suit, you can't transfer the proceeding to the county of the garnishee's residence without losing jurisdiction over the underlying suit. I think there's a -- some missing historical knowledge here, and it's reflected in the confusion of the current rules and, frankly, of the proposed rules.

CHAIRMAN BABCOCK: Okay. Any other comments about that issue? We got any other comments on Rule 5 specifically other than the broad comments we've been just talking about? Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Although I understand that the current rule sort of perpetuates this, you know, notice has to be in the writ issue, it seems to me that notice to respondent should be a separate document from the writ itself. The writ goes to the garnishee and I -- how you've written (d) and (e) together is kind of weird, to me. I mean, if all writs should have the notice to the respondent in it, we should just say that rather than having notice to respondent in (d) and form of writ in (e) that contains the notice to respondent. I mean, if we want all writs to contain the notice then it should just be "This is the form of the writ including the notice to the respondent." If we want the notice to the respondent to be a separate piece of paper that's attached to the writ then

we should clear that up.

CHAIRMAN BABCOCK: Yeah. Okay. What else? Any other comments about 5? Okay. Let's move on to 6. Pat, you want to talk about 6?

MR. DYER: 6(a), delivery of the writ, we added in "other authorized officers." We wouldn't necessarily have to refer to the specific rules, which I think we probably could just say "or other persons authorized to serve." Subpart (b), we've also added that, "other authorized persons," and then have added in the part that's highlighted with regard to serving a writ that requires the actual taking of possession. That's reserved for the sheriff or constable. It also alerted the practitioner that if the garnishee is a financial institution, service of the writ is governed by the provisions of the Texas Finance Code.

Return of the writ incorporates "other officers." Subpart (d), service on respondent, the last sentence has been added requiring a certificate of service, evidencing service of a copy of the writ on the respondent by the applicant must be on file with the court at least 10 days prior to the entry of judgment. That was added as an additional safeguard for the respondent. It's not in the current rules.

CHAIRMAN BABCOCK: Okay. Comments about 6?

Frank.

MR. GILSTRAP: The return of the writ, there is no requirement that the signature be verified or signed under penalty of perjury, and then if it's a private process server there is no requirement that the person be identified. We just went through an amendment to Rule 107 which doesn't apply here because it only applies to return of citations, but I just wondered what your thinking -- and this is true in all the rules I've seen. You could just be served by Paul Process Server and no further identification that's --

CHAIRMAN BABCOCK: He's good. I've used him.

MR. GILSTRAP: And what's your thinking on that, and is there -- and a larger question, is there an inconsistency with Rule 107 since we do require some -- some indication that person can serve process?

MR. DYER: Yes, it is inconsistent with the other rules. I think it should be changed like what we have in sequestration, return must be in writing, must be signed by the -- well, no, actually we've got it the same.

MR. GILSTRAP: I checked, they're all that way.

MR. DYER: They're the same way in all of them.

MR. GILSTRAP: And just a further comment,

the service of respondent, we don't have a return. We just have a certificate of service, which seems an even weaker thing. I don't know what it is, but I just wondered why we would have something different there, certificate of service, as opposed to a return.

MR. DYER: Well --

CHAIRMAN BABCOCK: Okay. Richard, you got an answer to that?

MR. ORSINGER: We've got Rule 21a service going to the judgment debtor, and so you're not going to have --

MR. GILSTRAP: Okay.

MR. ORSINGER: -- a return.

MR. GILSTRAP: For 21a.

MR. DYER: Right. What you're filing is a certificate with the court that says, "I served the respondent."

MR. GILSTRAP: That addresses my concerns on (d) but not on (c).

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I know we had a long discussion about private process servers in connection with these rules. Did we vote that we would include private process servers?

CHAIRMAN BABCOCK: Elaine, you remember?

HONORABLE TRACY CHRISTOPHER: And is that something that we really want to allow, and do the sheriffs and constables want the private process servers -- I know the private process servers came in and lobbied us at one point about something. I can't remember what rule it was.

CHAIRMAN BABCOCK: David, you got the answer on that?

MR. JACKSON: I think we agreed as long as they weren't seizing property.

MR. GILSTRAP: Yeah, as long as you're not seizing property.

HONORABLE TRACY CHRISTOPHER: Well --

CHAIRMAN BABCOCK: Yeah. Makes sense. Munzinger, did you have your hand up?

MR. MUNZINGER: Yeah. I just was curious. We use the word "respondent," but the statute says "defendant." Are we causing confusion, or is there a reason for it? Section 63.001 always refers to the debtor as the defendant.

MR. DYER: Well, the convention we tried to adopt across the board was to change it from "plaintiff" to "applicant" because the applicant doesn't necessarily have to be the plaintiff and "respondent" to "defendant" because the respondent isn't always the defendant. So we changed that throughout. This requires service on the respondent,

not the garnishee. The garnishee is actually served with citation.

MR. MUNZINGER: I understand that, and the respondent is the defendant.

MR. DYER: Yes.

MR. MUNZINGER: The judgment debtor.

MR. DYER: Yes.

MR. MUNZINGER: And my only question is to ask the question are we causing confusion by changing the nomenclature?

MR. DYER: I would say no, because the judgment creditor may have been the defendant. I think using "the defendant" in the statute is actually subject to more problems because it's not always the defendant who is the judgment debtor. The defendant could win on a counterclaim.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, didn't you yesterday say that sometimes the garnishee just hands the property over because they don't want to be involved in the lawsuit?

MR. DYER: Yes.

HONORABLE TRACY CHRISTOPHER: So we're going to have property turned over to private process servers.

MR. DYER: I would say no, because I think

we've got a provision in here --

HONORABLE TRACY CHRISTOPHER: Well, what's going to happen when somebody wants to do that? They don't want to have to get involved, and they just want to give it, "Here, take it." Is the private process server going to say "no," but if a sheriff or constable was executing it they would take it?

MR. DYER: Okay. Yeah, we don't exactly address that. The closest we come is in Rule 6(b), "Only a sheriff or constable may serve a writ of garnishment that requires the actual taking of possession." You're correct, you won't know until you get there to serve it. That's true.

CHAIRMAN BABCOCK: Okay. Richard Orsinger, and then Carl.

MR. ORSINGER: I believe I've got this right, but when the original writ of garnishment is served there's no anticipated turnover of anything. That's just notice of a lawsuit, and so if someone voluntarily tries to give you whatever being garnished, the officer is going to decline, whether -- even if it's a licensed peace officer because that's not the appropriate time for a turnover. That's just the time that the garnishee gets notice of the garnishment. Then at the end of the garnishment trial there's an order of turnover or order of garnishment, which

when that's served then someone's taking possession of a physical object or something like that. Isn't that --

MR. DYER: Unless there's been a replevy, yes.

MR. ORSINGER: Okay. So the proviso, "However, only a sheriff or constable may serve a writ of garnishment that requires the actual taking of possession," that's going to be a writ that issues after the garnishment trial, not the writ that issues when the garnishment is first filed, correct?

MR. DYER: No. This is new language that was added because the sheriffs and constables told us they wanted something in the rules to address the situation when they serve a writ of garnishment and the person says, "Hey, here it is. Here's the property. You take it. I want to wash my hands of this," because they said that happens.

MR. ORSINGER: Well, are they authorized -- this is in violation of the application. This is in violation of the procedures, and this is in violation of due process of law, that the garnishee would just turn it over to the serving officer that's serving notice of the garnishment. We don't allow that. That shouldn't happen. These people should say, "No, I'm sorry. You have to file an answer and then the judge will decide whether you turn it over or not."

So I'm not getting it. The writ -- there should be no turnover at the time that the writ is initially served because the writ is just notice of a lawsuit. The lawsuit will determine how much gets turned over to whom, right?

MR. DYER: Yes.

MR. ORSINGER: So we're never going to have a sheriff or constable that's serving a writ of garnishment that requires the actual taking of property because it's not an ex -- or is it an ex parte proceeding?

MR. DYER: Well, you raise a lot of good issues. I agree it's not what a sheriff or constable should do, but they say that it happens.

MR. ORSINGER: Boy, I tell you, what does the applicant do then? They just -- I'm not taking it until I have -- "I'm sorry, Mr. Constable, you're going to have to keep that car in your driveway or something because I'm not taking it until a judge says I'm entitled to it"?

MR. DYER: Well, no, they're not handing it over to anybody. They're taking it into their custody.

MR. ORSINGER: The constables or sheriffs are?

MR. DYER: Yes.

MR. ORSINGER: Well, we definitely don't want private process servers doing that, but I don't think we

want sheriffs or constables doing that either because the process is supposed to work out. You're supposed to go into a court and prove to a judge that you're entitled to have property, and if the garnishment is being effected at the service of the writ then we're having the judgment being executed when the garnishment proceeding is just filed. It really bothers me.

CHAIRMAN BABCOCK: Carl, then Judge Wallace.

MR. HAMILTON: I agree with what Richard says, but I wanted to point out on here it says, "Serve a writ of garnishment that requires taking." I don't think any writ of garnishment ever requires the taking of property, does it?

MR. DYER: Yeah.

PROFESSOR CARLSON: There is, but I cannot remember. It was both Carlos and Judge Lawrence talked about this very limited situation where the garnishment would require the taking of property. You're just going to have to let us get back to you because I don't remember the scenario.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: The only thing I've ever seen a writ of garnishment used for is to get money that's in some kind of an account. I mean, I guess it could be used for other things, I suppose, but in 30 or 35

years that's all I've ever seen a writ of garnishment used for, and a banker is -- I've never seen one just say, "Here, you take the defendant's money." It just doesn't happen.

MR. DYER: Well, what if you borrowed my tractor and I'm a --

HONORABLE R. H. WALLACE: That's what I'm saying, I've never seen it.

MR. DYER: No, if you have possession of my tractor and I'm a judgment debtor, I garnish you. You've got my effects in your possession.

HONORABLE R. H. WALLACE: Why wouldn't you attach it or do a writ of attachment or even if it's a car -- well, of course, that would be different.

MR. DYER: I might, but, I mean, if it's a post-judgment writ I don't have to jump through the hoops that I would for attachment.

HONORABLE R. H. WALLACE: Yeah.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I think that you would want the person to be able to turn the tractor over to the constable who comes out. Why are you forcing the garnishee to, you know, file some sort of a pro se answer in court when the garnishee says, "It's not mine. You-all go fight about it." Yeah, it's, you know, the

respondent's. We give notice to the -- I mean, I would want the constable -- if he came out and said, you know, "Turn over Jim's car that's sitting in your driveway," and I said, "Okay, here's Jim's car. Take it." I mean, I wouldn't want to have to file a lawsuit and get involved in the whole thing. It's Jim's car and the person trying to get Jim's car gets to, you know, get the order.

MR. DYER: But he raises a good point. We haven't really provided a mechanism that would let that person off the hook. They would still be required to file the garnishee's answer, and if they don't, suffer a default judgment.

HONORABLE TRACY CHRISTOPHER: But --

MR. DYER: We haven't addressed it fully enough, so I'm with Elaine on this. I think we need to take a look at it and get back to the committee on it.

CHAIRMAN BABCOCK: Okay. Any more comments on Rule 6? Roger.

MR. HUGHES: The only thing, in getting back to the issue of notice, I mean, if you're going to serve it like a citation, you're going to have a return that said whether it was served or not served, which sort of leads me to believe people will use a certificate of service under Rule -- under 21a because then they never have to tell the court the green card never -- I mean, the thing came back

unopened, moved, left no forwarding address, et cetera, et cetera; or in the case of the attorney, well, the attorney died, or whatever; and so I would think if you're going to rely on Rule 21a in this circumstance you at least ought to have the person file the certificates not only that he sent it but as to whether it was received as well.

MR. DYER: Why don't we have that requirement for any -- for any attorneys? They never have to certify that it was unclaimed or a bad address. You just have to certify that you mailed it.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I would like to urge the committee to simplify this, because, for example, where we see the garnishment most often is in the bank situation; and the bank comes in every time and says, you know, I want 500 or a thousand dollars in attorney's fees because I had to come into court and file this answer and come to the hearing, when, you know, the bank knows it's the debtor's money; and, you know, all they should have to do is freeze and wait for an order, rather than this process that eats away at, you know, a potential judgment creditor's recovery.

MR. DYER: And I think it's going to get more complicated because there are new Federal rules requiring banks to take a look at the source of some of the funds to

determine whether they're exempt. I'm not sure if they're finalized yet.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: When somebody is holding property for another, that person or entity has responsibilities and legal liabilities to the person for whom its holding property. Texas First National Bank can't just let Pat freeze my money and then when Tracy comes in and says, "I've got a valid judgment against Sarah. I want that money," Pat says, "Well, it's not my money, I don't care." That's not going to fly very far. You've got as my -- the holder of my money, you have fiduciary duties that you owe to me; and if it's money that I have, for instance, put in trust for my niece so that -- in an irrevocable trust, you have a responsibility to go in there and say, "No, Duncan doesn't own that. That's a trust for her niece."

MR. DYER: No. No. Case law says you don't have that responsibility.

HONORABLE TRACY CHRISTOPHER: Right.

MR. DYER: Your only responsibility is to answer what the writ requires. You've got no responsibility to determine ownership of the funds. You just have to file your garnishee's answer.

HONORABLE SARAH DUNCAN: Well, that's what

I'm saying, though, is you have the responsibility to say, "No, I don't have any of Duncan's money."

MR. DYER: If that's true.

HONORABLE SARAH DUNCAN: Well, if it's in an irrevocable trust for my niece it's not mine.

MR. DYER: Okay. Then what banks are typically going to do, they're going to play it real cautiously. They're going to say, "We don't know for sure, but this guy is on this account," and that fulfills their obligation. They would be at risk if they said, "Well, you know, we think it's a trust, so we don't really think it's his, so we're going to say we don't have any money." They don't do that.

HONORABLE SARAH DUNCAN: I understand, but if I'm not on the account and they come back and bring the trust account into the controversy when I'm not on that account, they've got responsibility, too.

MR. DYER: Well --

HONORABLE SARAH DUNCAN: My name isn't on that account, no matter who deposited the funds, they would have responsibility to me if those funds get embroiled in this controversy, which has nothing to do with my niece.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: One possibility -- I'm very attracted to what Judge Christopher suggested, and one

possibility is to provide for a bank, instead of filing an answer and being a formal party in a lawsuit, is to require them to pay the money into the registry of the court and then just walk away. So instead of them filing an answer and sending a lawyer to the courthouse to enter a perfunctory judgment by default anyway, maybe we should just change the procedure and say that by a certain date they shall pay over the funds in their possession into the registry of the court and then let's let the court handle it from there on.

CHAIRMAN BABCOCK: How is Sarah's niece going to be feel about that?

HONORABLE SARAH DUNCAN: Not good, not good at all.

MR. ORSINGER: Well, it's not going anywhere if --

HONORABLE SARAH DUNCAN: You've basically put funds that have nothing to do with this dispute -- you've frozen these funds, and you've let somebody who had fiduciary responsibility torch those funds and the beneficiary of the trust --

MR. ORSINGER: But they're just a stakeholder --

HONORABLE SARAH DUNCAN: -- walk away. They're not --

MR. ORSINGER: -- and if there is a third party, they can file a motion with the judge and say, "That's my money, please give it to me."

HONORABLE SARAH DUNCAN: But they're not just a stakeholder.

MR. ORSINGER: The question here is whether we need to force the bank, who's just holding the money until the trial, to be a party or whether we should just have them put the money with the district clerk to hold the money until the trial.

MR. DYER: Well, but then you have to depend on what they say the money is. Okay. You have a right to controvert the answer. Let's say the answer comes back and it says, "We don't own any money," and you know that there's a trust that is not a valid trust and it's at that bank. You have the right to controvert that answer and say, "No, that's not true. You do have effects belonging to this debtor." But if you allow the bank just to say, "Okay, here's what we've determined we have to satisfy this writ" and you don't have a mechanism to challenge that, well, that's not fair to the creditor.

MR. ORSINGER: Creditor, yeah.

MR. DYER: And you will run into financial institutions that are beholden to some very large depositors who will be very evasive in responding to a

writ, and I think you would let them off the hook if you just allowed them to pay in what they wanted.

But I completely agree with Judge Christopher with regard to the fees. I never get hit for less than five grand. You know, "It's five grand, I had to prepare this answer," and, you know, "Pay me and then we can, you know, set it up where we'll put the money into the registry of the court." That's what usually happens, you get burned on the fees.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, in putting it into the registry of the court, I'm not sure how much that's going to save on the fees. To me the time of the lawyer is probably going to be taken up. He's going to get a call from his banker client saying, "Hey, we've got this writ of garnishment, what do we do?" He's going to look at the paperwork. Drawing up an answer is like doing a general denial, but as far as putting it into the registry of the court, and I guess you could still fight over it, but sometimes they do fight over these things.

For instance, there may be -- the debtor may say, "I have sufficient property to satisfy this judgment in the state of Texas, and you shouldn't be garnishing this account." You end up having hearings over that, and maybe he gets his -- gets it released. So I don't know about

just tendering it to the registry of the court. I suppose you could still have those fights, but I don't know if that solves the problem.

CHAIRMAN BABCOCK: Yeah. Justice Bland did you --

HONORABLE JANE BLAND: Well, I think that the fees that are run up by the bank's appearance, that's kind of the cost that the debtor has to bear for not paying the judgment that the debtor owes, and the bank provides valuable information, like the existence of the accounts and the amounts. Also, sometimes the bank has an interest in these funds as well because they're pledged as receivables or they're collateral for some bank loan, and it's important that that be brought out so the bank doesn't self-help ahead of potentially creditors who are priority over the bank. So I don't think it's -- I don't think it's as simple as leave the bank out of it, just have them put money in the registry, and I realize that there's a cost to doing that, but if it's a messy enough sort of case then it's just the cost. And registry of the court can be as big of a black hole, if not bigger, where the funds are no interest and they're not at anybody's use and it takes forever to get them out. So --

CHAIRMAN BABCOCK: Okay. On that note let's take our morning break, and we'll come back and talk about

Rule 7. 10:29 AM.

(Recess from 10:29 a.m. to 10:47 a.m.)

CHAIRMAN BABCOCK: All right, let's talk about Rule 7, Pat.

MR. DYER: Okay. Before we go to Rule 7 I want to address one other thing Richard brought up. A defendant is not a party in connection with post-judgment garnishment insofar as you would normally have to send them notice. When you file a post-judgment application you don't immediately send a copy of that to the defendant. So this is another instance where they're not treated as a party normally would be treated, so we are going to have to address that somehow, but --

MR. ORSINGER: And I'd like to point out that you don't want to give them notice too quickly --

PROFESSOR CARLSON: Right.

MR. DYER: That's exactly what I'm saying.

MR. ORSINGER: -- or there will be nothing to garnish.

MR. DYER: Right. So if you treated them as a normal party, as soon as you file your application you would have to serve them. Well, you don't do that. You file your application, you get it granted, you get the writ served, and then you notify them.

MR. ORSINGER: Right. And the rule provides

that the notice is to be done after the writ is served.

MR. DYER: Yes.

MR. ORSINGER: Which means that the creditor has a fair shot at trapping some funds.

MR. DYER: Yes, but it is another instance where they're treated not the same as a normal party. Onto No. 7.

CHAIRMAN BABCOCK: Yep.

MR. DYER: This is out of Rule 664, and we have added the provision requiring service on the applicant and where any motions regarding the application are to be filed. (b), we've removed the option to replevy based on value just like we have in all of the other rules because the officers didn't want to be involved in that process. (c) imports Rule 14c. (d) is straight state out of the statute on review of respondent's replevy bond. (e) parallels with the other attachment and sequestration with regard to the right to possession of the property, when and how they get it. (f), garnishment, also allows for a substitution of property. It provides currently that it must be of equal value, and we've added flexibility by allowing it to be equal or greater value, not that that's going to occur very often. Subpart (f)(2), garnishment, is not as specific as sequestration and attachment with regard to the method of substitution, so we've added this to

parallel those provisions. (g), we've also added this with regard to the judgment against the respondent on the replevy bond.

CHAIRMAN BABCOCK: Okay. Comments about Rule 7. Richard Orsinger.

MR. ORSINGER: Just one thing. On paragraph (a), at the very last word of paragraph (a) in Rule 7, "All motions regarding the garnished property must be filed with the court having jurisdiction of the suit." There's been a lot of confusion here today about whether the suit, the proceeding, is the underlying lawsuit or the garnishment proceeding. This would be an opportunity for us to clarify that by saying "having jurisdiction of the garnishment proceeding." In many instances they may be in the same court, but in some instances they may not be, and you do want all of the requested relief relating to the garnishment to go to the court where the garnishment proceeding is pending, right?

MR. DYER: Yes.

MR. ORSINGER: So if we leave the word "suit" in there there's a possibility of the confusion with the underlying lawsuit, which this is supposed to be ancillary to, and I think it would be clearer if you said "having jurisdiction of the garnishment proceeding."

CHAIRMAN BABCOCK: Okay. Justice

Christopher.

HONORABLE TRACY CHRISTOPHER: In (a), when we say "at any time before judgment," to me that's a little unclear as to what judgment we're talking about.

MR. DYER: Well, the respondent has no replevy rights post-judgment.

HONORABLE TRACY CHRISTOPHER: Well --

MR. DYER: No, hold it. Yes, they do. Never mind. Never mind.

HONORABLE TRACY CHRISTOPHER: So, you know, to me I assume that we're talking about the judgment in the garnishment suit here as opposed to the underlying judgment, but it's not clear.

CHAIRMAN BABCOCK: Okay. Any other comments about 7? Okay. Let's go to 8. Pat, you want to take us through 8, please?

MR. DYER: Yes. I just made a note of that to clarify that. No. 8, garnishee has answered the writ of garnishment. First off, we repositioned a number of these rules to make them more sequential, so we've moved up garnishee's answer to the writ of garnishment in the place that we considered most appropriate. Subpart (a), we wanted to make it clear that the answer may be filed at -- under the same rules that apply to any other answer before default judgment. Subpart (b) comes out of the existing

rule with the exception of the last sentence, which was added to alert the practitioner that if it's a financial institution default judgment is covered by the Texas Finance Code.

CHAIRMAN BABCOCK: Okay. Any comments about 8?

MR. GILSTRAP: Yes.

CHAIRMAN BABCOCK: Yeah, Marisa.

MS. SECCO: I just have a question. The writ has the requirements that need to be in the answer, the substantive requirements. Do you think that those should be in the answer rule, you know, maybe rather than in the writ itself, requiring that, you know, a description of the property and all of those requirements? I see that the answer rule states that anything that's required by the writ has to be in the answer, but it might make more sense to just list the requirements for the answer in the answer rule.

MR. DYER: Okay. Do you mean substitute those for where it says "respond to each matter inquired of"?

MS. SENNEFF: Yes. Also, because the form of the writ is not mandatory, so if the form is not mandatory then what's in the answer could differ based on whether or not someone's using the mandatory form or not.

MR. DYER: Okay.

CHAIRMAN BABCOCK: Okay. Who else had their hand up? Richard Orsinger.

MR. ORSINGER: I'd like to ask some questions about (b). The way this works is if the garnishee fails to file an answer then the garnisher can go for a default judgment it says, "At any time after final judgment has been signed against the respondent," so the "final judgment signed against the respondent" means it's in the underlying proceeding, right?

MR. DYER: Yes.

MR. ORSINGER: But are we in the part of the rules that applies only to post-judgment garnishment, or does this apply equally to prejudgment garnishment?

MR. HAMILTON: It would apply to both.

MR. DYER: Yeah, this applies to both.

MR. ORSINGER: I think this underscores the concern that I had and that Judge Christopher had, is that we're using the term "judgment" to apply to the garnishment judgment as well as the underlying judgment, and I wish we would have some terminology we could agree on like underlying judgment or judgment of the underlying proceeding versus garnishment judgment in the garnishment proceeding. Now then the next -- carrying on with the sentence, and I guess I just didn't realize this, but if

the garnishee doesn't file an answer then they can suffer a default judgment for the full amount of the underlying judgment even if they only had $10 in their possession?

MR. DYER: Yes. And that's why the banks changed this, because, yeah, you got a windfall if a bank defaulted.

MR. ORSINGER: So the Finance Code basically says their liability is limited to what they have on deposit or in their possession or control?

MR. DYER: Yes, plus some other procedural requirements you have to jump through.

MR. ORSINGER: And does the statute require this? Because this seems to me to be a punitive provision if someone is holding a piece of property like an automobile or some jewelry that's on consignment at a jewelry store, and they're not a lawyer, and they get served, and they don't file an answer, and the next thing they know they owe somebody $300,000 when all they had was like four rings. Does the statute require that the default be for the full amount of the judgment?

MR. DYER: No, that's by rule.

PROFESSOR CARLSON: It's case law.

MR. ORSINGER: Okay. I have a problem with that, and it may be that that's not our position to even talk policy here, but that seems to me to be an

extraordinarily severe punishment that's going to be visited on somebody that otherwise has no stake in this and may not even have a regular lawyer that they see and may not understand the writ properly, and the next thing they know they owe somebody a hundred thousand or $500,000. It just doesn't seem like it makes any sense whatsoever. So it would seem to me that the default judgment ought to somehow relate to what they should have turned over in the garnishment proceeding plus the attorney's fees and costs to the garnisher associated with the allowance of a default to be taken. That makes more sense to me.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Marisa's comments may have been what I was going to do. Are you talking about the elements of the answer on page six?

MS. SECCO: Yes.

HONORABLE TOM GRAY: Be brought over to the rule that appears on page 11?

MS. SECCO: Yes.

HONORABLE TOM GRAY: Okay. That was my comment.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: But they would also say where the writ -- they're going to be in the writ also, right?

MR. DYER: Yes.

HONORABLE DAVID GAULTNEY: The requirements are.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Yeah, I totally agree on the default issue. It, again, gets us back to the situation where I've got, you know, Jim's car sitting in my driveway, and I don't understand that if I fail to answer this lawsuit suddenly I'm not liable just for Jim's car, I'm liable for the entire amount of the debt. It's not even in the notice to the garnishee that if you fail to answer you're responsible for the entire debt. I mean, I can see why people just give the property to the constable.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: On that last point about bringing the answer part over into the answer section, do you mean to leave it out of the writ?

MR. DYER: No.

MR. HAMILTON: Just have it in both places.

MR. DYER: Yes.

MR. HAMILTON: The other point is that I think the reason for that default provision was that a lot of garnishees just didn't answer.

PROFESSOR CARLSON: Right.

MR. HAMILTON: And then we were left with

nothing. We didn't know what they had or what they didn't have or how to proceed at that point. So, you know, there needs to be some kind of default provision.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: But the application right now doesn't require any assertion in terms of how much you anticipate the garnishee has, right? It's just the amount you're trying to satisfy.

MR. DYER: Correct. Because I don't know of any legitimate way to find out how much is in somebody's bank account. I mean, you'll find asset investigators that say they can do it without breaking the law, but I don't believe it.

CHAIRMAN BABCOCK: Okay. Any other comments about 8?

MR. GILSTRAP: Yes. I found "judgment must be determined by the Texas Finance Code" and the word "determined" is kind of indeterminate.

MR. DYER: Would "governed" be better?

MR. GILSTRAP: Yeah, I think so, "is governed by."

CHAIRMAN BABCOCK: Okay. Anything more on 8? All right. 9.

MR. DYER: 9 deals with the garnishee's answer. It may be controverted by either the applicant or

the respondent, and then subpart (b) deals with Rule 674 and 63.005 of the CPRC and dealing with where the trial of the garnishment will take place. If it's a garnishee who is a resident of the county or a foreign corporation then it has to be tried in the county where the garnishment proceeding is pending. Otherwise it has to be tried in the county in which the garnishee resides, and it is jurisdictional, so it's not just a matter of venue, but once the answer is controverted, if it's not a resident of the county and not a foreign corporation, then it has to be transferred to the county of the garnishee's residence.

And then subpart (c), we brought in some of the language of 63.005 to make it more clear to the practitioner and the clerk how it actually is transferred and docketed.

CHAIRMAN BABCOCK: Okay.

MR. GILSTRAP: I have a comment.

CHAIRMAN BABCOCK: Comments about Rule 9. Yeah, Frank.

MR. GILSTRAP: I think in (b) instead of -- in the last sentence it should say instead of "shall be tried in the county in which the garnishee resides" it needs to be say "shall be transferred to the county in which the garnishee resides," and then that kicks you over to (c) which ends by saying "the matter shall be tried as

in other cases."

MR. DYER: Okay. All right.

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: The statute says if there's a controverting affidavit and the garnishee doesn't live in that county the issues raised by the controverting affidavit shall be tried where the garnishee lives. The rule seems to say that the matter shall be tried. I don't know whether that means the whole garnishment proceeding or just those issues. What is the intent there?

MR. DYER: I would say the entire garnishment proceeding as to that garnishee.

HONORABLE SARAH DUNCAN: The Houston case that I was reading from, or maybe it's a San Antonio case, it was a discrete issue, and the court held that it was -- it was issue jurisdictional, that only the court in the garnishee's county of residence had jurisdiction to try and resolve those controverted issues. It was not a question of jurisdiction over the entire proceeding, garnishment or underlying suit or both.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR CARLSON: Yeah, and that's consistent with 63.005 of the Civil Practice and Remedies Code that governs garnishment. It talks about "the issues raised by the answer and controverting affidavits shall be

tried in the county."

MR. DYER: Okay. I'm a little unsure. Are we saying that there could still be part of the proceeding that you had in two different counties? That doesn't make sense to me.

MR. HAMILTON: Well, if it's a prejudgment garnishment proceeding --

HONORABLE SARAH DUNCAN: Post-judgment.

MR. HAMILTON: -- it's ancillary to the main suit.

HONORABLE SARAH DUNCAN: We're talking post-judgment here.

MR. ORSINGER: Well, but this part of the rule applies to both, didn't we establish? This applies to both pre- and post-?

MR. DYER: Yes, this applies to both.

MR. ORSINGER: If I may, I think the example may be, for example, that you might have snagged three or four accounts, and there may be a contest over one of those accounts but not the other two or three, so there is no trial on the ones that are not contested, so what's the point in sending the collection of those off to another county when you're entitled to it? So then it becomes a practical question of can you get a writ of -- pardon me, can you get a judgment or order of garnishment out of the

court where it was filed on the uncontested part and then have to go have a trial, and I know that that's bifurcating it, but it make sense because I don't see why someone whose right is not even contested has to be chasing all over the state to get a writ that they're entitled to and nobody is even contesting. So as odd as it may seem that we're going to break out some litigable issues, I don't think we should force everything to go that's not contested.

MR. DYER: That being the case then we should change "the matter" to "the contested issues" or something like that. The last sentence -- last sentence in subpart (b) says "otherwise the matter," so we should change that to "the controverted issues"?

PROFESSOR CARLSON: I think so.

CHAIRMAN BABCOCK: Yeah. Okay, Richard.

MR. ORSINGER: My point is slightly different, and that is the respondent has the right to controvert, but as we know, they're not -- they're not really served with process other than maybe getting a notice by certified mail, and there is no proviso in here for the garnishee's answer to be served on the judgment debtor that I can see, so I guess the judgment debtor is just going to have to be checking the courthouse everyday to see when the answer is filed and what it says, and I'm okay with that. As somebody pointed out, they've already

had all the due process they probably need, but we're not providing for them to get notice, and then there's no deadline by which anyone must controvert the answer, and maybe that's okay, but it does seem to me at some point somebody ought to have to come forward.

Can they come forward on the day of the garnishment trial, the respondent -- I mean, the judgment debtor and file a contest which then requires that the trial be scotched and the case transferred to some other county, and can they do it by motion for new trial, for example? Can they come in after the garnishment order and I'm now the judgment debtor, I'm not even really a party, or at least in my world they're not a party, and now they file a motion for new trial and they contest it? Should there be a deadline, I ask, by which somebody should do something or they've waived it? And should we give notice to -- I assume, I guess, Rule 21a in the Rules of Procedure would require that the answer be served on the judgment creditor's lawyer, but I'm not sure that Rule 21a requires that it be served on -- that the answer be served on the judgment debtor. You see what I'm saying?

I know we specifically incorporate -- we incorporate 21a's procedure by reference when we talk about the notice of the filing --

MR. DYER: Right.

MR. ORSINGER: -- but not of the answer, so then is the judgment debtor even going to know that an answer was filed or do we even want them to know that an answer is filed?

MR. DYER: Well, I would say it makes sense to have a deadline and if we are going to have a deadline then the defendant should receive a copy of garnishee's answer.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Gaultney, and then Justice Gray.

HONORABLE DAVID GAULTNEY: Are we talking about Rule 9? In fact, doesn't the respondent under 9(a) have the ability to controvert the answer?

MR. DYER: Yes, they do, but there's no requirement that the garnishee serve the answer on the defendant, so the only method is checking the courthouse to see if an answer has been filed.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Well, in direct response to that, first, if the respondent has received notice of the filing of the garnishment and has appeared in the lawsuit at that point, then just like any other party they're there. They have submitted themselves to the jurisdiction of the court. They're there. They're entitled to notice of everything that gets filed under Rule

21a, but my point was that this does not provide -- first of all, the caption of 9(a) is "Either party may controvert," and we've had that problem with "party" and who are the parties and how many parties there may be, and maybe we need to look at changing the caption to just "The answer may be controverted," and then I would suggest -- and I don't know if it's the right place or if it should be a subsection (b), but on the last sentence it seems to me that it could be modified to say, "The respondent or any other person with an interest in the property" or "asserting an interest in the property." This gets back to joint -- joint tenants with right of survivorship on bank accounts --

CHAIRMAN BABCOCK: Sarah's niece.

HONORABLE TOM GRAY: -- co-owners. Sort of Sarah's problems of we're not sure -- excuse me, the problems that Sarah raised and articulated so well earlier in the meeting about we may not be clear about whose property this is. The garnishee, you know, comes into court and says, you know, "Here's the bank accounts, here's how they're styled." "Here's the tractor," here's whatever. "I don't know who owns it, but by the way, I'm claiming an interest in it," and somebody else may show up as well. And so there needs to be another way to make it clear to the court that's going to try all of these issues

that other people may be entering in that claim an interest.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: And when Chief Justice Gray said earlier that the judgment debtor has had all the process that is due he, she, or it, that's true with respect to liability, but it's not true with respect to whether this particular property is subject to execution, and it's certainly not true with respect to the property of people who are not the judgment debtor or entities. So it's a little confusing to me how all of this can go on as though the judgment debtor isn't entitled to notice. If they're going after my IRA, which is exempt from execution, I'm entitled to notice of that, and I'm entitled to ensure that my IRA doesn't get subjected to execution; but I think this is still, going back to what I said earlier, reflective of the fundamental lack of knowledge, understanding, philosophical underpinnings of garnishment, post-judgment versus prejudgment versus turnover.

I mean, with respect to turnover, if the judgment debtor owns it it's subject to turnover. With respect to that property, the judgment debtor has had all the process that's due because they lost, but with respect to the property of third parties, they've not necessarily

received any process.

MR. DYER: And the one other thing that I wanted to add that I brought up right when we resumed after the break, they aren't treated as a normal party post-judgment. They may get the notice -- well, they're required to get the notice with regard to the writ and the application and the order, but there's no requirement that the garnishee serve them with an answer, and it's not implied because they were a former party. So, I mean, it makes sense to me also for the court to have a deadline by which the controverting answer has to be filed, and if we're going to do that and the defendant has the right to controvert, then we ought to require that the answer be served on the defendant.

CHAIRMAN BABCOCK: Roger, Richard, and Sarah.

MR. HUGHES: Yes, I think there definitely ought to be notice to the judgment debtor and perhaps some form of deadline because I think another reason is if the judgment debtor is going to effectively exercise their right of replevy that they -- that they need to know these things. I mean, sometimes you may have a case where the judgment creditor has decided to be selective about what assets go out into in order to inflict the maximum amount of damage on the defendant.

I recall one incidence in my neck of the

woods where the -- that the plaintiff sued somebody that was running for office, and so what they did was to garnish their campaign account in the middle of the campaign, for obvious reasons. I would think then a person who might have multiple bank accounts might want to be selective about which one ends up getting garnished in order that their whole financial situation not collapse because -- well, for a reason like that or perhaps they -- the plaintiff has managed to pick the account that is -- has been pledged and that will trigger multiple default accounts in various loans. So I think it would be a good idea.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: A practical question. When a bank is served a writ of garnishment and they have an account that's in two or three names, one of which is the judgment debtor, what kind of answer do they typically file in that situation?

MR. DYER: They usually put everybody's name that's on that account, including the debtor.

MR. ORSINGER: And they don't admit that it is or isn't the debtor's. They just say, you know, "The debtor's name is on this account and they may or may not own it"?

MR. DYER: Right, and sometimes you'll have

an answer that says, "Well, we don't know for sure, but we heard allegations he might have an interest in this account," and they just list that account, too.

MR. ORSINGER: Okay.

MR. DYER: And they freeze all of them.

MR. ORSINGER: And at that point then we know the names of some third parties who may have a stake in the proceeding, and routinely are they somehow brought into the lawsuit through notice, or if there's a trial over their ownership rights are they given notice of the trial?

MR. DYER: Most banks immediately notify that they've been hit with a writ of garnishment. That's how they get notice, but they're not required under the rule.

MR. ORSINGER: And do the third parties typically then file a plea in intervention and say, "That's my money, don't take it"?

MR. DYER: Yes.

MR. ORSINGER: And so then they're --

MR. DYER: No, actually, they don't file a plea in intervention. They move directly to dissolve or modify.

MR. ORSINGER: Okay, so then the motion has now been filed. Is the motion ruled on in a trial, or is it ruled on in a hearing that's preliminary to the ultimate garnishment trial?

MR. DYER: It's ruled on by motion.

MR. ORSINGER: Okay. So the third parties probably find out from the garnishee that their property has been frozen and then they file a motion and they have a hearing on a motion that's preliminary to the final trial of the garnishment?

MR. DYER: Yes.

MR. ORSINGER: Wow. Okay.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I thought -- your response a minute ago is what is causing me to ask this question. If a garnishment application is filed in the underlying lawsuit --

MR. DYER: Prejudgment or post-?

HONORABLE SARAH DUNCAN: Post-judgment. Is it your view that the judgment creditor is no longer a party in that proceeding?

MR. DYER: No, they are. No, what I had said referred to the judgment debtor. They're not treated as a normal party is treated post-judgment.

HONORABLE SARAH DUNCAN: But what I'm saying is let's say it's the defendant, because that makes it easy. The defendant gets hit with a judgment. The plaintiff, judgment creditor, files a garnishment proceeding in that same case. Just the filing of a

garnishment application doesn't make the defendant no longer a party to that suit, that cause of action with the number at the top, and there's nothing that says the usual service rules don't apply in an ancillary proceeding, so why would the defendant, judgment debtor, not be treated like any -- I mean, they're still a party. Just because they lost doesn't make them not a party.

MR. DYER: Well, because they're ex parte applications. Okay. And typically when you've got an existing lawsuit you can't do anything ex parte, right? But post-judgment you can get an ex parte garnishment, writ of garnishment, an ex parte turnover, an ex parte receiver. You don't want to be required to file that application and send it straight out to that debtor.

HONORABLE SARAH DUNCAN: I understand that, but --

MR. DYER: A normal party you would have to send it out and serve it at the same time.

HONORABLE SARAH DUNCAN: I understand that, but that's why I think garnishment is a separate proceeding. Even if it's filed under the original cause number, it should be given an A number to differentiate from the original cause of action.

MR. DYER: In Harris County it is.

HONORABLE SARAH DUNCAN: Yeah, I know.

CHAIRMAN BABCOCK: Stephen Tipps. You're scratching your head. Let the record reflect Mr. Tipps did not have his hand up, he was merely scratching. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I think even prejudgment you could have an ex parte --

MR. DYER: Yes.

HONORABLE TRACY CHRISTOPHER: -- garnishment just like you do with a TRO.

CHAIRMAN BABCOCK: Okay. Anything more on 9? Let's go to 10.

MR. DYER: Okay. The garnishment rules as they presently exist have a number of provisions dealing with how you handle the judgment. So subpart (a), you've got an answer that is not controverted by anybody, and a garnishee is not indebted, they don't have any cash, any money, and they don't have any property of the defendant. That being the case, the current rules say the court discharges the garnishee. We wanted to make it clear what that meant, that a take nothing judgment is entered against the applicant and in favor of the garnishee, and then subpart (2) states who the costs are taxed against. In this case they would be taxed against the applicant.

Subpart (b), garnishee files an answer and admits that it is indebted or it does have some effects.

Judgment gets entered for the amount admitted or found to be due, and if that amount is in excess of the applicant's judgment amount with interest and costs then it's for the full amount of the judgment already rendered. Subpart (2) is an allocation of costs depending on what transpires. If the court enters judgment for the amount admitted by the garnishee and the answer was not controverted then the costs are taxed against the respondent. If the garnishee's answer is successfully controverted then the garnishee doesn't get its cost, and these are not in the current rules, but they frequently become issues depending on the garnishee's answer.

The last one, if the garnishee's answer is not successfully controverted, the court may award and apportion the costs as may be appropriate. Current rules state "with costs to abide the issue," which we did not feel anybody had a firm grasp of what that meant. Subpart (d) was added to address the situation where you file an application for garnishment, and the garnishee says, "Yeah, I'm indebted, but it's for less than the amount of the costs," which sometimes happens. Costs in the amount of the indebtedness are then taxed against the respondent with the balance against the applicant. So an applicant files an application, and the garnishee answers, "I've got a hundred dollars." Costs are already $5,000 according to

the bank. Under this provision the court would tax $100 to the respondent and $4,900 to the applicant.

Subpart (c) deals with the judgment when it's not cash or money but when it's a property. Subpart (2) deals with the failure to deliver the property. Garnishee gets a show cause order, and we may want to address that because I think we talked about show cause orders and the terminology of those in earlier sessions. Subpart (3) is the parallel provision dealing with how costs are taxed when the garnishee has effects.

Subpart (d), it's another rule peculiar to garnishment. It's a sufficient answer to any claim -- and this is out of the existing rule -- of the respondent against the garnishee founded on an indebtedness or possession of effects for the garnishee to show that the indebtedness has been paid or that the effects have been delivered to any sheriff or constable as provided in these rules. Subpart (e) addresses the scenario if the writ is dissolved or overturned on appeal how costs are awarded. That's the end of 10.

CHAIRMAN BABCOCK: Okay. Comments about 10? Sarah.

HONORABLE SARAH DUNCAN: In 10(a)(1)(B) it speaks of any effects of the respondent that the garnishee has. Wouldn't this extend to effects over which the

garnishee has control even if they don't have the actual effect?

MR. DYER: I -- wouldn't that be within the meaning of "in its possession," or would we have to add in "its possession, custody, or control"?

HONORABLE SARAH DUNCAN: Yeah, that's what -- discoverable is possession, custody, or control is to reach all three possibilities.

MR. DYER: Uh-huh.

HONORABLE SARAH DUNCAN: Just a question.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Several places the rule provides for award of costs and reasonable compensation, and that language comes out of Rule 677. Is that where the bank gets its attorney's fees?

MR. DYER: Yes.

MR. GILSTRAP: So there is no statute anywhere that gives the bank the right to attorney's fees? It's just there's just a rule that says you can recover costs, and that allows the bank to get its lawyer's fees.

MR. DYER: Yeah, I don't know if the Finance Code addresses that specifically.

MR. GILSTRAP: Okay. And reasonable costs, I guess that could include copying or something like that?

MR. DYER: Yes, copying. They'll also hit

you for research time.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Just a question, because it seems to me -- and maybe we were doing it wrong, but you garnish an account, the bank comes in and says there's $10,000 in it. The judgment is for 50,000, and it seemed to me -- and the bank says, "It cost me $5,000 to get here." It seemed to me that the judgment that got entered was applicant gets 5,000 and bank gets 5,000 out of that 10,000-dollar pot rather than the bank getting a judgment against the respondent for that $5,000.

The way you have it written it appears that the bank should be getting a judgment against the respondent for that $5,000, so I don't know whether just as a matter of practice we've been doing it wrong or whether that's really the way it was intended to be, that the bank got first dibs on that $10,000.

MR. DYER: Well, the intent was to maintain the existing procedure. The bank takes it off the top, but it can -- it still can be reassessed as costs against the respondent, so it's not the bank having to go against the respondent.

HONORABLE TRACY CHRISTOPHER: But that's not what this stays. This says I get a judgment for $10,000 and the bank gets costs for $5,000.

MR. DYER: Which provision?

HONORABLE TRACY CHRISTOPHER: Well, because judgment when garnishee is indebted, I get "the judgment of the amount admitted or found to be due to the respondent from the garnishee," that would be the $10,000 and the "not controverted," the costs, judgment for the garnishee under (2)(a) is taxed against the respondent. So I read that to say I get the judgment for $10,000 against the garnishee, and the garnishee gets a 5,000-dollar judgment against the respondent, which means I get the money and the bank is left holding the bag, which --

MR. DYER: Yeah, it needs --

HONORABLE TRACY CHRISTOPHER: -- is not the way it currently happens.

MR. DYER: Yeah, it needs to be reworded.

HONORABLE TRACY CHRISTOPHER: I mean, usually the bank gets their costs out of that $10,000, and I walk away with five, and the bank is made whole.

MR. DYER: Yes.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I'm a little bit troubled by what appears to me to be inconsistency in the way we're handling and describing costs. 10(a), which is an uncontroverted answer of no property, then it has its own cost paragraph, which is Rule 10(2), 10(a)(2), that you get

costs, which include reasonable compensation to the garnishee, and that doesn't say "attorney's fees," and I don't think it means attorney's fees.

MR. DYER: It's always been interpreted to mean attorney's fees.

MR. ORSINGER: It does. Except that banks are entitled to charge you for research time, or is that just because of a provision in the Finance Code that says that?

MR. DYER: That I don't know. I can't speak to the Finance Code, but by rule you get costs including the reasonable compensation, which is attorney fees, and typically that means whatever the bank says are their costs, which include research costs. You can challenge it, but I've yet to see a court say that's not a cost.

MR. ORSINGER: Well, and the other provisions of law, which are mostly statutes, they say "attorney's fees," and so I think that there might be some wisdom in defining this compensation to the garnishee, although I don't mean to exclude the research time for the banks. I know that that's money out of pocket.

Now then, in (b)(2) we have another cost provision where there is an indebtedness, and that just uses in (b)(2)(B), entitled to recover its costs. "If the garnishee's answer is successfully controverted the

garnishee is not entitled to recover its costs." I assume that means not entitled to recover its costs including reasonable compensation.

MR. DYER: Right.

MR. ORSINGER: But it doesn't say that, and it's a little bit inconsistent, and then (b)(2)(C) says, "If the answer is not successfully controverted the court may award and apportion costs, including reasonable compensation." Now, the award and apportion is as between the garnisher and the garnishee or as between the garnishee and the respondent, judgment debtor? Who is it as between, the apportionment?

MR. DYER: I think that can involve an apportionment for all three.

MR. ORSINGER: And do we have any idea what the standard is for apportionment there? Because it's been a successful garnishment. I'm not understanding -- this is a judgment where the garnishee is indebted, so that means the applicant did a good thing and he captured some money, and yet when you get down here all of the sudden it's not clear to me is the garnishee getting all of their costs or is the applicant paying some of them or is the respondent paying some of them? And then to go onto (d), we have again respondent, "The balance of the costs shall be taxed against the applicant," and it doesn't say anything about

including reasonable compensation to the garnishee. So I would like it if we had more concrete terms and if they were consistently used.

CHAIRMAN BABCOCK: Okay. Anybody else on this? Yeah, Frank.

MR. GILSTRAP: Just in response to what Richard said, I'm a little concerned if there's no statute that provides for the order of attorney's fees with us putting an award of attorney's fees in the rule. I mean, I don't know the Court has the power to do that. I mean, if historically we've lumped attorney's fees in costs and that's how we do it here, I guess that's the way it is, but, you know, I mean, in a tort suit the losing side gets hit with costs, and, I mean, could someone say those are attorney's fees? I'd leave the word "attorney's fees" out.

CHAIRMAN BABCOCK: Okay. Anything else on 10? Yeah, Justice Gray.

HONORABLE TOM GRAY: Just to echo Richard's concern over the varying methods that we reference the costs being taxed against, in other places they're "awarded" and "apportioned," and that's what I was talking about yesterday where there's a difference between taxed and awarded, and I think it follows through in a couple of other places where they're taxed or apportioned and it typically -- or excuse me, taxed or awarded, and we need to

be careful how we're saying that and --

CHAIRMAN BABCOCK: Yeah. Okay. Rule 11, Garnishment Rule 11.

MR. DYER: This is the same language we used for attachment and sequestration on the motion to dissolve or modify the hearing and burden of proof, the order, and third party claimant.

CHAIRMAN BABCOCK: Okay. Any comments?

MR. ORSINGER: I have a question.

CHAIRMAN BABCOCK: Or questions.

MR. ORSINGER: Yes, does the motion process exist independently from the controverting affidavit process, or do the motions typically involve a controverting affidavit?

MR. DYER: They're actually different. That's from the existing rules. The controverting -- the controverting answer doesn't pertain to a third party under the existing rules. We haven't included it here either.

MR. ORSINGER: So can a party move to do something to the writ of garnishment without controverting the garnishee's answer under oath? I figured -- I thought that the garnishee's answer stood unless somebody filed an affidavit saying it's wrong, but this appears to allow a motion process that apparently occurs before the trial and no sworn affidavit, and then matters that I would have

figured were reserved for trial after an affidavit had been filed contesting the garnishee's answer instead get resolved on nonsworn motions filed by nonparties before the trial.

MR. DYER: No, this has to be by sworn motion.

MR. ORSINGER: It's a sworn motion?

MR. DYER: Yeah.

MR. ORSINGER: So it's effectively like an affidavit controverting the garnishee's answer?

MR. DYER: Right. Right.

MR. ORSINGER: Okay. I may be reading too much into this, but it seems to me like if there's going to be a bona fide dispute over whether the property belongs to the judgment debtor or not, that ought to be resolved in one trial where everybody that has something to say shows up and calls witnesses and you get one result at the end of the trial. This makes it look like everybody that has a bone to pick can file a motion and have a pretrial hearing and you piecemeal try all of these claims and by the time the last motion is ruled on there is no -- nothing left to try in the trial, and that seems odd to me, that that's an odd way to take care of business.

MR. DYER: It is possible, but it doesn't normally work out that way. What you normally see with the

motion to dissolve the writ is the assertion of some technical defect. If you get a bunch of other parties who come in and lay claim to the property, it's rare that a judge is going to determine that solely on motion. It's usually all pushed into a trial.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: One more question on the judgment, and I don't know the answer to this. In my scenario, 50,000-dollar judgment, I capture 10, the bank wants 5 of it, have I then gotten the satisfaction of $10,000 worth of the judgment or just $5,000 worth of the judgment when I'm continuing to go on and try to get more money?

MR. DYER: 5,000.

HONORABLE TRACY CHRISTOPHER: Okay. Then I think that we've got problems with the way the judgment is written because it appears that I got my 10 when I didn't really get it.

MR. DYER: Well, I thought we were going to have the language changed to reflect judgment, that the bank receives 5,000 as reasonable necessary costs and judgment creditor gets 5,000.

HONORABLE TRACY CHRISTOPHER: As long as that's the law, I'm good with it.

MR. DYER: I'm sorry?

HONORABLE TRACY CHRISTOPHER: As long as that's a current statement of the law, I'm good with it, you know, to change that.

MR. DYER: Okay, no, what I'm saying is when you brought up the language before I said we needed to change it so that the judgment would reflect that apportionment.

HONORABLE TRACY CHRISTOPHER: So it will just show a judgment to me of $5,000.

MR. DYER: Yes.

HONORABLE TRACY CHRISTOPHER: Okay.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I'm sensitive to Richard's claim that a motion to dissolve or modify or a contest filed by a third party maybe ought to be rolled over into any hearing on a contest of the original answer. On the other hand, I'm all for saving a bank's money when it's necessary, especially when they're going to be charging their expenses to somebody else, and I'm not sure if all we've got is some third party coming in and saying, "That's really my money" or "He was holding it in trust for me," and the bank really hasn't got a dog in that fight because they're not quite sure, kind of like the answer they normally file. I don't see why to determine that fight we need to make the bank show up for that hearing so that they

can charge their expenses to sit through a hearing which they're not really interested in and then tax those costs against somebody else, so perhaps that's one reason to keep it separate.

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

MR. ORSINGER: Yeah. Generally this whole motion practice is a little bit disconcerting to me because there's a provision here that the court has to rule on the motion promptly after reasonable notice, which can be less than three days; and so I'm a garnisher, judgment creditor, and I've got an answer on file that's basically admitted that I'm entitled to whatever -- you know, whatever the garnishee has; and then all of the sudden somebody files a motion, which must be sworn; and then I get a phone call of get down here and prove up your case because the applicant has to prove their case at this hearing that might occur on 10 minutes' notice or something; and then there's a provision in here about ruling on the basis of affidavits unless they conflict; and then you have to have a hearing. So we're talking about like a trial on ownership on less than three days' notice maybe before I have my witnesses lined up or anything. I mean, does this ever cause trouble for anybody? I mean, it seems to me like that's really problematic for an applicant.

MR. DYER: Well, it can be. I mean, typically it's not. I mean, you go down there and say, "Judge, you know, I just got 10 minutes' notice, give me a little bit more time," you're probably going to get a little bit more time, but can it happen on less than three days' notice? Yes. Now, I would think if you're going to go through the garnishment procedure you're going to be aware that if it is challenged you've got to have your ducks lined up, but, yeah, it can be a problem. It normally isn't.

MR. ORSINGER: I mean, the reason -- I mean, I might have my ducks lined up in that I can show I got the judgment, but if somebody is coming in and said, "My father is holding money in a trust for me" and that's not apparent on the face of the bank records, but I'm prepared -- this guy is prepared to testify that he doesn't own it and that his son owns it and he's just a trustee, how am I going to be prepared to deal with that with no discovery, no depositions, no trial setting, less than three days notice? It seems to me like that's really a problem and then if you don't, you lose, you're out. You don't get a trial, you don't get nothing. It's over. The hearing on the motion is over, and you don't have any evidence to controvert what the debtor and his son is saying, you lose, right.

MR. DYER: Yes. So you ask for more time.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Well, maybe you're right, Richard, because over in (f) we kind of carve out third party claimants, and maybe that time frame should be different. The reason for the short fuse, as I understood it, on the motion to dissolve was really kind of driven by the Fuentes and those kind of cases that say that the judgment loser should have an early opportunity for a judgment debtor or a debtor to have the opportunity for early motion to dissolve or modify the writ when the grounds, for example, aren't established, and we see that down in burden of proof, (d)(1) and (d)(2). So I'm wondering if that is something we might want to take a look at.

MR. DYER: Wouldn't that apply across the board to attachment, sequestration, distress warrants, which all have the hearing which may be on less than three days' notice.

PROFESSOR CARLSON: Well, I think what Richard is saying is there's one thing for the party directly affected by the garnishment to come in and move to dissolve. You're trying to garnish my property, property I have in the hands of another, as opposed to a third party claimant in that property who is not a party to the proceeding.

MR. DYER: But, I mean, in attachment somebody can say, "That's not my property," and a third party can come in also.

PROFESSOR CARLSON: And I guess my question is you don't have the same constitutional concerns timingwise for the third party claimant's claim to be adjudicated as you do for the debtor whose property has been garnished or attached or sequestered.

MR. DYER: Okay. So that would be charge changing the third party claimant timing?

PROFESSOR CARLSON: I think so. I think there is some validity to what Richard is saying.

CHAIRMAN BABCOCK: All right. Other comments? Rule 12.

MR. DYER: Rule 12 is the perishable property rule that we discussed yesterday. Same rule only difference is this says "garnished property."

CHAIRMAN BABCOCK: Okay. Any other second thoughts about Rule 12? Remember we're dealing with perishables. Is live cattle a perishable?

PROFESSOR CARLSON: No.

CHAIRMAN BABCOCK: According to Mary Lou Robinson, no.

HONORABLE JANE BLAND: I think the T-bones might be.

CHAIRMAN BABCOCK: What?

HONORABLE JANE BLAND: When they're made into T-bones.

CHAIRMAN BABCOCK: Rule 13.

MR. DYER: It's the same report of disposition of property that was used in attachment.

CHAIRMAN BABCOCK: Rule 14.

MR. DYER: Same amendment of errors that we've used in attachment/sequestration.

CHAIRMAN BABCOCK: Now we come to the moment you have all been waiting for.

MR. ORSINGER: Can I ask a question?

PROFESSOR CARLSON: Let's talk about distress warrants.

CHAIRMAN BABCOCK: Everybody has been hanging around for this, I know. But before we get to that, before that climactic moment in our Supreme Court advisory two-day meeting, Richard wants to delay that with a comment, so it better be good.

MR. ORSINGER: Do we have any rules that govern the transfer of ownership as a result of the auctions or the conclusion of the process because I know that the constables require -- they issue a bill of sale and they require payment of that and whatnot, and I'm wondering if all of that is done pursuant to law or each

constable just makes up his own rules.

MR. DYER: I know it's in execution. It refers to an order of sale, and the officer has to account for the amount received and the expenses that were paid and what the net is, that's the only one that I'm familiar with that it's spelled out.

MR. ORSINGER: Well, it may be pretty rare, but I recently had a garnishment where I was -- had enough good fortune to capture some silver and gold, and so we sold that at auction, and it was a very careful process that this constable went through. I was really impressed, and he had to describe the property, conduct the auction, take the money, count the money, and then give a bill of sale and then charge fees for all of that, and I didn't see that there was any authority to do any of that or any directions on how to do it, so I figured that it was just an internal process that they have.

MR. DYER: I think it's in the execution rules.

MR. ORSINGER: So he was following the execution rules in a garnishment sale?

MR. DYER: Uh-huh. I don't know that that's in the Government Code. I can take a look at that.

MR. ORSINGER: No, I mean, don't do it on my account. I just --

CHAIRMAN BABCOCK: Okay. What is a distress warrant?

MR. DYER: Okay, if you've got your packet, turn to the last two pages of distress warrant. Yeah, the last three pages. Distress warrant is another type of writ that allows an agricultural landlord or a commercial landlord to seize the tenant's property if they owe rent. There are no rules of procedure for distress warrants, so these are all new rules patterned after attachment, sequestration, and garnishment, there you go.

MR. GILSTRAP: Have there been any rules?

MR. DYER: Everybody has followed the same rules for attachment and sequestration. All of the forms are patterned after them, but Judge Lawrence wanted to include them, and there seems to be no reason why not to include them to give practitioners and courts the guidelines to follow, but the Property Code grants these liens and, you know, like if you look at 54.001 through 005, those deal with the agricultural lien. 006 says when you can get the distress warrant issued if you've got an agricultural lien. It has a provision for a judgment on a replevy bond. Then you look at 54.021 through 025, that's for the commercial landlord lien.

So these are the guidelines on what the statute says has to be filed; and sometimes, like with the

commercial landlord lien, you can only trap or your lien is only good for a certain amount of time and for a certain amount of rent, so it's fairly esoteric unless you practice a lot in that area, but they all allow for the distress warrant.

So if we now move back to Rule 1, you'll note that the format is the same as in the others. (c), the application, by the statute you have to state the amount sued for is rent or advances that are covered by the statute. The other thing about a distress warrant -- and, Elaine, you might have to help me out a little bit with this, but normally what happens with a distress warrant, it can only be issued by the JP, so you file your underlying lawsuit in county or district court because the JP doesn't have jurisdiction over the amount in controversy, but you go get your distress warrant from the JP court. So the writ is served coming out of the JP court. It's returned to the court where your underlying lawsuit was filed. This is a peculiarity of distress warrants.

So subpart (2), you state the amount in controversy of the underlying suit. Okay. You can have a situation where the amount in controversy is within the jurisdiction of the JP court, so the JP court has jurisdiction of the underlying suit and is also the one that issues the distress warrant, and that's where it's

returned, but in those instances where that's not the case, subsection (4), you have to identify the underlying suit. Subpart (d), the same verification requirement.

CHAIRMAN BABCOCK: By the way, your language here is not parallel to --

MR. DYER: Yes, and I did not have time -- actually I thought Judge Lawrence was going to be presenting this one, so he owes me big time, but I did not have time to go through this and do what I did with attachment, sequestration, so the language will be made parallel to all of those, so, yeah, there are quite a few instances where it's not parallel but will be. I cannot remember why we deleted from the existing rule a requirement that the application state that it is not sued out for the purpose of vexing or harassing. Any comments on that? I can't remember why we deleted it. Perhaps because we thought that that was already a part of our rules with regard to frivolous pleadings, but I throw that out there.

Subpart (e) deals with the order. The only thing that I need to comment on is subsection (3). It must provide that the warrant is returnable to the court where the underlying suit is pending. That's to address that peculiarity. Subparts --

CHAIRMAN BABCOCK: Richard, you're not

crying, are you?

MR. ORSINGER: No, no, I'm on board with this so far.

MR. DYER: Subpart -- I know this is very emotional stuff.

CHAIRMAN BABCOCK: Well, you know, he had his glasses off and he was rubbing his eyes, so I was worried about him.

MR. GILSTRAP: If it's your stuff it will be emotional.

MR. DYER: (6), (7), and (8) are straight out of existing Rule 610. Did I say that there weren't rules?

CHAIRMAN BABCOCK: That's what you said.

MR. DYER: Yeah, that's what I said, and that's not right. That's not right. Yeah, there are rules. 610. (f), it's multiple writs with "writs" changed to "warrants." We've already discussed that we need to consider making changes to that language. That's all of 1.

CHAIRMAN BABCOCK: Okay. Any comments about 1?

MR. GILSTRAP: Yes.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: These requirements that "the application shall not be quashed because two or more grounds are stated conjunctively or disjunctively," is that

in the rule?

MR. DYER: Yes, I believe it is. I think that's in all of the -- these similar rules.

MR. GILSTRAP: Is that in the other ancillary rules?

PROFESSOR CARLSON: It's in Rule 610.

MR. DYER: Yes. We did move the placement of it. Instead of having it under "order" -- actually, and also the part "issuance without notice," we have moved those up. Issuance without notice went into subpart (a) as the very last sentence. "The effect of pleading" was moved to a standalone provision, so those same changes will be made.

MR. GILSTRAP: And the requirement of a specific findings of fact is in the rule in (e)(4)?

MR. DYER: Yes.

MR. GILSTRAP: Okay. I'm just wondering why we need those. Historically they've always been there?

MR. DYER: Yes.

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: What other comments about 1? Justice Christopher.

HONORABLE TRACY CHRISTOPHER: (a), (a) is a little confusing to me. We talk about pending suit, we talk about in (a). We talk about underlying suit in (c),

and just reading that, it's unclear to me what you said, that normally there will be a suit in county court or district court before this distress warrant gets filed.

MR. DYER: Yes.

HONORABLE TRACY CHRISTOPHER: I mean, it just doesn't -- I guess I'd need a little more information if I was just sitting down and reading that rule. I wouldn't understand that that's what it is.

MR. DYER: Okay.

HONORABLE TRACY CHRISTOPHER: Because (a) says pending suit is required and then when you say, "An application for a distress warrant may be filed at the initiation of a suit," well, you should say, you know, you have to file a pending suit in a court of appropriate jurisdiction for rent, I guess, and then if you want the application you go to the JP court. If that's what we're trying to get here.

PROFESSOR CARLSON: Yeah. Yeah.

CHAIRMAN BABCOCK: Okay, Frank.

MR. GILSTRAP: (7), on page 71, applicant's bond, third line to the bottom is conditioned on the applicant prosecuting the suit to effect, I guess that's some archaic language you might want to take out.

MR. DYER: That's been in all of our rules. We --

MR. GILSTRAP: I thought it said "shall prosecute the suit" and then "to effect and pay all damages."

MR. DYER: Which section are you looking at?

CHAIRMAN BABCOCK: (7).

MR. GILSTRAP: (7).

MR. DYER: (7), okay. Now, that's the same language that we've used in all of them, admittedly archaic. I think we thought of substituting language for that but decided "to effect" was actually a relatively short way to convey the meaning.

MR. GILSTRAP: Depends on what it means.

MR. DYER: Basically you don't dismiss your suit.

MR. GILSTRAP: Okay.

MR. DYER: You prosecute it, and we thought, okay, why not say "prosecute it to a conclusion." Well, then we thought, well, what if it's a conclusion by settlement? Does that mean that the bond conditions have been met and you can collect against the bond? So we decided to leave it "to effect."

CHAIRMAN BABCOCK: Okay. Any more comments about 1? Carl.

MR. HAMILTON: In several of these writs we've got No. (2), the amount in controversy in the

underlying suit. Why is that important, the amount in controversy in the underlying suit?

HONORABLE SARAH DUNCAN: I was just thinking that same thing. Subject matter jurisdiction of the court. Isn't that what it was?

CHAIRMAN BABCOCK: Subject matter jurisdiction?

MR. DYER: Uh-huh.

CHAIRMAN BABCOCK: Subject matter jurisdiction was the answer.

MR. DYER: But you're asking why does -- why would the JP court need to know that?

MR. HAMILTON: Yeah.

MR. DYER: Well, if it were filed in the JP court he would definitely need to know that. If it were filed in the county or district court I'm not sure that they would need to know that, that the JP would need to know it.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, they might need to know it because if it's for unpaid rent, they're trying to -- I mean, the purpose of this is either leave the premises, the lease premises, or put -- pay some money into the registry of the court for the amount in dispute of unpaid rent. So if you have a month that you're disputing

then you would know what to set the bond at. You would know the amount in controversy and if -- if the tenant remains in possession, that amount can increase and they have to pay more money then.

CHAIRMAN BABCOCK: Okay. Any other comments about 1?

Okay. Well, we'll stop there on the distress rules for today, but I'm glad we got started on that. This made me feel a whole lot better. Now, our next meeting is on December 9th and 10th, and here's -- Pat, so you know, here's how we're going to do it. The dismissal rule is going to come back for about an hour of discussion and then Justice Phillips is going to report on the expedited actions issue and then we're going to go back into the ancillary rules and finish them. The meeting on Friday will start not at our usual time of 9:00, but rather at 10:00 o'clock on the 9th, although breakfast will be here as always, and you're welcome to come by and eat breakfast.

PROFESSOR CARLSON: How civilized.

CHAIRMAN BABCOCK: All right. How civilized, huh? Thanks so much for hanging with us, and have a good rest of the weekend.

(Adjourned at 11:55 a.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 19th day of November, 2011, and the same was thereafter reduced to computer transcription by me.

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

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Given under my hand and seal of office on this the _____ day of _____, 2011.

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